

**PRESENTED AT**

March 1, 2021  
Live Webcast

## **Texas Sales Tax for the Construction Industry**

**Jimmy Martens  
Allison Cunningham**

Author Contact Information:

Jimmy Martens  
Martens, Todd & Leonard  
Austin, TX

[jmartens@textaxlaw.com](mailto:jmartens@textaxlaw.com)  
512.542-9898



---

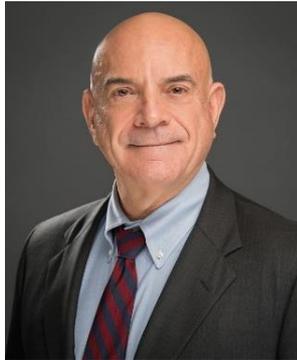
# Texas Sales Tax for the Construction Industry

---

2021

This teaching manual/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.

## Instructor



JIMMY MARTENS

Attorney, CPA | Martens, Todd & Leonard

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 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](mailto:jmartens@textaxlaw.com) or by telephone at (512) 542-9898.

## Instructor



ALLISON CUNNINGHAM

Attorney | Martens, Todd & Leonard

Ms. Cunningham is a Texas tax litigation attorney with Martens, Todd & Leonard, a boutique Texas tax litigation law firm located in downtown Austin, Texas. She and other members of her firm limit their law practices to resolving Texas sales and use tax and Texas franchise tax disputes. Ms. Cunningham is licensed by the State Bar of Texas and represents Texas tax taxpayers in audits in administrative hearings, and in state trial and appellate courts. Ms. Cunningham writes and speaks on a variety of Texas tax subjects to numerous groups including the State Bar of Texas, Texas Society of Certified Public Accountants, The University of Texas Law School – CLE, and many others. She frequently writes articles for the Committee on State Taxation (COST) Practitioner Newsletter and other publications including Martens, Todd & Leonard’s blog on trending issues in Texas tax law, which may be viewed at: <https://texaslaw.com/blog>.

Ms. Cunningham holds a bachelor’s degree from The University of Texas at Austin and a Juris Doctorate from The University of Texas School of Law.

Ms. Cunningham may be reached by email at [acunningham@textaxlaw.com](mailto:acunningham@textaxlaw.com) or by telephone at (512) 542-9898.

# Table of Contents

|  |           |
|--|-----------|
| <b>Chapter I. Overview .....</b>                             | <b>1</b>  |
| Texas Sales & Use Tax.....                                   | 1         |
| Texas Emissions Reduction Program (TERP) Surcharge .....     | 5         |
| Rentals & Leases .....                                       | 8         |
| Texas Motor Fuels Tax.....                                   | 8         |
| Texas Motor Vehicles Tax .....                               | 12        |
| <b>Chapter II. The Texas Sales &amp; Use Tax Rules .....</b> | <b>18</b> |
| Introduction .....   | 18        |
| Essence of the Transaction Doctrine .....                    | 21        |
| Entity Concept .....   | 22        |
| Credit for Tax Paid to Other States .....                    | 22        |
| Nexus .....  | 23        |
| Registration, Permit and Reporting Requirements .....        | 24        |
| Local Sales & Use Taxes .....                                | 26        |
| Record Retention Guidelines.....                             | 29        |
| Direct Pay Permits.....                                      | 29        |
| Materials, Supplies & Equipment.....                         | 32        |
| Taxable Services - Generally .....                           | 43        |
| Taxable Services Affecting the Construction Industry .....   | 50        |
| <b>Chapter III. Sales &amp; Use Tax Exemptions.....</b>      | <b>69</b> |
| Accepting an Exemption Certificate .....                     | 69        |
| Good Faith Acceptance .....                                  | 69        |
| Content of an Exemption Certificate .....                    | 70        |
| Resale Exemption.....  | 71        |
| <b>Chapter IV. Construction Industry Principles .....</b>    | <b>74</b> |
| Personal v. Real Property .....                              | 74        |
| Residential v. Commercial Property.....                      | 75        |
| New Construction.....  | 76        |
| Contract Pricing.....  | 81        |

|  |            |
|--|------------|
| Reimbursements.....  | 93         |
| Maintenance.....   | 103        |
| <b>Chapter V. Site Development.....</b>                            | <b>105</b> |
| Acquiring Land.....  | 105        |
| Permit Fees.....   | 105        |
| Engineers and Draftsman Services.....                              | 105        |
| Blueprints.....  | 106        |
| Land Clearing.....   | 106        |
| Surveying.....   | 107        |
| Sand, Dirt and Gravel.....   | 108        |
| Erosion Control.....   | 110        |
| Roads & Utilities.....   | 117        |
| “Dedicated and Accepted” Improvements.....                         | 117        |
| Residential and New Commercial Construction.....                   | 118        |
| Real Property Services Exception.....                              | 120        |
| Other Considerations Contractors Using Both Contract Types.....    | 123        |
| Common Areas.....  | 127        |
| Problem Areas for Contractors.....                                 | 128        |
| <b>Chapter VI. Commercial Property Repairs and Remodeling.....</b> | <b>132</b> |
| Tax Consequences.....  | 132        |
| Materials and Supplies.....  | 133        |
| Repairs v. Maintenance.....  | 134        |
| Painting.....  | 135        |
| Mixed Services.....  | 136        |
| <b>Chapter VII. Tax-Exempt Jobs.....</b>                           | <b>139</b> |
| Exempt Purpose of the Entity.....                                  | 139        |
| Exempt Entity Proof.....   | 139        |
| Tax Consequences.....  | 140        |
| Exempt Entity Examples.....  | 142        |

Quasi-Exempt Entities .....144

Water-Related Exemptions .....147

**Chapter VIII – Performing Work in Declared Disaster Areas ..... 151**

    Cleaning, Restoring, and Repairing Tangible Personal Property.....151

    Landscaping.....152

    Demolition .....153

    Removing and Discarding Waste .....153

    Rebuilding Nonresidential Structures.....154

    Rebuilding Residential Structures.....155

    Out-of-State Businesses .....155

## Chapter I. Overview

---

### Texas Tax for the Construction Industry

Different types of Texas state taxes apply to the parties and transactions associated with real estate construction. These Texas taxes include the:

- sales & use tax on materials, supplies, equipment, and services.
- TERP surcharge tax on off-road diesel construction equipment;
- motor vehicle tax,
- motor fuels tax, and
- cement production tax.

This course focuses its discussion on the Texas sales & use tax, and briefly discusses the TERP surcharge tax, the motor vehicle and motor fuels taxes as applied to the construction industry.

### Texas Sales & Use Tax

Although many types of taxes apply to the construction industry, the most significant tax is the sales & use tax. The Texas Limited Sales, Excise and Use Tax Act imposes a tax on the sale, lease or rental of tangible personal (touchable, movable) property and on certain specified services.<sup>1</sup> Sales & use taxes are complementary. Together, they are intended to uniformly tax transactions only once, whether in or out of Texas. Sales & use taxes account for 26% of all state revenues, roughly five times the contribution of any other tax.

### Sales Tax

Texas imposes sales tax on retail sales of taxable items in Texas. The state rate is 6.25%, although various local jurisdictions may impose sales and use taxes. The maximum combined tax rate for local taxes may not exceed 2% at any location. Therefore, the maximum possible sales tax rate is 8.25%.

---

<sup>1</sup> Chapter 151 of the Texas Tax Code.

*Example*

Alpha Construction is located in San Antonio. It purchases a diesel-powered backhoe from a supplier located in Houston. Alpha must pay sales tax on this purchase. The law treats Alpha Construction as the consumer of the backhoe because its workers will use it to perform services at construction sites.

☞ **Note:** It doesn't matter whether Alpha Construction uses the backhoe to provide taxable or non-taxable services. This transaction is subject to both the sales tax and the TERP surcharge.

**Use Tax**

This tax presumptively applies when items are acquired out-of-state and brought into Texas within one year of purchase for storage, use, or consumption in Texas. Since the sale is made by a non-Texas seller, the seller would not collect Texas sales tax at the time of sale. Moreover, the seller would likely not collect the origin state's sales tax because the item is destined for Texas. This transaction is subject to the Texas *use* tax.

Without the use tax, persons could purchase items from an out-of-state retailer, use the items in Texas, and escape paying any tax. The use tax prevents this abuse and places out-of-state vendors on an even playing field with Texas vendors. The use tax applies to "any taxpayer who purchases tangible personal property from any retailer for storage, use or other consumption in Texas."<sup>2</sup>

*Example*

Alpha Construction purchases the backhoe from a supplier located in Tulsa and has the backhoe delivered to its yard in San Antonio. Alpha Construction owes Texas use tax and the TERP surcharge. If sales tax was legally-owed and paid in Oklahoma, Alpha Construction would be entitled to a tax credit against the Texas use tax for the Oklahoma sales tax paid. If the Oklahoma retailer lacked nexus with Texas or did not otherwise collect Texas sales tax, Alpha Construction must accrue and remit Texas use tax.

---

<sup>2</sup> Texas Tax Code § 151.101.

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: Part 1: Overview; Texas Sales and Use Tax Rules

First appeared as part of the conference materials for the  
2021 Essentials on Texas Sales Tax for the Construction Industry session  
"Part 1: Overview; Texas Sales and Use Tax Rules"