

# TTARA 2018

## Texas Comptroller Panel

September 27, 2018

**Mike Reissig, Moderator**  
Deputy Comptroller  
Texas Comptroller of Public Accounts



# Some Pending Franchise Tax Cases

2016

- ***Graphic Packaging v. Hegar***, Tex. S. Ct. No. 15-0669
  - Can taxpayer use MTC three factor allocation?
  - 09/30/2016 Petitioner’s Brief on the Merits
- ***American Multi-Cinema, Inc. v. Hegar***,  
Austin Ct. App. No. 03-14-00397-CV
  - Do movie theaters get COGS?
  - 01/19/2016 State’s Reply in Support of State’s MRH
- ***Sirius XM Radio, Inc. v. Hegar***,  
Travis Co. Dist. Ct. No. D-1-GN-16-000739
  - Apportionment, COGS, flow-through funds mandated by law
  - Discovery in progress



# Some Pending Franchise Tax Cases

2017

- ***Graphic Packaging v. Hegar***, Tex. S. Ct. No. 15-0669
  - Can taxpayer use MTC three factor allocation?
  - 09/13/2017 Oral Argument
- ***American Multi-Cinema, Inc. v. Hegar***,  
Tex. S. Ct. No. 17-0464
  - Do movie theaters get COGS?
  - 11/21/2017 Reply to State's Petition for Review Due
- ***Sirius XM Radio, Inc. v. Hegar***,  
Travis Co. Dist. Ct. No. D-1-GN-16-000739
  - Apportionment, COGS, flow-through funds mandated by law
  - Discovery in progress



# Some Pending Franchise Tax Cases

2018

- ~~*Graphic Packaging v. Hegar*, 538 S.W.3d 89 (Tex. 2017)~~
  - Can taxpayer use MTC three factor allocation?
  - No.
- *American Multi-Cinema, Inc. v. Hegar*,  
Tex. S. Ct. No. 17-0464
  - Do movie theaters get COGS?
  - Petition for Review pending
- *Sirius XM Radio, Inc. v. Hegar*, No. 03-18-00573-CV
  - Apportionment, COGS, flow-through funds mandated by law
  - Appeal pending



# *American Multi-Cinema v. Hegar*



- Is the sale of a movie admission the sale of tangible personal property for COGS?
  - Court of Appeals said yes.
  - Petition for review pending.



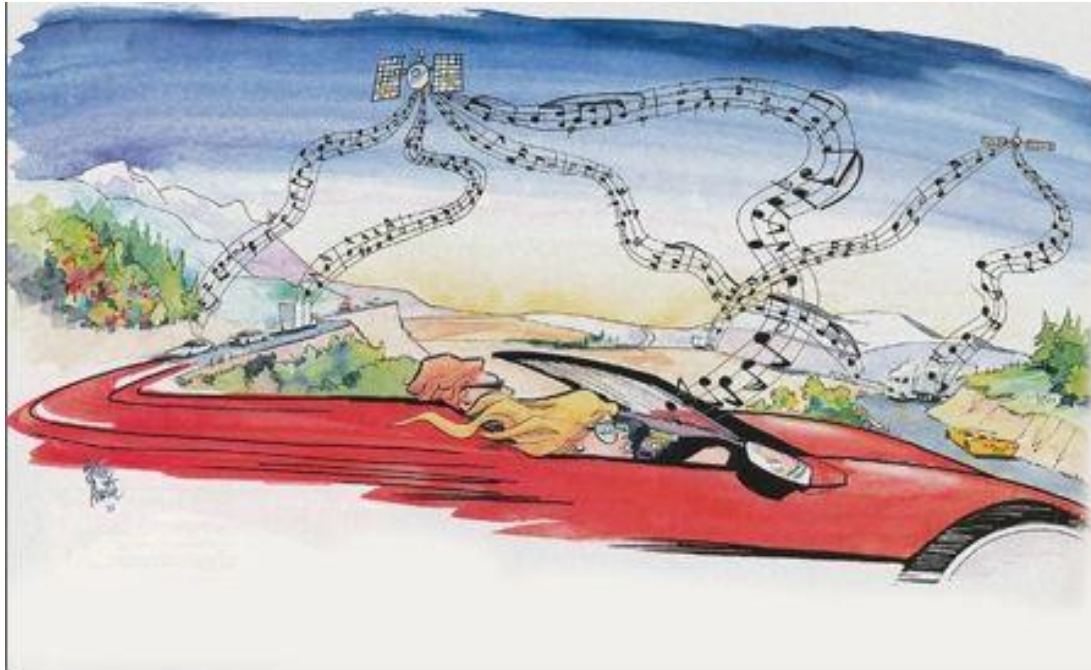
## Sons of *American Multi-Cinema*

- ***NTS Communications v. Hegar***, No. 03-16-00771-CV, Austin Court of Appeals (June 7, 2018 Opinion)
  - Internet access, telephone connectivity, and video streaming are not sale of TPP.
  
- ***Dallas World Aquarium v. Hegar***, No. 03-18-00209-CV, Austin Court of Appeals (appeal filed April 6, 2018)
  - District Court Judgment - Aquarium admissions are not sale of TPP.
  
- ***Sirius XM Radio, Inc. v. Hegar***, No. 03-18-00573-CV, Austin Court of Appeals (appeal filed Sept. 12, 2018)
  - District Court Judgment - Satellite radio subscriptions are sale of TPP.



# *Sirius XM Radio, Inc. v. Hegar*

## Franchise Tax Apportionment



- Where do you source satellite radio subscription receipts?



# Sourcing Statute

- Tax Code § 171.103. Determination of Gross Receipts from Business Done in this State for Margin.
- (a) Subject to Section 171.1055, in apportioning margin, the gross receipts of a taxable entity from its business done in this state is the sum of the taxable entity's receipts from:
  - .....
  - (2) each service performed in this state, except that receipts derived from servicing loans secured by real property are in this state if the real property is located in this state; ....





# Comptroller Rule 3.591(e)(26)

(e) Treatment of specific items in the computation of gross receipts.

.....

(26) Services. Receipts from a service are apportioned to the location where the service is performed. If services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas.



# Agency interpretation:

- “. . . shifting the focus geographically from every activity performed by a corporation that generates service receipts to those specific, end-product acts for which the customer contracts and pays to receive . . . distinction between receipts-producing activities versus non-receipt producing, albeit essential, support activities...”

Hearing No. 10,028 (1980)



# *Sirius XM Radio, Inc. v. Hegar*

## ➤ Trial court ruled for Sirius:

- Find of Fact 24. Sirius XM's receipt producing, end product act was the production and distribution of more than 150 channels of music, sports, news, talk, and entertainment programming.
- Conclusion of Law 2. Sirius XM performed its satellite radio subscription service both inside and outside Texas. Sirius XM's subscription receipts are therefore apportioned to Texas based upon the "fair value" of the services performed in Texas.

## ➤ On appeal.

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# Some Pending Sales Tax Cases

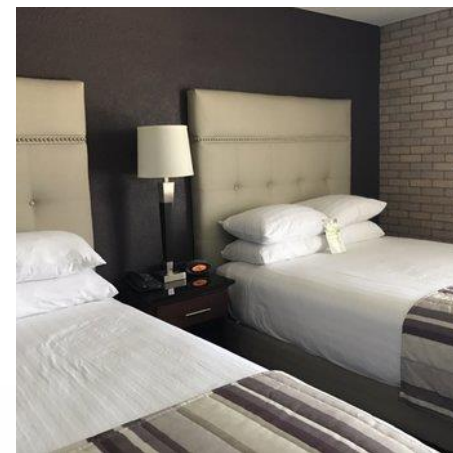
- ***Alamo National Building Management v. Hegar,***  
Austin Court of Appeals No. 03-16-00873-CV  
(appeal filed Jan. 18, 2017)
- ***CEC Entertainment v. Hegar,***  
Austin Court of Appeals No. 03-18-00375-CV  
(appeal filed May 31, 2018)
- ***El Paso Electric Co. v. Hegar,***  
Travis Co. Dist. Ct. No. D-1-GN-17-006837  
(trial set for October 29, 2018)



# *Alamo National v. Hegar*

Sale of toilet paper

Rental of hotel room



➤ Are hotels reselling toilet paper to guests?



# *Alamo National v. Hegar*

- District Court ruled for the Comptroller.
  - Conclusion of Law 6: Plaintiff ... did not sell the items to its guests with or as a taxable item, as defined by Tax Code § 151.010.
  - Conclusion of Law 7: If Plaintiff had resold the items with or as a taxable item, as alleged by the Plaintiff, Plaintiff would have been required to remit sales tax due on the resale of the items to its guests.
  
- On appeal.



# ***CEC v. Hegar***



➤ Is Chuck E. Cheese reselling gaming machines to customers?





# ***CEC v. Hegar***

➤ The District Court ruled for the Comptroller.

- Tax Code § 151.302(b)

Tangible personal property used to perform a taxable service is not considered resold unless the care, custody, and control of the tangible personal property is transferred to the purchaser of the service.

➤ On appeal.



# *El Paso Electric v. Hegar*



➤ Does an electric utility resell meters to its customers?

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# Comptroller Procedural Rules – Some 2017 Amendments

- Rule 1.4 – Representatives - A taxpayer can have multiple authorized representatives but must designate a single representative for notice.
- Rule 1.8 – Resolution Agreements - Formalizes content and procedures.
- Rule 1.29 – Motion for Rehearing – Implements the new 25-day statutory deadline and states the procedures for additional time.
- Rule 1.39 – Motions to Dismiss – Grounds and procedures.
- Rule 1.41 – Ex Parte Communications – Identifies persons who cannot be contacted and identifies permissible internal ex parte communications.



# Procedural Rules Under Consideration

- Later this year, the Comptroller plans to propose repeal and re-adoption of the Rules of Practice and Procedure in their entirety so that the rules can be reordered and renumbered.



- The public will have the opportunity to submit comments after the rules are formally proposed in the Texas Register.



# Procedural Rules Under Consideration

- Taxpayer's option to set a Position Letter deadline.
  - After a contested case is assigned, the Tax Hearings Attorney will issue an introductory letter.
  - If the Tax Hearings Attorney does not issue the Position Letter within 60 days after the date of the introductory letter, the taxpayer may submit a written request to the Tax Hearings Attorney to issue a Position Letter within 45 days of the receipt of the request.
  - The Tax Hearings Attorney will issue a Position Letter within the 45-day deadline, obtain an agreed extension of the deadline to issue the Position Letter, or confer with the taxpayer concerning the docketing of the case at SOAH.



# Procedural Rules Under Consideration

## ➤ Discovery.

- A taxpayer is required to produce documents and information concerning the transactions in question to substantiate and enable verification of the taxpayer's contentions concerning the amount of tax, penalty, or interest to be assessed, collected, or refunded in a contested case. Tax Code § 111.0041.
- Before SOAH acquires jurisdiction, the parties are encouraged to informally request and exchange documents and other information.
- Formal discovery after SOAH acquires jurisdiction.



# Procedural Rules Under Consideration

- Request for additional briefing after Proposal for Decision.
  - If the agency determines that additional argument from the parties will be helpful before making a final Comptroller determination in a contested case, the agency will issue an order requesting the parties to submit written briefs on specified contested case issues.
  - Briefs will be limited to the issues identified in the order and arguments addressing any issues not identified in the order will not be considered.
  - The parties cannot unilaterally submit additional briefing.



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# Some Pending Pay-to-Play Cases

- ***Hegar v. EBS Solutions, Inc.***,  
Austin Court of Appeals, 549 S.W.3d 849  
(April 20, 2018 opinion)  
(petition for review pending)
- ***Hegar v. CHZP, LLC***,  
Austin Court of Appeals No. 03-17-00214-CV  
(June 28, 2018 opinion)



# Ways to Get to Court

- Tax Code Chapter 112 refund lawsuit
- Tax Code Chapter 112 payment under protest
- Tax Code Chapter 112 injunction
  - Bond - 2X tax, penalty & interest
- Administrative Procedure Act Declaratory Judgment
  - “validity or applicability of a rule”
- Uniform Declaratory Judgment
  - “affected by a statute...declaration of rights”



# *Hegar v. EBS Solutions*

- EBS made partial payment of the assessment under protest and did not post a bond.
- Court of Appeals: “...we must similarly conclude that the district court did not have jurisdiction to consider EBS’s tax-protest suit and its injunctive claims under the Tax Code because EBS did not comply with the statutory prerequisites for pursuing those types of suits.”
- But what about a violation of the open courts provision of the Texas Constitution?



# *Hegar v. EBS Solutions*

- Court of Appeals: “... we must similarly conclude that requiring EBS to comply with the prepayment obligations when filing a protest suit and when seeking injunctive relief under the Tax Code did not violate EBS’s constitutional rights because EBS had another avenue available to it that did not involve prepayment obligations in that EBS could have pursued the type of declaratory relief recognized by the supreme court as being available prior to the enactment of section 112.108.”
- Remand to plead declaratory judgment.
- *CHZP* also remanded for further pleading.

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