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Patrick J. Reynolds
President & Executive Director
(202) 484-5218
preynolds@cost.org

October 11, 2024

VIA EMAIL TO:

Ms. Jenny Burluson
Director
Tax Policy Division
Texas Comptroller of Public Accounts

Re: Comments on Proposed Amendments to TAC §3.330

Dear Ms. Burluson:

On behalf of the Council On State Taxation (COST), I respectfully submit these comments on the draft amendments to Texas Administrative Code §3.330 and, pursuant to Tx. Govt. Code § 2001.029(b), respectfully request a public hearing on the proposed amendments. COST believes that some of the language of §3.330 (“Amendments”) represents an expansion of the Texas sales tax base that is not supported by any statutory change and is in direct opposition to Texas Supreme Court jurisprudence. Moreover, any change in administrative policy should apply only prospectively; it should not apply retroactively.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 500 major corporations engaged in interstate and international business. COST’s objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multistate business entities.

Amendments Not Supported by Legislative or Judicial Action

COST is not aware of any legislative or judicial changes that support the Amendments. “Data processing service” was added to Tex. Tax Code § 151.0035 as a taxable service in 1987, and the Texas Supreme Court adopted the essence of the transaction test in 1977 in *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977). Yet, the Amendments would reject the essence of the transaction test and unilaterally, without involvement of the Texas Legislature, expand the sales tax base to more services.

We believe that the administrative decision to expand the sales tax base to more of what the Comptroller considers “data processing” is a significant change for affected taxpayers that exceeds the bounds of administrative authority and would be better addressed by the Texas Legislature.

Policy Changes Should be Prospective Only

The COST Board of Directors has adopted the following policy position on retroactive tax legislation:

Legislation imposing new or increased tax liabilities attributable to prior periods is fundamentally unfair and, in some cases, unconstitutional and thus must be avoided. Under no circumstance should legislation imposing new or increased tax liabilities be applied to any periods beginning prior to the date the legislation was enacted. Retroactive legislation or administrative pronouncements that do not impose new or increased tax liabilities may be appropriate.

The reasoning of the policy position also applies to administrative policy changes. COST therefore respectfully requests that if the Comptroller, in spite of the apparent administrative overreach and the likely litigation that will ensue therefrom, proceeds with the changes in administrative policy those changes should apply only prospectively.

Conclusion

COST respectfully suggests that the Amendments represent a significant departure from current policy and should therefore be addressed by the Legislature. Moreover, any change in policy should apply only prospectively. If you have any questions or would like to discuss further, please do not hesitate to contact me.

Sincerely,



Patrick J. Reynolds
President & Executive Director

CC: COST Board of Directors