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Overview of the Doctrine of Legislative Acceptance:
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I. General Overview

The doctrine of legislative acceptance is a judicially created doctrine. Under this doctrine, "A statute of doubtful meaning that has been construed by the proper administrative officers, when re-enacted without any substantial change in verbiage, will ordinarily receive the same construction." *Humble Oil & Ref. Co. v. Calvert*, 414 S.W.2d 172, 180 (Tex. 1967). The doctrine may work in favor of either the State or taxpayers, depending on the circumstances.

Some key issues that arise under this doctrine include: (i) Is the statutory provision at issue of "doubtful meaning" or otherwise ambiguous; (ii) Was there an affirmative administrative policy interpreting the statutory provision; (iii) Was the administrative policy long-standing in nature?

II. Select Cases Applying the Doctrine of Legislative Acceptance

The following cases are representative cases in Texas applying the doctrine of legislative acceptance. They are not intended to reflect a comprehensive list of such cases or even the most relevant.

A. *Humble Oil & Ref. Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967)

1. Facts:

Humble Oil & Refining Co. ("Humble"), a Delaware Corporation with its principal place of business in Houston, sought to recover franchise taxes paid under protest for 1963. Humble argued that, in calculating its Texas franchise tax, it was entitled to exclude interest and

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dividends it received from corporations and other entities outside of Texas from Texas receipts under the Texas Comptroller's location-of-payor rule. The Texas Comptroller had adopted the location-of-payor rule for sourcing intangibles in 1917. The statutory basis for the rule was found in art. 7084 of the Texas Civil Statutes which provided for an apportionment factor that generally focused on "gross receipts from business done in Texas."

In 1959, the Legislature amended this statutory provision by adding four subsections which specifically allocated certain items to business done in Texas, including "services performed in Texas"; "rentals from property situated and royalties form the use of patents or copyrights within Texas; and "other business receipts within Texas." On the basis of this amendment to the apportionment language, in 1963, the Texas Comptroller abandoned the location-of-payor rule in favor of a commercial domicile and business situs rule.

Humble argued that the long-standing construction of the phrase, "business done in Texas," using the location-of-payor rule could not be administratively overruled because the current statute (art. 12.02) used the same phrase from the original statute without definition. Accordingly, Humble argued that by including the phrase in the new statute the Legislature had no intention of rejecting its well-established meaning and adopting or authorizing a new one.

2. Held:

Under these facts, the Court held that the Legislature did not intend to reject the location-of-payor rule but rather through the doctrine of legislative acceptance made it a part of the present law. The Court held that a statute of doubtful meaning that has been construed by the proper administrative officers, when re-enacted without any substantial change in verbiage, will ordinarily receive the same construction. In arriving at its holding, the Court noted that the franchise tax statutes at issue were re-enacted six times before 1959, were recodified in 1959, were amended and reenacted in 1961 without ever entertaining any idea that the location-of-payor rule had been overruled. The phrase "business done in Texas" in both the old statute and recodified version is ambiguous, and from 1917 until 1963 receipts from intangibles were consistently allocated to states under the location-of-payor rule. For this reason, "The department construction of the ambiguous statute was of such long-standing that it should not be changed in the absence of clear statutory authorization."

B. *Sharp v. House of Lloyd*, 815 S.W.2d 245 (Tex. 1991)

1. Facts:

House of Lloyd, Inc. ("House of Lloyd"), a Missouri corporation engaged in solicitation sales of toys and gifts through independent contractors, sued the Texas Comptroller to recover franchise taxes paid. House of Lloyd had gross sales during the periods in questions from sales

to Texas customers, but had never held, nor had it been required to obtain, a certificate of authority to do business in Texas. Prior to May 1, 1941, the Texas Tax Code provided that only corporations chartered or authorized to do business in Texas were liable for the Texas franchise tax. Effective May 1, 1941, the Texas Tax Code was amended to provide that the Texas franchise tax applied to all corporations that were actually "doing business" in Texas. House of Lloyd argued that the Texas Comptroller should be barred from collecting the tax, "because of nonassessment prior to 1983 for a period of approximately forty-two years after the enactment of the statute which authorized the imposition of the tax."

2. Held:

The Court held that the doctrine of legislative acceptance rule from *Humble Oil* is only applicable where there has been an affirmative long-standing administrative policy. The mere failure to enforce a statute, absent showing of an affirmative policy that the statute is construed by the agency to be inapplicable to specific circumstances, does not establish an affirmative agency policy.

According to the Court, there was no evidence of any affirmative administrative construction of this statute prior to 1975 other than Texas Comptroller Rule 3.406 in effect from 1975 until 1983. Texas Comptroller Rule 3.406 specifically tied the definition of "doing business" for franchise tax purposes to the definition of 'transacting business' in the Texas Business Corporation Act. The Texas Business Corporation Act, in turn, defined transacting business to exclude "the activity of soliciting sales through independent contractors." The Court noted that Texas Comptroller Rule 3.406 was invalid as contrary to the language of the statute.

The Court also held that the doctrine of legislative acceptance could not apply in this case because it only applies where the statute to be construed is ambiguous or of doubtful meaning. Although the terms "doing business" and "business done in Texas" may have been ambiguous under the facts of this case prior to 1969, the statute was amended at the time to specify that "business done in Texas" includes the sales of tangible personal property when the property is delivered or shipped to a purchaser within this state. Accordingly, "No discretion was vested in the Texas Comptroller to interpret the law in a manner inconsistent with the clear intent of the Legislature."

C. *Sharp v. Park 'n Fly*, 969 S.W.2d 572 (Tex. App. ─ Austin 1998, pet. denied)

1. Facts:

Park 'N Fly of Texas, Inc. ("PNF") provides parking services to airport passengers who wish to leave their cars near the airport and take a shuttle bus to the airport. A sign at the parking attendant booth stated that about seventy percent of the fee goes to pay for transportation while

about thirty percent of the fee is actually allocated to the parking service. PNF collected sales tax on the parking service only.

In 1984, PNF's predecessor received a letter from the Texas Comptroller advising the company that while the charge for the parking service was taxable, the charge for the shuttle service was not. In 1992, the Texas Comptroller audited PNF and informed it that the entire fee it was charging was taxable. The Texas Comptroller addressed its policy of taxing these type shuttle services in its Tax Policy News in October 1993.

The Texas Comptroller subsequently amended its rules to state that the shuttle service component of off-site airport parking charges would be taxable effective October 1995. PNF filed a suit in district court seeking a refund of sales tax paid under protest for the period of August 1995 through January 1997.

2. Held:

The Court held that the doctrine of legislative acquiescence to departmental construction does not support the conclusion that PNF's shuttle service was not incident to its parking services. The doctrine only applies when a particular construction of a statute is of such long standing that it should not be changed in the absence of clear statutory authorization.

According to the Court, while the 1984 letter was arguably more significant than the mere failure to collect the tax in *House of Lloyd*, the 1984 letter and the five years that passed before the Texas Comptroller asserted a contradictory construction together did not rise to such a level as to be an affirmative long-standing departmental construction. "Accordingly, the doctrine of legislative acquiescence does not require the treatment of PNF's shuttle service as nontaxable."

D. *Fleming Foods of Tex. v. Rylander*, 6 S.W.3d 278 (Tex. 1999), *superseded by statute*, Tex. Tax Code Ann. § 111.104(b), *as recognized in Levy v. Office Max, Inc.*, 228 S.W.3d 846, 850 (Tex. App.─ Austin 2007, pet. denied)

1. Facts:

Fleming Foods ("Fleming"), a wholesale grocer, purchased products and commodities from vendors and paid sales taxes to those vendors, who in turn remitted the taxes to the State. In 1989, the Comptroller audited Fleming, and as part of the audit process, Fleming and the Comptroller entered into agreements that extended the four-year limitations for assessment. None of Fleming's vendors joined in the extension agreements between Fleming and the Comptroller, but Fleming obtained assignments of refund rights from its vendors. However, in some cases, vendors did not execute the assignments until more than four years had elapsed since

Fleming paid the tax, and in other cases, assignments were made to Fleming after its extension agreements with the Comptroller had expired.

The Comptroller assessed a deficiency, and Fleming subsequently requested a redetermination hearing and filed for refunds. The Comptroller maintained that Fleming's refund rights were wholly derivative of its vendors' rights and that the Tax Code did not permit Fleming, as an indirect taxpayer, to obtain refunds from the State unless vendors timely assigned refund rights.

Tax Code section 111.104 provides that "a tax refund claim may be filed with the Comptroller by the person who paid the tax." The statute that preceded section 111.104, former article 1.11A, provided that a refund claim could be filed by any person who paid sales taxes "directly to the [S]tate." The 1981 enactment of section 111.104 states that "this Act is intended as a recodification only, and no substantive change in the law is intended by this Act." The court of appeals concluded that despite clear language in the Tax Code allowing Fleming to seek a refund, the former statute governed. The court of appeals relied on the doctrine of legislative acceptance in reaching its decision. The Comptroller interpreted former article 1.11A by issuing section 3.325(b) of the administrative rules. Section 3.325(b) provides that a person who paid tax to a seller rather than directly to the State could not request a refund from the Comptroller but must recover the tax from the seller. The Legislature subsequently amended article 1.11A many times without changing the law with regard to who had standing to seek a refund from the State.

2. Held:

The Court held that the doctrine of legislative acceptance did not apply to section 111.014 because there was a substantial change in verbiage when former article 1.11A was codified in section 111.104. In addition, the doctrine of legislative acceptance did not require the Court to adopt the Comptroller's construction of former article 1.11A because section 3.325(b) conflicted with another Comptroller rule, section 1.5(c), allowing a taxpayer to request a refund within the time provided by section 111.104(c). Finally, the doctrine of legislative acceptance can only apply if the statute at issue is ambiguous, and an agency's construction of a statute may be considered only if it is reasonable and not inconsistent with the statute. Here, section 3.325(b) directly contradicted the plain meaning of section 111.104 to the extent the statute generally allows taxpayers to seek refunds, but the Comptroller's interpretation allowed only direct taxpayers to seek refunds.

E. *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.— Austin 2000, pe. denied)

1. Facts:

Southwestern Life Insurance Company ("Southwestern") sued to recover insurance premium taxes paid under protest for its 1990 tax year. Southwestern contended that it was entitled to carryover unused tax credits attributable to examination and valuation fees paid in 1989 (to the extent such credits exceeded its premium tax liability for 1989) and use those credits to offset and reduce its 1990 premium tax liability.

Article 4.11 of the Texas Insurance Code requires every life, health, and accident insurance company to pay a yearly tax on premiums. Section 8 of the article creates a tax credit that allows an insurance carrier to offset its premium tax liability by the amount of examination and valuation fees it pays to the Texas Department of Insurance. The Texas Comptroller and the Texas Department of Insurance had always interpreted the Texas Insurance Code to permit a credit against a company's premium tax liability only for the year in which the examination and valuation fees were paid.

Southwestern argued that because the Legislature in its 1984 amendment removed a phrase from the Texas Insurance Code that clearly restricted the credit's application to tax liability for the year the fees were paid, it implied that the credit could be carried forward.

2. Held:

The Court disagreed with Southwestern's interpretation of the statute. The Court disagreed that the 1984 amendment to the statute reflected anything more than grammatical clean-up to remove unnecessary language and was not intended to reflect a substantive change in the law. In addition, the Court stated that Southwestern's interpretation would lead to absurd results because it could mean that unused tax credits could also be carried back indefinitely.

Moreover, stated the Court, "When the legislature reenacts without substantial change a statute that has been previously construed by an agency charged with its execution, a court should ordinarily adopt the agency construction." The Court noted that the Legislature had made several amendments to article 4.11 since 1984 but had not changed the language of section 8 to explicitly overrule the agencies' consistent interpretation that credit for fees paid may not be carried forward.

F. *Gilbert v. El Paso Country Hosp. Dist.*, 38 S.W.3d 85 (Tex. 2001)

1. Facts:

The Texas Constitution and the Texas Tax Code contain truth-in-taxation provisions that require local government units to tell their taxpayers each year how the next year's property tax rates will compare with the current year. As part of this taxpayer notice, taxing units must show how much money, if any, they estimate that they will have left over from previous years' maintenance and operations and debt service funds. The Texas Comptroller provides forms as part of a "Truth-in-Taxation Guide" that explain taxing units' truth-in-taxation obligations and highlights changes in the law.

The El Paso Hospital District ("District") paid its operating expenses from several kinds of revenue, including paying patients, cafeteria sales, Medicaid and property taxes. The District read the truth-in-taxation statute and Texas Comptroller's form to require that its notice show only the District's estimate of its remaining property taxes, even if other non-tax funds were also available for maintenance and operations.

Gilbert and other taxpayers argued that the statute requires the District to show the full amount of its unspent funds from all sources. Among the many arguments asserted, the District argued the Texas Comproller's form authorized the District's reporting method. Because the applicable statutory provision in the Tax Code had been amended since the Texas Comptroller had published the form, the District argued that the Legislature had accepted the Texas Comptroller's interpretation of the Tax Code as suggested by the form.

2. Held:

The Court disagreed with the District for two reasons. First, the Court held that Administrative construction of a statute must be clear before that construction is read into the Legislature's re-enactment of the statute. Here, the meaning of the Texas Comptroller's form was not clear. The form in question had two columns, one headed "Type of Property Tax Fund" and the other "Balance." While the District argued that these headings required disclosure only of balances composed exclusively of property taxes, the Court found that an alternative reading was also possible. Specifically, the Court found it more likely that a "Property Tax Fund" as referenced on the Texas Comptroller's form is one that may include property taxes, rather than one that may not, and that the Texas Comptroller meant the form to ask whether any balance remains in such funds.

Second, the Court held that it could not deem the Legislature to have accepted even a clear administrative construction that conflicts with a statute's plain language or clear purpose. Following a review of the statutory language at issue, the Court concluded that the District's interpretation of the Tax Code conflicts with the Legislature's evident purpose in enacting the statute. Although the truth-in-taxation provisions require the Texas Comptroller to create forms for taxing units to use in their disclosures, the statute did not authorize the Texas Comptroller to change the substance of those disclosures.

G. *Wilson v. State*, 272 S.W.3d 686 (Tex. App.─ Austin 2008, pet. filed)

1. Facts:

Thomas Wilson ("Wilson") was the sole officer and director of Wilson Nursery, Inc. ("Wilson Nursery"). Wilson Nursery twice had its corporate privileges forfeited for failing to timely file its franchise tax reports. The Texas Comptroller audited Wilson Nursery and issued an assessment against it which later became final. Subsequently, the State filed suit against both Wilson Nursery and Wilson basing Wilson's personal liability on Section 171.255 of the Texas Tax Code.

Section 171.255 of the Texas Tax Code imposes a corporation's tax liability on the corporation's directors and officers during a period of forfeiture of corporate privileges for failing to file franchise tax reports. Under section 111.207 of the Tax Code, the section 111.202 statute of limitations is tolled for the period during which an administrative redetermination or refund hearing is pending before the Texas Comptroller.

Wilson argued that the Texas Comptroller's assessment against him was invalid because (i) the Texas Comptroller failed to assess Wilson personally for the tax owed within four years from the date that the tax became due and payable, and (ii) the State failed to file suit against Wilson within three years from the date the tax deficiency became due and payable.

Wilson relied on a previous Texas Comptroller Hearing Number 44,195 to argue that while Wilson Nursery's administrative redetermination may have tolled the statute of limitations as to Wilson Nursery, it did not toll the statute of limitations as to Wilson himself. Hearing No. 44,195 involved a personal assessment against an individual for his company's sales tax delinquency. The administrative law judge in Hearing No 44,195 determined the Company's administrative proceeding on the redetermination of is sales tax liability did not toll the statute of limitations for making an assessment against the individual.

2. Held:

The Court upheld the assessment against Wilson. The Court concluded initially that there is no authority requiring the personal assessment against a director or officer before filing suit under the Texas Tax Code for taxes that have been assessed against the corporation. For this reason, the Court found no violation of Section 111.201 of the Texas Tax Code. In addition, the Court held that the plain language of section 111.207 does not require that the director or officer be a party to the administrative redetermination for tolling to apply. For this reason, the lawsuit against Wilson was not barred by Section 111.202.

The Court also found that the administrative construction reflected in Hearing No. 44,195 was neither long-standing nor universally applied, as Hearing Number 44,195 was a single decision and provided no authority for or explanation of its construction of section 111.207. In addition, rather than re-enacting the statute under which the Texas Comptroller sought to impose personal liability in Hearing Number 44,195 without change, the Legislature in 2007, amended Section 111.016 in a manner that overturned the construction given by Hearing Number 44, 195.

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