Texas Comptrollers Decision No. 27,950 ,

Date Issued: 04/16/1992

Tax Type(s): Sales and Use Tax

IN RE: BEFORE THE

COMPTROLLER

OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS
MARK WEISS
Administrative Law Judge

TAXPAYER

NO.: KATHLEEN CORDOVA
AUDIT OFFICE: Representing Tax Division
AUDIT PERIOD: JANUARY 1, 1986
THROUGH JUNE 30, 1990
SALES TAX Representing Petitioner

COMPTROLLER'S DECISION

PRELIMINARY DISCUSSION

Hearings Attorney Kathleen Cordova represented the Tax Division at the oral hearing and presented the testimony of the examining auditor, Tom Moore. both represented and testified in behalf of the Petitioner. Mr. had intended to present the testimony of Petitioner's former Chief Financial Officer; however, Mr. wife was in an automobile accident the day before the hearing, and, as a result, Mr. could not attend and testify.

Unless otherwise noted, references to Section are to Texas Tax Code Annotated (Vernon 1982 and Supp. 1992).

PETITIONER'S CONTENTIONS

1. Petitioner's NAHRS services are not subject to sales and use tax as "insurance services" under Section 151.0039 or Rule 3.355.
2. The assessment should be dismissed because Petitioner relied to its detriment on erroneous advice provided by Comptroller's employees.
3. The assessment should be waived because the Comptroller failed to timely notify Petitioner and others in its industry that the services in question were subject to tax.
4. The interest assessment should be waived.

FINDINGS OF FACT

1. Petitioner provides various insurance claim adjustment services.
2. During the summer and fall of 1990, the Comptroller audited Petitioner for sales and use tax compliance for the period noted above. On January 29, 1991, the Comptroller issued Petitioner a Texas Notice of Tax Due in the total amount of $ The assessment included tax and statutory interest through the date of the Notice. The Audit Division waived the statutory penalty.
3. During the audit period Petitioner's division offered insurance companies, among other things, a "case by case assessment." These assessments were provided by registered nurses. These assessments included the following:
    a. a personal evaluation of the insured client during the recovery/rehabilitation process;
    b. a meeting with the primary treating physician to clarify diagnosis, prognosis, and treatment plan;
    c. an assessment of the insured client's "motivation" to return to work;
    d. a meeting with the insured client's employer to study the physical demands of the client's job (in order to aid in directing medical treatment to facilitate a return to work); and
    e. the submission of comprehensive reports to the insurance company's claims

professionals (including the case manager's assessment of the medical and vocational aspects of the claim and recommendations for aggressive, cost-effective claim resolution).

4. Petitioner no longer offers the NAHRS services.

5. At the hearing, Petitioner conceded that its NAHRS services were subject to tax under Section 151.0039 and Rule 3.355.

6. In October of 1987, Mr. contacted the Comptroller's Office through his toll-free tax "hotline." Petitioner alleged that Mr. was informed that the NAHRS services were not subject to tax. Petitioner was unable to provide the name of the employee Mr. spoke with. Further, Petitioner was unable to provide evidence of the specific information Mr. provided to the person with whom he spoke. And finally, Petitioner did not get written confirmation of the advice given.

7. During most of the audit period, Petitioner's representative was manager of the Comptroller's Tyler Audit Office. During the time he was manager of the Comptroller's Tyler Audit Office, Petitioner's representative had numerous phone conversations with Mr. concerning the taxability of various services provided by Petitioner. None of those conversations involved the question of whether Petitioner's NAHRS services were subject to tax.

8. Petitioner alleged, but did not prove, that it had only five competitors in the NAHRS-type services field.

9. In the late spring of 1990, one of Petitioner's competitors asked the Comptroller for a ruling on the taxability of numerous services, including those like the ones provided by Petitioner's NAHRS division.

10. In June of 1990, the Comptroller's Tax Correspondence Section (now part of the Tax Administration Division) issued a letter ruling to Petitioner's competitor, informing it that the services in question were subject to tax.

11. The March, 1991, issue of the Comptroller's "Tax Policy News" contained an item informing readers that NAHRS-type services were subject to tax.

DISCUSSION AND CONCLUSIONS OF LAW

Petitioner's first three contentions should be denied. I have no jurisdiction over the issue raised in the fourth contention.

Petitioner conceded that the services provided by nurses in its NAHRS division are taxable insurance services. See Sections 151.0039, 151.0101(a)(9), and 151.051. See also, Rule 3.355, the letter ruling referred to in Finding of Fact No. 10, and the March, 1991, issue of "Tax Policy News" referred to in Finding of Fact No. 11. The nontaxable medical services described in Subsection (c)(2) of Rule 3.355 are those provided to an insured client for the client's health and welfare. They do not include services, such as those set out in Finding of Fact No. 3, provided to an insurance company for the purpose of evaluating the validity and scope of an insured client's claim.

Petitioner's detrimental reliance claim must be denied because Petitioner failed to sustain its burden of proof. During the audit period, Section 1.40 of the Comptroller's Rules of Practice and Procedure required a taxpayer to show, by a preponderance of the evidence, that its position was correct or that the Comptroller's position was incorrect.

While the Comptroller will stand behind the tax advice provided by his employees (even when incorrect), he has set out proof requirements for all taxpayers who seek to bring themselves within the detrimental reliance policy. Each taxpayer making such a claim must show:

> a. that the advice was actually given (both as to the substance of the advice and the identity of the employee who provided the advice) - this normally requires either written proof of the advice or the name of the employee (so that the claim can be verified);
> b. that the taxpayer provided sufficient information for the Comptroller's employee to have reasonably reached the correct conclusion;
> c. that the advice was followed; and
> d. that the Comptroller's failure to adhere to the advice would harm the taxpayer.

See, e.g., Comptroller's Decision Nos. 21,014 (1988), 24,996 (1990), 27,064 (1991), 26,530 (1991), 28,137 (1991), and 26,904 (1991).

The record in this case reflects that Petitioner was unable to supply either the name of the employee to whom Mr. spoke or the specific information provided during the conversation. Further, Petitioner did not get written confirmation of the advice given. Therefore, Petitioner has failed to sustain its burden of proof under the first two of the requirements set out above. Rule 1.40, supra.

In its third contention, Petitioner essentially asserts that the taxable insurance services area of the law is difficult and the assessment should be dismissed because the Comptroller failed to specifically notify the affected taxpayers that NAHRS-type services were taxable until the letter ruling in June of 1990 and the March, 1991 issue of "Tax Policy News." However, as Petitioner's representative conceded during the hearing, all taxpayers are charged with knowledge of the law. While the Comptroller goes to great lengths to anticipate the effects of legislative changes and inform taxpayers of those effects, he simply cannot discern every nuance, every possible set of facts that could ultimately present itself. In Comptroller's Decision No. 22,520 (1988), the Administrative Law Judge noted the following:

> .... The Comptroller's office is not obligated to anticipate lack of tax knowledge and fill in the gaps, although the office makes a herculean effort every year to do just that ..... In the end it is the taxpayer's responsibility to know the law and apply it correctly.

Each taxpayer concerned with the effects of legislative changes should request a written ruling from the Comptroller. That's the only effective way a taxpayer can determine its responsibilities and protect itself from different interpretations on down the road.

Finally, because the Audit Division made its determination on the penalty and interest waiver issues prior

to the adoption of amendments to Rules 3.5 and 1.3, I only have jurisdiction over interest waiver questions involving detrimental reliance and undue post-audit delay occasioned by Comptroller personnel. Neither of those situations are present in this case; therefore, I have no jurisdiction over Petitioner's request for interest waiver.

RECOMMENDATION

The audit should be affirmed.

Signed this 5th day of March, 1992.

MARK WEISS

Administrative Law Judge

Hearing No. 27,950

ORDER OF THE COMPTROLLER

The above decision of the Administrative Law Judge, resulting in Petitioner'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 (20) 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, a 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 clerk of the Administrative Law Judges within twenty (20) days from the date of this Order, and must state the grounds upon which the motion is based.

JOHN SHARP

Comptroller of Public Accounts of the State of Texas