

PRESENTED AT

The University of Texas School of Law
68th Annual Taxation Conference

December 2-3, 2020
Live Webcast

**Texas Franchise Tax /Sales & Use Tax:
Recent Developments**

Jimmy Martens

Author Contact Information:
Jimmy Martens
Martens, Todd, Leonard & Ahlrich
Austin, TX 78701

jmartens@textaxlaw.com
512-542-9898



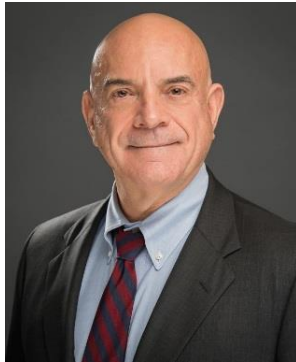
Texas Tax New Developments

2020

This outline provides information on general tax issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

© James F. Martens (2020). All rights reserved. Last Revised 10/15/20

Instructor



JIMMY MARTENS

Attorney, CPA | Martens, Todd, Leonard & Ahlrich

Jimmy Martens, trial and appellate attorney, is the founding partner of Martens, Todd, Leonard & Ahlrich, a boutique tax litigation law firm located in downtown Austin, Texas. Mr. Martens has handled the trial of 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: *Hegar v. Gulf Copper & Manufacturing Corp.*, No. 17-0894 (Tex. Apr. 3, 2020); *Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632 (Tex. 2013); *In re AllCat Claims Serv., L.P.*, 356 S.W.3d 455 (Tex. 2011); and *Titan Transp., LP v. Combs*, 433 S.W.3d 625 (Tex. App.—Austin 2014, pet. denied).

His recent appellate cases include: *Combs v. Newpark Res., Inc.*, 422 S.W.3d 46 (Tex. App.—Austin 2013, no pet.); *Hegar v. CGG Veritas Servs. (U.S.), Inc.*, No. 03-14-00713-CV, 2016 WL 1039054 (Tex. App.—Austin Mar. 9, 2016, no pet.) (mem. op.); *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d 138, 140 (Tex. App.—Austin 2015), *aff'd*, 538 S.W.3d 89 (Tex. 2017); and *OGCI Training, Inc. v. Hegar*, No. 03-16-00704-CV (Tex. App.—Austin Oct. 27, 2017, no pet.).

He focuses his law practice on challenging Texas franchise and sales tax assessments in administrative hearings, in state district court, and the related Courts of Appeal. He is board certified by the Texas Board of Legal Specialization in Tax Law.

Mr. Martens is vice-chair of the Texas State Bar Tax Controversies Committee, a former council member of the Tax Section for the State Bar of Texas and the former chair of the CLE Committee. He is the statewide course instructor for the Texas Society of CPAs. He teaches his Texas Franchise Tax and Texas Sales Tax courses for them annually in the major Texas cities.

Mr. Martens received his B.B.A. and J.D. from The University of Texas at Austin, both with honors.

Mr. Martens may be reached by email at jmartens@textaxlaw.com or by telephone at (512) 542-9898.

Instructor



GORDON MARTENS

Attorney | Martens, Todd, Leonard & Ahlrich

Gordon Martens, trial attorney, is an associate with Martens, Todd, Leonard & Ahlrich, a boutique tax litigation law firm located in downtown Austin, Texas. He and other members of his law firm limit their practices to Texas tax controversies and litigation. Mr. Martens represents clients in administrative proceedings before the Texas Comptroller's office, the Texas State Office of Administrative Hearings, and in Texas state

courts.

Mr. Martens is licensed to practice law in Texas and Louisiana. He has several years' experience representing clients in state and local tax controversies, with a focus on the energy, construction, and technology industries.

Mr. Martens is a member of the State Bar of Texas Tax Section and the Louisiana State Bar Association. Mr. Martens earned his bachelor's degree from The University of Texas at Austin, with honors. Mr. Martens earned his J.D. degree from the University of Houston Law Center with highest honors.

Mr. Martens may be reached by email at gmartens@textaxlaw.com or by telephone at (512) 542-9898.

Table of Contents

| | |
|---|-----------|
| INTRODUCTION | 1 |
| I. FRANCHISE TAX | 1 |
| COVID-19 DEADLINE RELIEF | 1 |
| NEXUS..... | 4 |
| TAXABLE ENTITIES | 7 |
| REVENUE | 8 |
| REVENUE EXCLUSIONS | 9 |
| COGS..... | 14 |
| APPORTIONMENT..... | 26 |
| TAX RATE..... | 38 |
| II. TAXING REMOTE SALES | 41 |
| WAYFAIR CASE | 42 |
| COMMERCE CLAUSE ANALYSIS | 42 |
| MANDATORY PHYSICAL PRESENCE TEST OVERRULED | 44 |
| CASE-BY-CASE ANALYSIS IMPOSED..... | 45 |
| NEW SUBSTANTIAL NEXUS STANDARD | 46 |
| STATES IMPLEMENTING WAYFAIR STANDARDS..... | 47 |
| TEXAS..... | 47 |
| III. SALES TAX | 51 |
| NO AUTOMATIC COVID-19 DEADLINE RELIEF | 51 |
| ANTI-TAXPAYER LEGISLATION..... | 53 |
| SELLERS ALLOWED TO PAY SALES TAX ON CUSTOMERS' BEHALF | 54 |
| BURDEN OF PROOF ON TAXABILITY OF SERVICES | 55 |
| LOCAL TAX RULE REVISED..... | 55 |
| PERSONAL LIABILITY | 56 |
| DATA PROCESSING SERVICES | 57 |
| INTERNET ACCESS SERVICES | 58 |
| INSURANCE SERVICES..... | 58 |
| AMUSEMENT SERVICES | 59 |
| SALE FOR RESALE EXEMPTION..... | 59 |
| MANUFACTURING EXEMPTION | 61 |
| ENVIRONMENTAL AND CONSERVATION SERVICES EXEMPTION | 62 |
| HEALTH CARE | 62 |
| HEALTH CARE SUPPLIES EXEMPTION | 63 |
| EMERGENCY PREPARATION SUPPLIES SALES TAX HOLIDAY | 64 |
| ENERGY..... | 65 |
| HIGH TECH..... | 66 |
| RESEARCH & DEVELOPMENT | 68 |
| DATA CENTERS..... | 68 |

| | | |
|------------|--|-----------|
| | FOOD & BEVERAGES | 69 |
| IV. | JURISDICTION | 70 |
| | TEXAS SUPREME COURT REJECTS PAY-TO-PLAY REQUIREMENT..... | 70 |
| | WINS FOR TAXPAYERS ON JURISDICTION..... | 71 |
| | LOSSES FOR TAXPAYERS ON JURISDICTION | 73 |
| V. | PROCEDURE | 77 |
| | COMPTROLLER PUBLISHES 2020 INTEREST RATES | 77 |
| | COMPTROLLER AMENDS RULES OF PRACTICE AND PROCEDURE..... | 77 |

Introduction

This paper discusses a variety of important developments in Texas franchise tax, Texas sales tax, e-commerce, jurisdiction, and procedure. It includes the 2019 legislative amendments to the franchise tax laws, recent agency rules and administrative guidance from the Comptroller. It surveys and analyzes critical Texas state and local tax cases, either pending or recently decided, by the Texas Supreme Court and courts of appeals.

I. Franchise Tax

COVID-19 Deadline Relief

Extended Due Date. On April 2, 2020, the Comptroller announced that the due date for Report Year 2020 Texas franchise tax reports is automatically extended for all taxpayers to July 15, 2020.¹ The automatic extension includes both the report deadline and the payment deadline. The Comptroller extended the franchise tax deadline “to be consistent with the Internal Revenue Service” which has extended certain federal income tax filing deadlines to July 15, 2020.² The Comptroller’s press release explained the rationale for extending the franchise tax deadline:

“We recognize that the information aggregated from taxpayers’ federal tax returns comprises the building blocks for their Texas franchise tax returns,” Hegar said. “In addition to coping with the unprecedented impacts of the growing pandemic, we understand the difficulty Texas businesses will face in filing franchise tax returns now that the federal deadline has moved, and so we thought it appropriate to align the state’s franchise tax deadline with the IRS deadline.”³

In addition to the automatic extension, the Comptroller announced the process for requesting additional franchise tax extensions. These extensions, like those available every year, require taxpayers to file timely extension requests and include with those requests estimated tax payments. The extensions differ depending upon whether the taxpayer is required to pay franchise tax via electronic funds transfer (EFT).

Entities that paid \$10,000 or more in franchise tax (or any other single category of payments or taxes) in the previous state fiscal year are required to pay using EFT.⁴

¹ Texas Comptroller, *Comptroller’s Office Extends Franchise Tax Deadline* (Apr. 2, 2020), available at <https://comptroller.texas.gov/about/media-center/news/2020/200402-extend-tax-deadline.php>.

² Internal Revenue Service, *IR-2020-58 Tax Day now July 15: Treasury, IRS extend filing deadline and federal tax payments regardless of amount owed* (Mar. 21, 2020), available at <https://www.irs.gov/newsroom/tax-day-now-july-15-treasury-irs-extend-filing-deadline-and-federal-tax-payments-regardless-of-amount-owed>.

³ Texas Comptroller, *Comptroller’s Office Extends Franchise Tax Deadline* (Apr. 2, 2020), available at <https://comptroller.texas.gov/about/media-center/news/2020/200402-extend-tax-deadline.php>.

⁴ Comptroller Rule 3.9(b).

Extensions for Non-EFT Taxpayers. Taxpayers who are not required to pay via ETF can request one additional extension using the Comptroller's Webfile system or may file Form 05-164, Texas Franchise Tax Extension Request.⁵ If the taxpayer properly requests the extension, the report will be due January 15, 2021.

Non-EFT taxpayers must request the extension before the original due date for the report (July 15, 2020). Along with the extension request, the taxpayer must make an "extension payment" equal to the lesser of the following:

1. 90% of the tax that will be due with the report that is ultimately filed; or
2. 100% of the tax reported as due on the prior franchise tax report.⁶

A taxable entity that became subject to the franchise tax for the first time during the 2019 calendar year cannot use the 100% payment option to calculate its extension payment. Also, a separate entity that was included in a combined group report in Report Year 2019 cannot use the 100% payment option.⁷ Using the 90% payment option, however, requires the taxpayer to be able to calculate its expected Report Year 2020 franchise tax liability, which the taxpayer is typically unable to do before submitting its federal income tax return.

If the taxable entity fails to meet the "extension payment" requirements once it files its Report Year 2020 report, penalty and interest applies to any part of the 90% of tax not paid by the July 15, 2020 due date and to any part of the 10% not paid by the extended due date.⁸ If a taxpayer does not meet the minimum payment threshold, the extension is denied and the taxpayer's report remains due on the July 15, 2020 due date.⁹

Extensions for EFT Taxpayers (Two-Step). Taxpayers required to pay Report Year 2020 franchise tax via EFT must request two extensions. The first extends the due date to August 15, 2020, and the second extends the due date to January 15, 2021.

If the taxpayer paid between \$10,000 and \$499,999.99 in franchise tax in Report Year 2019, they may meet the extension payment requirement by using the Comptroller's Webfile system to make their payment.

If the taxpayer paid \$500,000 or more in franchise tax in Report Year 2019, they must use the Comptroller's TEXNET system. They may request an extension by making a timely TEXNET payment using tax type payment code 13080 (Franchise Tax Extension). They must complete the

⁵ Texas Comptroller, Franchise Tax Extensions of Time to File, <https://comptroller.texas.gov/taxes/franchise/filing-extensions.php> (last visited Apr. 20, 2020). Access to the Comptroller's Webfile system and downloadable forms are available at <https://comptroller.texas.gov/taxes/file-pay/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Failing to secure a valid extension causes the statute of limitations to begin running on the original due date. Tex. Tax Code § 111.201 (four-year limitations period begins once tax is due and payable).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Texas Franchise Tax/ Sales & Use Tax: Recent Developments

Also available as part of the eCourse

[Texas Franchise and Sales Taxes: Recent Developments \(2020\)](#)

First appeared as part of the conference materials for the
68th Annual Taxation Conference session

"Texas Franchise and Sales Taxes: Recent Developments"