

Challenging State Tax Assessments: Choosing Your Battleground



Jimmy Martens
Martens, Todd, Leonard, Taylor & Ahlrich
301 Congress Ave., Ste. 1950
Austin, TX 78701

phone: (512) 542-9898
jmartens@textaxlaw.com

BACKGROUND, EDUCATION AND PRACTICE

Jimmy Martens, trial and appellate attorney is a partner with Martens, Todd, Leonard, Taylor & Ahlrich, a boutique Texas tax litigation and controversy law firm located downtown, Austin, Texas. He is board certified by the Texas Board of Legal Specialization in Tax Law. Mr. Martens has handled the trial of federal and Texas tax cases and related appeals all the way through both the Texas Supreme Court and the U.S. Supreme Court.

His recent Texas Supreme Court cases include *Combs v. Roark Amusements & Vending.*, 422 S.W.3d 632 (Tex. 2013); and *In Re: AllCat Claim Service, L.P.*, 356 S.W. 3d 455 (Tex. 2011).

His recent Court of Appeals cases include *Combs v. Newpark Resources, Inc.*, 422 S.W.3d 46 (Tex. App. – Austin, Dec. 31, 2013, no pet.); and *Titan Transportation, LP v. Combs*, 433 S.W.3d 625 (Tex. App. – Austin, 2014, pet. denied).

He and other members of his law firm limit their law practices to Texas tax, multi-state, and federal tax controversies and litigation. He is a former council member of the Tax Section for the State Bar of Texas and the former chair of the CLE Committee. Mr. Martens teaches courses in Advanced Texas Franchise and Sales Tax, Texas Sales Tax for the Oilfield Services Industry, and Texas Sales & Use Tax for LAT Seminars. He also teaches the TSCPA's statewide course on Texas taxes. He received his B.B.A. and J.D. from University of Texas at Austin, both with honors. Mr. Martens is also a CPA.

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I. INTRODUCTION

Your client has just received an audit assessment. What should be done? Should your client proceed with an Independent Audit Review conference? File a Petition for Redetermination? Initiate a lawsuit in state district court? Or, undertake a combination of these options? This paper discusses the advantages and disadvantages of the various forums in which taxpayers may challenge a Comptroller determination.

II. INDEPENDENT AUDIT REVIEW CONFERENCE

Upon the issuance of an audit assessment, the Comptroller auditor will likely encourage a taxpayer who disagrees with the assessment to undergo an Independent Audit Review Conference (“IARC”).

A. The Process

As outlined in the Comptroller’s “Contesting Disagreed Audits” publication, the IARC allows taxpayers to meet with a Comptroller employee who has not been involved in the taxpayer’s audit to review the assessment. The IARC is an informal meeting between the taxpayer, the auditor, and the Independent Audit Reviewer. Appropriate matters for the conference include taxability issues, sampling issues, accounting disputes, and waiver of penalty and interest.

Upon completion of the IARC, the Independent Audit Reviewer will submit a written report to the assistant director of Tax Administration with recommendations as to how to resolve the disputed issues. The Comptroller’s Tax Policy Division will then review any recommendations regarding taxability issues to ensure that they are consistent with applicable law and agency policy. The Independent Audit Reviewer will then notify the taxpayer of the agency’s decision. Participation in an IARC does not prevent a taxpayer from subsequently pursuing an administrative hearing or district court suit.

While the IARC report is generally not provided to the taxpayer, a copy may be obtained by filing an Open Records Act Request.

B. The Advantages and Disadvantages

In our experience, we have found this forum may not be conducive to resolving many types of audit disputes. Unless a taxpayer is contesting a simple mathematical error, a blatant violation of Comptroller policy, or an auditor imposing unreasonable documentation requirements, then an IARC may not be worth pursuing and potentially disadvantageous if litigation ensues.

Although the Independent Audit Reviewer is not an employee of the Audit Division, he or she is still employed by the Comptroller. We have seen that most IARC reviewers are former, senior auditors who continue to advance the Comptroller's positions rather than arrive at fair solutions to tax issues. In our experience, the auditors' assessments are frequently upheld without substantive adjustment. In light of this, we find that the IARC process sometimes does little more than provide the Comptroller with a preview of the details of the facts and legal arguments that the taxpayer may advance at hearing or trial.

In the event the taxpayer does not concede issues of taxability, the Independent Audit Reviewer may request full briefing on the issues along with requests for copies of supporting documents. This information would likely be used by attorneys representing the Comptroller to better prepare their cases when the dispute proceeds to hearing or trial.

III. ADMINISTRATIVE HEARING

A taxpayer may also contest an audit assessment through the administrative hearings process.

A. The Process

A taxpayer initiates the administrative hearings process to contest an audit assessment by filing a Petition for Redetermination within the specified time after the issuance of a Texas Notification of Exam Results. The Comptroller will then assign an internal attorney, commonly called a "hearings attorney" to the case. The hearings attorney will issue a Position Letter addressing the grounds raised by the taxpayer in the Petition for Redetermination. The hearings attorney will either agree or disagree with the taxpayer's positions. The taxpayer is then required to file a Reply if it disagrees with the Position Letter. If the parties are unable to resolve the contested issues, the matter may be referred to the State Office of Administrative Hearings ("SOAH") for a hearing

before an administrative law judge (“ALJ”). The hearing may be oral or based on written submissions. After the hearing, the ALJ will issue a Proposal for Decision stating his or her findings of fact and conclusions of law. The ALJ will then submit the Proposal for Decision to the Comptroller for approval or modification. The Comptroller will then issue her decision and generate an updated assessment reflecting items such as credits due to the taxpayer or accrued interest.

B. The Advantages

The biggest advantage to pursuing an administrative hearing to challenge an audit is that a taxpayer does not have to first pay the assessment. This is useful for both taxpayers who cannot pay an assessment or who have multi-year assessments concerning the same issue(s). In the latter scenario, a taxpayer can use the administrative hearings process to reduce the financial burden of pursuing a district court protest suit.

For example, if a single franchise tax audit results in separate assessments for four tax years, the taxpayer may be financially able to pay only one year under protest. If so, the taxpayer could file a protest suit for that year and file Petitions for Redetermination for the remaining years’ assessments. The taxpayer would then seek an agreement from the Comptroller’s hearings attorney to put the administrative cases on hold while the district court lawsuit proceeds. However, this scenario only benefits a taxpayer when resolution of the protest suit issues would also resolve the issues in the administrative cases. Please note that there is no guarantee that the hearings attorney will agree to put the cases on hold, and interest will continue to accrue on the unpaid assessments.

Administrative hearings are also often concluded much faster than district court litigation because SOAH has more flexibility than the Travis County district courts’ crowded dockets. Quicker resolution often means lower attorney’s fees. In addition, taxpayers pursuing an administrative hearing also enjoy relaxed rules of procedure and easier access to witness testimony (e.g., telephone appearances).

Finally, a Comptroller administrative hearing decision does not bar a taxpayer from subsequently pursuing a protest suit in Travis County District Court. Thus, a taxpayer who receives an unfavorable decision has the right to a trial de novo before either an elected judge or a jury.

C. The Disadvantages

The biggest disadvantage to the administrative hearing process lies with the decision makers. First, the ALJs that comprise SOAH's tax division are usually former Comptroller employees. This is not the result of collusion between SOAH and the Comptroller; rather, it is a legislatively-created issue. Texas Government Code § 2003.101(d) outlines the requirements for those seeking an ALJ position within SOAH's tax division. Two key statutory requirements result in most tax division ALJs being former Comptroller hearings attorneys:

[The ALJ must] have substantial experience in tax cases in making the record suitable for administrative review or otherwise and have devoted at least 75 percent of the person's legal practice to Texas state tax law in at least five of the past 10 years before the date on which the person begins employment in the tax division.¹

As a result, a taxpayer who pursues an administrative hearing is often presenting its case to an individual who has previously defended Comptroller assessments.

Second, ALJs issue *Proposals for Decision*, which means that, even if the ALJ rules for the taxpayer, the final decision at the administrative hearings level is made by the Comptroller.

Another drawback to the administrative hearings process is that taxpayers tend to lose. A quick STAR search on almost any topic often results in a multitude of hearing decisions that do not favor taxpayers. Instead, hearing decisions often serve as a means to create Comptroller policy not based in the Tax Code or Comptroller rules. Unless a taxpayer challenges the assessment in district court, the Comptroller "policy" stands.

One consequence of proceeding in a forum with a poor taxpayer-win ratio is that settlement becomes extremely difficult due to the Comptroller's high likelihood of prevailing at an administrative hearing. The Comptroller has little incentive to settle a case that her lawyers will try and that she will decide and likely win.

¹ Tex. Gov't Code § 2003.101(d)(4),(5).

The Comptroller uses the administrative hearings process to set her policies. As the Chief Financial Officer of the State and having responsibility for collecting the taxes due to the State, her employees often set policies designed to maximize the amount of taxes paid to the State (which is another way of saying the taxes paid by the taxpayers.)

The hearings process is used by the Comptroller to create taxing policies to which she will ask a court to defer. As a result, the hearings process should not be viewed as an impartial tribunal, but instead viewed as an extension of the Comptroller's office, staffed by former Comptroller employees who are very knowledgeable of Texas taxes and assist the Comptroller in establishing her taxing policies. At the conclusion of this process, the Comptroller, or her designee, signs all of the final hearing decisions – not the ALJs.

As a result, taxpayers are cautioned against pursuing challenges to audits where Comptroller letter rulings or other literature suggest a taxing position adverse to the taxpayer's position. Taxpayers are also cautioned against pursuing challenges when the language of the underlying statute is unclear.

When the language of the taxing statute is unclear, the Comptroller may use the administrative hearings process to establish her taxing policies. Once she establishes her policies in this manner, state district court judges may give weight to the Comptroller's policies and follow them unless the judge finds that they constitute unreasonable interpretations of the statute.

When the statute's language is unclear, it's better for taxpayers to proceed straight to district court, if possible, to avoid the issuance of a hearing decision setting forth Comptroller policy. In state district court, a judge, when faced with an unclear statute that has not been formally interpreted by the Comptroller, will likely interpret the statute in the most reasonable manner and consistent with legislative intent.

Notwithstanding the above, an administrative hearing may be useful to narrow the issues that a taxpayer intends to raise in a district court suit. For example, if a taxpayer can find support in Comptroller hearing decisions or informal policy to support its position on a particular issue, an administrative hearing may be worthwhile to resolve that disputed point. Resolving issues through the administrative hearings process prior to filing a protest suit can both reduce the protest payment (by reducing the assessment) and attorney's fees (by limiting the number of issues the attorney must

litigate). A taxpayer seeking to utilize this procedure should confer with legal counsel to ensure that all potential arguments are preserved even though the taxpayer only intends to obtain resolution of particular points through the administrative hearing process.

IV. STATE DISTRICT COURT

A. PROTEST SUITS

1. The Process

A taxpayer initiates a protest suit under Texas Tax Code Chapter 112 by filing with the Comptroller a Protest Letter within the statutorily-specified time after the issuance of a Texas Notification of Exam Results. There are very technical jurisdictional **requirements** associated with filing Protest Letters, so taxpayers should seek the assistance of knowledgeable legal counsel. For example, a taxpayer must physically attach to the Protest Letter a check for the total amount of tax, penalty, and interest due as of the date of filing.

A taxpayer must then file a protest suit in Travis County District Court by filing an Original Petition within 90 days of filing its Protest Letter. The Tax Code specifies Travis County as the mandatory venue for taxpayer protest suits. Upon perfection of the protest suit in district court, the lawsuit essentially proceeds like any other litigation with oral and written discovery and culminating in either dispositive motions or a trial.

2. The Advantages

In contrast to the administrative hearings process, the biggest advantages of a protest suit are found in the decision maker. For protest suits, the Comptroller is represented by the Office of the Attorney General. The decision maker is either a Travis County District Court elected judge or a jury, depending on whether the taxpayer selects a jury or non-jury docket. Because a protest suit limits the Comptroller's role to just a party, taxpayers have a much better chance at a favorable outcome. Taxpayers have had success in district court on issues that were destined to lose at the administrative hearings level.

For example, in *Robert Garriott v. Combs*,² the taxpayer filed a protest suit to challenge the Comptroller's Texas use tax assessment on an aircraft purchased and principally hangared outside of Texas. Mr. Garriott did not pursue an administrative hearing because the Comptroller had previously issued several hearing decisions upholding assessments against similarly-situated taxpayers.

However, Mr. Garriott noted that these hearing decisions were based on Comptroller policy and not the language of the relevant statute and rule. Therefore, Mr. Garriott decided to challenge the Comptroller's policy in district court. The district court judge rejected the Comptroller's policy and, relying on the clear language of the statute and rule, struck down the Comptroller's assessment. A district court does not have to defer to Comptroller policy unless the governing statute or rule is ambiguous. And even then, the Comptroller's interpretation cannot contradict the plain language of the provision.

Finally, district court judges are more likely to reject Comptroller arguments or assessments based on technicalities. For example, they may be more likely to look for substantial compliance with the exemption certificate rules than an ALJ.

3. **The Disadvantages**

One of the biggest hurdles to a district court protest suit is the statutory requirement that a taxpayer pay the amount of the tax, penalty, and interest under protest. There is an indigency provision that allows a taxpayer to pursue injunctive relief without paying the tax under protest,³ but its utility is currently under review.⁴ And, the requirements to show indigency are very costly and burdensome. Based upon our experience in hearings on whether a taxpayer is unable to pay the full assessment, the Comptroller argues that both the taxpayer itself *and* any of its owners or related entities must be also be indigent. Trying to establish this fact often results in substantial legal fees in the form of discovery and a hearing on jurisdiction.

² Travis County District Court Cause No. D-1-GN-12-003034. Martens, Todd, Leonard & Taylor tried this case.

³ See Tex. Tax Code § 112.101.

⁴ See *Combs v. Richmond Aviation, Inc.* presently pending in the Texas Supreme Court, Cause No. 13-0857.

Another potential disadvantage of a protest suit is that the taxpayer will need to educate the judge or jury on the relevant taxing scheme and rules. Unlike ALJs and the Comptroller, district court judges and juries are likely not familiar with the tax at issue in a particular proceeding. For example, taxpayers who have brought suits contesting assessments under the revised franchise tax have had to do a substantial amount of educating the decision maker about the tax structure and overarching concepts because the judges assigned to their cases have typically handled business or family litigation unrelated to tax. Taxpayers who take the time to educate the decision maker can overcome this drawback.

Finally, a district court protest suit typically incurs more legal fees than an administrative hearing due to the length (due to Travis County's docket) and the contentiousness of the litigation (the Comptroller has to try harder to win).

B. REFUND SUITS

1. The Process

Refund suits typically arise from the discovery of overpaid taxes as reflected on a Comptroller tax report. The refund process is initiated by the filing of amended reports. If the Comptroller determines that there are tax issues to be decided, she will reject the informal claim and require the taxpayer to file a formal refund claim within 30 days. The taxpayer must then submit a claim setting forth the amount of the potential recovery and the grounds for recovery.

Unlike the Petition for Redetermination process, the administrative refund claim process must be pursued all the way through the final decision and the motion for rehearing process.

The applicable rules require that an unsuccessful taxpayer file a Motion for Rehearing in response to an adverse final Comptroller Decision. The Motion for Rehearing must specify the maximum amount of the potential recovery along with all of the grounds for recovery. The grounds alleged in the refund suit may not vary from the grounds alleged in the Motion for Rehearing and the refund suit may not seek recovery of an amount greater than that specified in the Motion for Rehearing.

2. **The Advantages & Disadvantages.**

The advantages and disadvantages are basically the same as they are for filing protest suits, as stated above.

C. INJUNCTIVE RELIEF

1. **The Process**

The Texas Tax Code provides different methods for challenging audit assessments. One method allows a taxpayer to seek an injunction prohibiting “the assessment or collection of a tax.” Tex. Tax Code §§ 112.101–.108. The Texas Tax Code also imposes criteria that must be met.

First, a taxpayer must file a statement with the Attorney General setting out the grounds for the injunction at least five (5) days prior to filing suit.

Second, a taxpayer must either pay all taxes as well as the accompanying interest and penalties “then due” or file a “bond to guarantee the payment of the taxes, fees, and penalties in an amount equal to twice the amount ... then due” and that will likely “become due” during the injunction’s effective period.

- The Texas Tax Code excuses a taxpayer from the obligation to prepay the disputed taxes as a condition of filing suit if the party files “an oath of inability to pay taxes” and “if the court, after notice and hearing, finds that such prepayment would constitute an unreasonable restraint on the party’s right of access to the courts.” The relevant provision reads:

Except for a restraining order or injunction issued as provided by this subchapter, a court may not issue a restraining order, injunction, declaratory judgment, writ of mandamus or prohibition, order requiring the payment of taxes or fees into the registry or custody of the court, or other similar legal or equitable relief against the state or a state agency relating to the applicability, assessment, collection, or constitutionality of a tax or fee covered by this subchapter or the amount of the tax or fee due, provided, however, that after filing an oath of inability to pay the tax, penalties, and interest due, a party may be excused from the requirement of prepayment of tax as a prerequisite to appeal if the court, after

notice and hearing, finds that such prepayment would constitute an unreasonable restraint on the party's right of access to the courts. The court may grant such relief as may be reasonably required by the circumstances. A grant of declaratory relief against the state or a state agency shall not entitle the winning party to recover attorney fees.

- In *Richmont Aviation v. Combs*, the Third Court of Appeals held that the prepayment requirement constituted an unconstitutional violation of the Open Courts Doctrine under Tex. Const. Art. I §13.⁵ The Comptroller has appealed the case to the Texas Supreme Court, which has, as of the date of this article, not decided whether to hear the case.

Finally, as a condition of receiving the injunction, the taxpayer must establish the following elements to prove its case:

- the taxpayer must show “irreparable injury will result” if the injunction is not granted;
- the taxpayer has “no other adequate remedy at law;” and
- the taxpayer “has a reasonable possibility of prevailing on the merits of the claim.” *Id.* § 112.1011.⁶

2. **The Advantages**

The obvious advantage is that a taxpayer who does not have the ability to pay the full assessment has the opportunity to go to court and seek impartial review of the assessment.

3. **The Disadvantages**

The primary disadvantage is that the Comptroller may force the taxpayer to undergo two separate lawsuits. The first lawsuit will address the issue of whether the taxpayer has the ability to pay the assessment in full. It has been our experience that the Assistant Attorney Generals

⁵ *Richmont Aviation, Inc. v. Susan Combs and Greg Abbott*, No. 03-11-00486-CV, 2013 WL 5272834, (Tex. App – Austin [3rd Dist.] September 12, 2013, pet. granted).

⁶ In addition to allowing taxpayers to file a suit seeking injunctive relief, the Tax Code also authorizes a taxpayer to file suit seeking a refund of taxes paid, Tex. Tax Code §§ 112.151-.156, and to file a protest suit under which the taxpayer is required to pay the amount assessed and file a written protest challenging the tax, *id.* § 112.051–.052. Neither the refund nor the protest provisions are at issue in this appeal.

representing the Comptroller will engage in extensive discovery designed to determine if anyone or entity related to the taxpayer has funds to pay the assessment.

As a result, the cost of proving that the taxpayer doesn't have sufficient funds to pay the assessment may itself consume any funds the taxpayer may have to pursue trial of the case on the merits or funds with which to settle the case.

A second disadvantage is that the Comptroller may pursue collection of the assessment while the suit is pending. As a result, an indigent taxpayer may be forced to undergo two lawsuits while attempting to stave off collection at the same time. It can be very difficult to run a business under these circumstances.

V. APPEALS

If the trial court rules in favor of the Comptroller, the next step is to decide whether to appeal that judgment to the Court of Appeals. In every case, there will be both advantages and disadvantages of pursuing an appeal.⁷

A. Nature and Purpose of the Appeal:

The foremost advantage of an appeal is that it provides you a new, neutral audience to present your arguments, and hopefully to change the decision of the trial court. In tax cases, we have the advantage of always filing the appeal in the Third Court of Appeals in Austin. (This is based on a procedural rule requiring that tax lawsuits against the Comptroller be filed in Travis County, Texas).

⁷

This information was supplied by Amanda Taylor, who is an appellate partner with Martens, Todd, Leonard & Taylor. Ms. Taylor began her career as a staff attorney for the Third Court of Appeals in Austin, Texas. She currently has nearly 10 years of experience in private practice where she routinely handles tax and complex civil appeals before the Third Court of Appeals, the Texas Supreme Court, and other intermediate courts of appeals.

Consistently filing in the Third Court of Appeals is advantageous to taxpayers because the six justices who sit on that Court quickly develop a specialized-level of knowledge in this area, and they are able to make well-informed decisions about how the Tax Code works and what it means. This also has an important implication for tax litigants: It is critical to hire appellate counsel who has in-depth knowledge of the Third Court's practices and procedures, and who has a strong reputation with the justices of that court.

When you file an appeal, you ask the Court of Appeals to review the trial court's decision, and to reverse or modify it based on the existence of factual, legal, and/or procedural errors. Both parties file written briefs. The Court can decide the appeal based only on the written briefs, or it can request that the parties present an oral argument. Again, it is very important to employ an appellate lawyer with specialized knowledge and experience practicing before this Court to make sure your brief and/or argument are handled correctly.

B. Timing and Procedure:

A tax appeal typically takes one-and-a-half years. Depending on the circumstances of your case, this timing can be an advantage or a disadvantage. If you are seeking a refund from the Comptroller for funds paid under protest, the amount of your refund will earn interest during the appeal.

After the trial court signs its final judgment, a party generally has 30 days to file a Notice of Appeal if it wants to pursue an appeal. This deadline can be extended for up to 90 days by filing certain post-judgment motions or by requesting that the trial court issue written findings of fact and conclusions of law to support its judgment.

The party who files the appeal is called the "Appellant." The other party is called the "Appellee."

After the Notice of Appeal is filed, the Appellant will ask the trial court clerk and the court reporter to prepare the record (containing all of the court papers and any hearing or trial transcripts) to be filed in the Court of Appeals. This process typically takes about 1-3 months. Next, the parties prepare their written briefs. The Appellant files its brief first, followed by the Appellee's brief, and then the Appellant files a Reply brief. The briefing process usually takes 4-6 months.

After all of the briefs are filed, the Court of Appeals decides whether to “submit” the case on briefs only or with an oral argument. In tax appeals, oral argument is usually requested because the issues presented are important and often have not been decided by any other court before. The argument is usually scheduled within 2-3 months of the briefing being completed. Once the case is “submitted,” the parties simply wait for an opinion from the Court. The opinion is usually issued within 3-7 months after the “submission.” However, there is no deadline by which the court is required to issue its opinion.

C. Costs of Appeal:

At first glance, costs always seem like a disadvantage. However, depending on the amount of the tax liability or refund at stake, the cost of an appeal may be more than a worthwhile investment to arrive at a successful result.

At the time an Appellant files its Notice of Appeal, it is required to pay a filing fee of \$195. The Appellant also has to pay for the record on appeal. In a tax appeal, the cost of the record is usually \$500-\$2,500. The cost of the record depends on its size and, thus, can vary greatly depending on the case. If the Appellant is successful on appeal, all of these costs can be recovered from the Appellee.

In addition to these costs, the Appellant will also incur attorney’s fees for the appeal. It is important to hire an appellate lawyer with specialized knowledge in this area, who can properly and realistically advise you about the estimated fees on appeal. The amount of fees for a tax appeal will vary depending on the factual and legal issues involved. However, a lawyer with experience handling these matters will be able to do the work with greater efficiency than someone who is unfamiliar with the process and the law.

D. Outcome and Next Steps:

After the Court of Appeals issues its opinion, the parties have options to (1) file a Motion for Rehearing in that Court, and/or (2) file a Petition for Review in the Texas Supreme Court. If no further review is sought by either party, then the Court of Appeals’ judgment will become final and enforceable upon issuance of the “mandate” approximately 2 ½ months later. Additional proceedings at the trial court or administrative level may be necessary to finalize the tax calculation in accordance with the Court of Appeals’ judgment.

VI. ATTORNEY'S FEES

Whether a taxpayer should pursue the recovery of attorney's fees remains a difficult issue. While taxpayers face potential statutory impediments to recovering attorney's fees, the Comptroller does not appear to be so constrained.

Taxpayers should anticipate that if they seek an award of attorney's fees then the Comptroller will likely seek the same relief. Ultimately, the taxpayer must determine the likelihood of success on the merits before alleging a claim for attorney's fees. Taxpayers should also anticipate that the Comptroller will file a challenge to the claim for the recovery of fees at the time it answers the district court petition. The challenge will occur in the form of a filing called a "Plea to the Jurisdiction and will likely be based upon the following provision.

Texas Tax Code § 112.108 states, in relevant part: A grant of declaratory relief against the state or a state agency shall not entitle the winning party to recover attorney fees.

It is not clear whether this provision applies to any grant of declaratory relief or only the grant of declaratory relief in connection with the 'inability to pay' provision.

Moreover, the Third Court of Appeals, in *Rylander v. Bandag Licensing Corp.*, held that the statutory bar on attorney's fee recoveries was unconstitutional as a non-severable provision from the remainder of section 112.108.⁸

VII. CONCLUSION

A taxpayer who receives a Comptroller audit assessment has several forums in which to challenge it. As explained above, there are advantages and disadvantages to each. A taxpayer should carefully consider the points outlined in this paper, as well as any additional concerns raised by counsel, before making its selection.

⁸ 18 S.W.3d 296 (Tex. App. – Austin 2000, pet. denied.)