

PRESENTED AT

71st Annual Taxation Conference

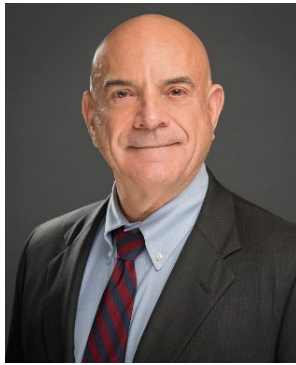
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**Texas Tax Disputes:
Four Ways to Get Your Ticket to the Courthouse
&
Recent Texas Tax Developments**

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Jimmy Martens, trial and appellate attorney, is the founding partner of Martens, Todd & Leonard, 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, slip op. (Tex. Apr. 3, 2020), 601 S.W.3d 668 (Tex. 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); *Hegar v. Gulf Copper and Manufacturing Corporation*, 535 S.W.3d 1 (Tex. App.—Austin 2017, pet. granted); 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, state district court, the related courts of appeal and Texas Supreme Court. He is board certified by the Texas Board of Legal Specialization in Tax Law.

Mr. Martens is a former 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.

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Table of Contents

I.	CHALLENGING TEXAS TAX CASES IN COURT.....	1
II.	2023 TEXAS TAX LEGISLATION.....	5
	FRANCHISE TAX LAWS	5
	SALES TAX LAWS.....	6
	OTHER SUBSTANTIVE TAX LAWS.....	6
	TAX ADMINISTRATION AND PROCEDURE LAWS	7
III.	FRANCHISE TAX.....	8
	COST OF GOODS SOLD (COGS).....	8
	COMPENSATION.....	9
	APPORTIONMENT.....	10
	RATE	18
	RESEARCH & DEVELOPMENT CREDIT	20
IV.	SALES TAX.....	24
	LOCAL SALES TAX SOURCING FOR ONLINE SALES	24
	MANUFACTURING EXEMPTION	27
	DATA PROCESSING.....	29
V.	JURISDICTION & PROCEDURE.....	31
	NEW RULE FOR BANKS SHARING DELINQUENT TAXPAYER RECORDS.....	31
	ADDING SUBSEQUENT TAX PERIODS TO PENDING LITIGATION	32
	THE JURISDICTIONAL SAGA OF <i>EL PASO ELECTRIC COMPANY V. HEGAR</i>	32

I. Challenging Texas Tax Cases in Court

Audit Assessments. Audited taxpayers may now challenge audit assessments in state court without having to first pay the disputed amounts. This is a very significant, pro-taxpayer change. Previously, if a taxpayer could not pay the full audit assessment, it had to endure a costly “inability to pay” proceeding. The ‘inability to pay’ proceeding process was fraught with uncertainty and decades of inconsistent state court precedent and numerous cases under which insolvent taxpayers could not, and cannot to this day, have their day in court. It required insolvent taxpayers – businesses that could not pay the assessment to begin with, to incur enormous legal fees in order to undergo a separate evidentiary proceeding, similar to a small trial, to prove they could not pay.

All of that changed during the 2021 legislative session. The Texas Legislature enacted a new provision giving taxpayers the option to postpone payment of the disputed portion of an audit assessment by following certain procedures:

1. **Timely File Statement of Grounds.** Upon receipt of the Notice of Assessment, the taxpayer must timely file (within 60 days) a Statement of Grounds (also known as a Petition for Redetermination).
2. **Content.** The Statement of Grounds¹ must:
 - List and number the contested items or transactions, or state general contentions that identify categories of contested items or transactions.
 - State the factual basis and legal grounds for each contested item, transaction or general contention (pertaining to categories of contested items).
 - Signed by taxpayer or authorized representative.
3. **Amendment.** The taxpayer may amend its Statement of Grounds up to the time the Reply to the Position Letter is due.
4. **Position Letter.** This is the Comptroller’s attorney’s detailed response to the taxpayer’s Statement of Grounds. The Comptroller’s attorney has absolute discretion when to issue the Position Letter because the Comptroller decides when to issue the introductory letter. The issuance of the introductory letter initiates the taxpayer’s right to request the issuance of the Position Letter. See Comptroller Rule § 1.12(d).
5. **Reply to Position Letter.** The taxpayer’s deadline to file a Reply to the Position Letter is 45 days after the Comptroller’s attorney issues the Position Letter.

Statute of Limitations Issue. The Comptroller’s litigating position is that the four-year statute of limitations is not tolled (i.e. it continues to run) for any issue not raised, either in the Statement of Grounds or in the Reply to the Position, within the original four years statute of limitations

¹ Comptroller Rule § 1.11

period.² This is important because the statute of limitations may expire on new issues prior to the taxpayer's deadline for filing its Reply to the Position Letter.

6. Complete Oral Hearing or Written Submission Process.
7. Receive Comptroller Decision that states the disputed and non-disputed amount.
8. File a Motion for Rehearing. The grounds in the taxpayer's lawsuit are limited to those grounds which were raised in its Motion for Rehearing. The Motion for Rehearing must be filed by the 25th day after the Comptroller signs the Decision.
9. Denial of Motion for Rehearing. A Motion for Rehearing may be denied by Comptroller written order or by operation of law. If the Comptroller takes no action, the Motion for Rehearing is deemed denied by operation of law 55 days after the date of the Comptroller Decision.

Important Note: *Upon receipt of the Comptroller's Decision, calendar both the deadline for filing the Motion for Rehearing (25 days) and the deemed denial date of the Motion for Rehearing (55 days). The 90 day suit deadline begins to run on the earlier of the actual or deemed denial date of the Motion for Rehearing.*

10. The taxpayer must file suit within 90 days of the denial of the Motion for Rehearing.
11. Pay the undisputed portion of the final assessment. Failure to pay may generate collection action and penalties but will not affect the taxpayer's ability to challenge the disputed portion of the assessment in state court.

Any unpaid amounts which the courts ultimately find are due accrue penalties and interest. Once the Comptroller is served with the lawsuit, the Comptroller is prohibited from collecting the disputed amounts but may still assert tax liens. The suit is barred if it is not brought within 90 days after the denial of the taxpayer's motion for rehearing.

Important Note: *The Comptroller's practice is to automatically file Notices of State Tax Lien to secure the ultimate, potential repayment of the assessment, plus accruing interest. Taxpayers need to be aware of this as it may adversely affect their ability to do business.*

A taxpayer may still bypass the administrative process altogether, pay the full amount of the assessment under protest and pursue a protest suit in state court. In a protest payment suit, the taxpayer need not exhaust its administrative remedies. It may make its payment under protest by including with it a protest letter setting forth the grounds it intends to raise in its protest suit. It must then bring a suit to recover the protest payment within 90 days after submitting its protest letter and payment. The benefit of the new procedure is that taxpayers may defer payment of the

² Tex. Tax Code § 111.207(b).

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71st Annual Taxation Conference: Day 2 - Focus on Tax Controversy session

"Texas Tax Disputes: Four Ways to Get Your Ticket to the Courthouse/SALT Update"