December 11, 2020

VIA EMAIL TO: Teresa.Bostick@cpa.texas.gov

Teresa G. Bostick
Director
Tax Policy Division
Texas Comptroller of Public Accounts

Re: Comments on Proposed Amendments to TAC §3.591

Dear Ms. Bostick:

On behalf of the Council On State Taxation (COST), I respectfully submit these comments on the proposed amendments to Texas Administrative Code §3.591. COST believes that some of the language of §3.591(26)(A) (“Amendments”) represents a change in administrative policy that is not supported by any statutory change. 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 over 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 Statute

COST is not aware of any legislative changes that support the Amendments. Tex. Tax Code § 171.103(a)(2) provides that, when calculating total gross receipts from “business done in this state,” a taxable entity must include receipts from “each service performed in this state.” The Comptroller’s current regulation on the apportionment of service receipts provides that services are “apportioned to the location where the service is performed.” 34 Tex. Admin. Code § 3.591(e)(26).

In the Amendments, the Comptroller now seeks to, retroactively and without a legislative change, bifurcate the performance of services into “receipts-producing, end-product acts” and all other acts. If a “receipts-producing, end-product act” exists, then under the Amendments, the location of all other acts will not be considered, even if they are essential to the performance of the receipts-producing acts. The
Amendments would therefore adopt market-based sourcing of services with no legislative action.

We believe that the Comptroller should be receptive to apportionment methods that achieve the truest reflection of income earned in the State. However, we believe that the administrative decision to move to market-based sourcing is a significant change for affected taxpayers that exceeds the bounds of the Administrative Procedure Act, and therefore should be 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 the changes in administrative policy apply only prospectively.

**Conclusion**

COST respectfully suggests that the Amendments represent a departure from current policy and should 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,

[Signature]

Patrick J. Reynolds
Tax Counsel

CC:  [Karey.Barton@cpa.texas.gov]
COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director