

SECTION OF TAXATION

State Bar of Texas



OFFICERS:

Tina R. Green, Chair
Capshaw Green, PLLC
2801 Richmond Road #46
Texarkana, Texas 75503
(903) 223-9544
(888) 371-7863 (fax)
tgreen@capshawgreen.com

Elizabeth A. Copeland, Chair-Elect
Oppenheimer Blend Harrison & Tate, Inc.
711 Navarro, Suite 600
San Antonio, Texas 78205-1796
(210) 224-2000
(210) 224-7540 (fax)
ecopeland@obht.com

Andrius R. Kontrimas, Secretary
Fulbright & Jaworski LLP
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
(713) 651-5246 (fax)
akontrimas@fulbright.com

Alyson Outenreath, Treasurer
Texas Tech University
School of Law
1802 Hartford Avenue
Lubbock, Texas 79409-0004
(806) 742-3990 Ext. 238
(806) 742-1629 (fax)
alyson.outenreath@ttu.edu

COUNCIL MEMBERS:

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August 23, 2012

via email to bryant.lomax@cpa.state.tx.us

Mr. Bryant Lomax
Texas Comptroller of Public Accounts
Manager, Tax Policy Division
P.O. Box 13528, Capitol Station
Austin, Texas 78711-3528

**RE: Response to Comptroller Request for Comments Concerning
Proposed Amendments to Rule 3.325**

Dear Mr. Lomax:

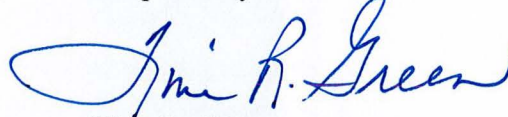
On behalf of the Section of Taxation of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Texas Comptroller of Public Accounts for comments pertaining to proposed amendments to Comptroller Rule 3.325.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE SECTION OF TAXATION, WHICH HAS SUBMITTED THIS LETTER, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW. THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENTAL SUBMISSIONS OF THE STATE BAR OF TEXAS SECTION OF TAXATION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE SECTION OF TAXATION MEMBERS WHO PREPARED THEM.

Mr. Bryant Lomax
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We greatly appreciate the opportunity to work with your office on these significant tax issues and hope to provide relevant analysis for your review. Thank you for your consideration.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Tina R. Green". The signature is fluid and cursive, with a large initial "T" and "G".

Tina R. Green
Chair, Section of Taxation
The State Bar of Texas

**RESPONSE TO REQUEST FOR COMMENTS REGARDING
PROPOSED AMENDMENTS TO COMPTROLLER RULE 3.325**

This response to request for comments with respect to proposed amendments to Comptroller Rule 3.325 is presented on behalf of the Section of Taxation of the State Bar of Texas (the "Section"). The principal drafters of these comments are the Chair and Vice Chairs of the Section's Committee on State and Local Taxation: Ira Lipstet, Charolette Noel, Sam Megally and Matt Hunsaker. The Section's Committee on Government Submissions ("COGS") has approved these comments. Stephanie Schroepfer is the Chair of COGS and Alyson Outenreath, officer of the Section reviewed this response to request for comments on behalf of COGS.

Although many of the persons who participated in preparing this letter have clients who would be affected by the state tax principles addressed by this letter or have advised clients on the application of such principles, no such person (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of this letter.

Contact Persons:

Ira Lipstet
DuBois, Bryant & Campbell, LLP
700 Lavaca, Suite 1300
Austin, Texas 78701
Tel: (512) 457-8000
Fax: (512) 457-8008
ilipstet@dbcllp.com

Charolette Noel
Jones Day
2727 North Harwood Street
Dallas, Texas 75201-1515
Tel: (214) 220.3939
Fax: (214) 969.5100
cfnoel@jonesday.com

Sam Megally
K&L Gates LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
Tel: (214) 939-5491
Fax: (214) 939-5849
Sam.Megally@klgates.com

Matt Hunsaker
Baker Botts
2001 Ross Avenue
Dallas, Texas 75201-2980
Tel: (214) 953-6828
Fax: (214) 661-4828
matt.hunsaker@bakerbotts.com

Date: August 23, 2012

I. EXECUTIVE SUMMARY

This comment letter is in response to the request of the Texas Comptroller of Public Accounts (the “Comptroller”) for comments concerning proposed amendments to 34 Tex. Admin. Code § 3.325 relating to practices and procedures concerning refunds and payments under protest (“Proposed Rule § 3.325”).¹

II. INTRODUCTION

We recognize and appreciate the challenges facing the Comptroller when balancing the task of providing a fair and transparent administrative process for responding to refund claims and resolving taxpayer disputes against the Comptroller’s need for an efficient administrative process to resolve such claims and controversies. It is our intent to present items for consideration that may help and support Comptroller personnel.

The focus of these comments is on the modification and/or addition of Rule provisions that dictate what type of documentation will be considered sufficient to support a valid claim for refund. A corresponding consideration is that failure to provide what is considered to be necessary or sufficient documentation will result in the statute of limitations for the administrative process not being tolled. Because failure to toll the statute of limitations can be fatal to a refund claim it is important that any such Rule provisions be both extremely clear as to interpretation as well as reasonable with respect to the ability of the claimant to comply with the Rule requirements. Following are comments and suggestions addressing several of these issues.

III. PROPOSED RULE § 3.325 COMMENTS

The Comptroller’s office has proposed amending current Rule § 3.325 concerning refunds and payments under protest in several respects including with respect to: 1) the establishment of policy with respect to third parties to whom permitted sellers may assign a right to refund; 2) the identification of types of documents that are needed by the Comptroller to verify claims; and 3) the identification of items that must be submitted with a refund claim in order to toll the statute of limitations in connection with the claim, as well as instances where such requirements are not met and the statute of limitations will not be tolled.

The proposed changes would include modifications to Rule § 3.325(a)(4)(E) providing that supporting documentation for verification of any refund claim or credit taken must include “copies of invoices, cancelled checks, and executed contracts.” We note that not every claim will be of a type such that those specific types of documentation exist, but may well still be a valid claim. We suggest that the Comptroller’s office consider adding language clarifying such documentation is to be included “as appropriate.”

A further proposed modification to Rule § 3.325(a)(4)(E) contains language specifying that if supporting documentation cannot be easily mailed or otherwise easily submitted to the agency, the refund claim must include a statement that all supporting documentation necessary to verify the claim will be made available to the Comptroller upon request. Indicating that difficult

¹ Hereinafter, all references to “Rule” or “Rules” (as appropriate) are to Chapter 34 of the Texas Administrative Code.

to deliver documentation will be made available by claimant upon Comptroller request is certainly reasonable. The language as drafted, however, could give rise to an interpretation that any supporting documentation that is not available at the moment when the refund claim is submitted will not, if subsequently obtained, be considered in support of the claim. We suggest that the Comptroller's office consider adding language clarifying that documentation obtained or located subsequent to the initial filing of the refund claim will be provided to the Comptroller as it becomes available so long as it is within the specified period during which such documentation may be provided.

New subsection (b)(10) is proposed to be added to existing Rule § 3.325. Proposed subsection (b)(10) specifies requirements that need to be met in order to toll the statute of limitations with respect to a refund claim. There may be a significant amount of time that elapses between filing a refund claim and a determination of the Comptroller's position with respect to the claim. Submitting a claim and learning only at some later date that the Comptroller considers the initial claim to be inadequate would be an extremely adverse result for the claimant if the statute of limitations to modify the claim had expired in the interim. Currently proposed draft language and potential modifications to certain proposed changes are as follows.

Proposed Rule § 3.325(b)(10)(A)(i) specifies that "the claim states fully and in detail each reason or ground on which the claim is founded, as required by subsection (a)(4)(A) of this section." Rule § 3.325(a)(4)(A) (as proposed to be modified) requires that a person who requests a refund from the Comptroller must submit a claim in writing that states fully and in detail each reason or ground on which the claim is founded. Setting out in sufficient detail the bases for a refund claim such that the Comptroller is adequately apprised of the nature of the claim is certainly reasonable and appropriate. A literal reading of the proposed modification, to "state fully and in detail each reason or ground on which the claim is founded," could lead to a construction that if any reason at all upon which the claim **could** be based is not included in the refund submission, the statute of limitations **would not** be tolled even if there are sufficient other grounds to sustain a refund.

We suggest the Comptroller's office consider modifying the language of Proposed Rule § 3.325(b)(10)(A)(i) to specify that "the claim must state fully and in sufficient detail the reason or ground on which the claim is founded." We further suggest that Rule § 3.325(a)(4)(A) be modified to specify that "A person who requests a refund from the comptroller must (A) submit a claim in writing that states fully and in sufficient detail the reason or ground on which the claim is founded."

Proposed Rule § 3.325(b)(10)(A)(iii) specifies that "if the claim is being filed by a non-permitted person who is an assignee of or successor to a refund that may be owed, the person submits with the claim for refund the assignment of right to refund." This proposed language could be interpreted to mean that if an assignment of the right to refund is not submitted with the initial refund claim, the statute of limitations will not be tolled irrespective of when the assignment of the right to refund is provided to the Comptroller by claimant. We suggest that the Comptroller's office consider modifying the language of Proposed Rule § 3.325(b)(10)(A)(iii) to read "if the claim is being filed by a non-permitted person who is an assignee or successor to a refund that may be owed, the person submits with the claim, **or timely**

provides thereafter (but in no event later than the time specified for providing evidence pursuant to Tex. Tax Code § 111.105(e)), the assignment of right to refund.”

Proposed Rule § 3.325(b)(10)(A)(iv) specifies that the statute of limitations will be tolled “if a person other than the person to whom the refund is due is submitting the claim for refund, a power of attorney is submitted with the claim.” This proposed language could be interpreted to mean that if a power of attorney is not submitted with the initial refund claim, the statute of limitations will not be tolled irrespective of when the power of attorney is provided to the Comptroller. We suggest that the Comptroller’s office consider modifying the language of proposed Rule § 3.325(b)(10)(A)(iv) to read “if a person other than the person to whom the refund is due is submitting the claim for refund, a power of attorney is submitted with the claim, **or such power is timely provided thereafter (but in no event later than the time specified for providing evidence pursuant to Tex. Tax Code § 111.105(e)).**”

For the reasons discussed above, we respectfully request that the Comptroller’s office consider modifying the currently Proposed Rule § 3.325 as discussed above.

IV. CONCLUSION

We greatly appreciate the opportunity to work with your office on these significant tax issues and hope that these comments are helpful to you as you craft final rules relating to practices and procedures concerning refunds and payments under protest. Thank you for your consideration.