

TAX SECTION

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January 29, 2015

Via email to Teresa.Bostick@cpa.state.tx.us

Ms. Teresa G. Bostick
Texas Comptroller of Public Accounts
Manager, Tax Policy Division
P. O. Box 13528, Capitol Station
Austin, TX 78711-3528

RE: Comments Pertaining to The Texas Comptroller's Proposed Rule 3.13
Relating to Timely Filing and Payment

Dear Ms. Bostick:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed comments pertaining to proposed Comptroller Rule 3.13, relating to postmarks, timely filing of reports, and timely payment of taxes and fees. The proposed rule was published in the January 2, 2015, edition of the Texas Register.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION 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 TAX SECTION OF THE STATE BAR OF TEXAS, 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 GOVERNMENT SUBMISSIONS OF THE STATE BAR OF TEXAS TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, 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 TAX SECTION MEMBERS WHO PREPARED THEM.

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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,



Andrius R. Kontrimas
Chair, Tax Section
The State Bar of Texas

COMMENTS ON THE TEXAS COMPTROLLER'S PROPOSED RULE 3.13

These comments, submitted in response to proposed Comptroller Rule 3.13, as published in the Texas Register on January 2, 2015, are presented on behalf of the Tax Section of the State Bar of Texas (the "Section"). The principal drafters of these comments include the Chair and Vice Chair of the Section's Committee on State and Local Tax, Charolette Noel and Sam Megally, and Section members Ira Lipstet, Kirk Lyda, and Sandi Farquharson. The Section's Committee on Government Submissions ("COGS") has approved these comments. Robert Probasco, Chair of COGS, reviewed these comments. Alyson Outenreath also reviewed these 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.

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Date: January 29, 2015

I. INTRODUCTION

This letter provides comments concerning the proposed adoption of 34 Tex. Admin. Code § 3.13, relating to postmarks, timely filing of reports, and timely payment of taxes and fees (“Proposed Rule 3.13”).¹

We recognize and appreciate the challenges facing the Texas Comptroller of Public Accounts (the “Comptroller”) in establishing whether a report or payment submitted by mail is timely remitted. We also appreciate the time and efforts of the Comptroller to prepare new Rules to assist in efficient tax administration. These efforts are very helpful to taxpayers, practitioners, and Comptroller personnel. It is our intent to present comments for consideration that may help and support the Comptroller personnel.

II. PROPOSED RULE 3.13 COMMENTS

As an initial matter, we note that the preamble to Proposed Rule 3.13 states that this Proposed Rule does not apply to taxpayers required by statute or another section of this title to remit funds electronically. Thus, we understand this provision will apply primarily to smaller taxpayers, taxpayers located outside the state, and other taxpayers not required to remit funds electronically. Such taxpayers often have limited sales or operations in Texas. Particularly since these taxpayers may find identifying and understanding the procedural rules challenging, we recommend incorporating some of the explanatory language in the preamble into the text of the Proposed Rule and clarifying other ambiguities in Proposed Rule 3.13 to limit potential confusion, increase the likelihood of desired compliance, and reduce corresponding administrative burden on the Comptroller when confusion causes a filing or a payment to be treated untimely.

A. Clarification of the “Comptroller’s Correct Address”

Proposed Rule 3.13(c)(1) appears to incorporate a “correct address” requirement in order for a report to be determined to be timely filed or a payment timely made. In particular, Subsection (c)(1) of Proposed Rule 3.13 provides:

To determine whether a report has been timely filed or a payment timely made, the date of a United States Postal Service postmark or a receipt mark showing when a report or payment was delivered to a common carrier or contract carrier will be prima facie evidence of the date the filing or payment was made, so long as the envelope, or common carrier or contract carrier documentation, reflects *the comptroller's correct address.*” (emphasis added).

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

Proposed Rule 3.13 does not define or provide reference to determine “the comptroller’s correct address.” Instead, the guidance that is available is limited to language in the preamble, which with respect to Subsection (c) of Proposed Rule 3.13 provides, in relevant part:

[A] postmark or receipt mark will serve as prima facie evidence of the date of filing a report or submitting a payment, so long as the postmarked or receipt-marked envelope of documentation reflects the comptroller’s correct address. The correct post office box address for submitting reports and payments for individual tax and fee types can be found on the comptroller’s website at http://www.window.state.tx.us/taxinfo/p_o_box.html. In addition, reports or payments may be submitted to the comptroller’s physical address: 111 East 17th Street, Austin, Texas 78701.

The language of the preamble may be read to imply that the “correct address” may differ for particular tax and fee types. A recent review of the website shows nine addresses for filing reports. If any of those separate addresses represents the preferred address for a particular filing requirement, we recommend that Proposed Rule 3.13 be clarified to state such (in the text as opposed to the preamble). Further, the new Proposed Rule is not clear as to whether a particular address must be used because the explanation also provides the option of using the Comptroller’s headquarters address: “111 East 17th Street, Austin, Texas, 78701.” While availability of the Internet is common, it is not universal. Accordingly, we appreciate the safe-harbor option of being able to use the Comptroller’s headquarters address. We would also recommend that Proposed Rule 3.13 be clarified to state that taxpayers are permitted to use addresses provided in relevant tax forms and instructions, including addresses appearing on correspondence the taxpayers have received from the Comptroller.

We propose the language in Subsection (c)(1) of Proposed Rule 3.13 be revised to permit any address of the Comptroller to be used, as long as the envelope or other document lists a *valid* Comptroller address found on the Comptroller’s website or as indicated on the relevant form or instructions, so that it reads:

To determine whether a report has been timely filed or a payment timely made, the date of a United States Postal Service postmark or a receipt mark showing when a report or payment was delivered to a common carrier or contract carrier will be prima facie evidence of the date the filing or payment was made, so long as the envelope, or common carrier or contract carrier documentation, reflects a *valid comptroller’s address.*” (emphasis added).

If Proposed Rule 3.13 intended that a particular address be used, we recommend such a requirement be reconsidered. The primary reason is that requiring a specific address would appear to be contrary to the various tax statutes, which do not require any specific address to be used. Also, requiring a specific address as determined by tax or fee type based on ambiguous language in the preamble of Proposed Rule 3.13 does not provide sufficient notice to a taxpayer or a tax practitioner – particularly those taxpayers or practitioners who do not deal with Comptroller tax matters on a regular basis. The vagueness inherent in having several alternate

addresses creates a regrettable potential for error based upon a report or payment merely going to the “wrong” address, even if the Comptroller received the report or payment on a timely basis. The impact could be particularly severe if a filing to preserve important procedural rights, with a relatively short deadline (such as a 30 day period to contest an asserted tax deficiency or denial of a refund claim), is deemed to be untimely because the submission was sent to the “wrong” Comptroller address.

B. Definition of Postmark

The explanations in the preamble preceding the Proposed Rule include a clarification of what constitutes a postmark or receipt mark. We believe it would be useful to include the same language in the text of the rule itself. Specifically, we suggest that the Comptroller add a definition in Subsection (a) for “*United States Postal Service postmark or a receipt mark*” to clarify that they do not include dates on postage purchased over the Internet, purchased as pre-metered stamps, or from postage meters unless an actual postmark is generated.

C. Adhering to the Statutory Mailbox Rule

Finally, we are concerned that Proposed Rule 3.13(c)(2) is inconsistent with Texas Tax Code § 111.054. Tax Code § 111.054(a) establishes a so-called “mailbox” rule for determining that a payment or report is filed when such item is placed in a U.S. Post Office or in the hands of a common or contract carrier. In particular, Tax Code § 111.054(a) provides:

Sec. 111.054. TIMELY FILING: MAIL DELIVERY. (a) *If a tax payment or a report is placed in a U.S. Post Office or in the hands of a common or contract carrier properly addressed to the comptroller on or before the date the payment or report is required to be made or filed, the payment or report is made or filed on time.* (emphasis added).

Tax Code § 111.054(b) further provides that the date of such filing may be evidenced by the receipt mark or postmark, but such evidence is rebuttable by either the taxpayer or the Comptroller if delivery to the U.S. Post Office or to a common or contract carrier (filing) differed from the date of the receipt mark or postmark:

(b) The receipt mark of a contract or common carrier or the postmark on a tax payment or report is prima facie evidence of the date on which the payment or report was delivered to a carrier or the post office. The comptroller or the person making the payment or filing the report may show by competent evidence that the actual date of delivery to the carrier or post office differs from the receipt mark or postmark.

Proposed Rule 3.13(c)(2), however, provides a test that differs from the statutory test for determining when a report or payment is filed. Proposed Rule 3.13(c)(2) provides:

(2) If a report or payment is received through the United States Postal Service and does not have a postmark, or is received

through a common or contract carrier and does not have a receipt mark, the date the report or payment is physically received by the comptroller and a file stamp is affixed to the envelope containing the report or payment shall be the date of filing or payment.

Proposed Rule 3.13(c)(2) seems inconsistent with the statutory “mailbox” rule in three respects. First, under the rule of the statute, delivery to the U.S. Post Office or the carrier is the date of filing. Nothing in the statute indicates the filing date should be delayed if items are subsequently delivered by the carrier without a receipt mark or a postmark. Second, the statute does not suggest that filing is deemed to occur only when the item is physically received by the Comptroller. Certainly filing would have occurred at least as early as receipt by the Comptroller, but receipt by the Comptroller is not the statutory filing date. Third, nothing in the statute delays the deemed filing date to when the Comptroller affixes a stamp to the envelope after the item is physically received by the Comptroller.

Rule 1.32 acknowledges that some period of time occurs between the date mailed and the date received. We suggest incorporating presumptions similar to the concepts in Rule 1.32 to recognize that the filing date is based on the date mailed, not the date received. Thus, we suggest Proposed Rule 3.13(c)(2) be modified as follows:

(2) If a report or payment is received through the United States Postal Service and does not have a postmark, or is received through a common or contract carrier and does not have a receipt mark, the date of the filing of the report or payment is presumed, in the absence of evidence supporting the assertion of a different filing date, to be:

(A) if received through the United States Postal Service, three days prior to the date on which the report or payment is physically received by the comptroller as evidenced by comptroller records; or

(B) if received through a common or contract carrier, one day prior to the date on which the report or payment is physically received by the comptroller as evidenced by comptroller records.

III. CONCLUSION

For the reasons discussed above, we respectfully suggest that current Proposed Rule 3.13 should be modified as indicated.

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