

Texas – Sales tax changes limit Comptroller's adjustment powers, provide a new refund for telecommunication/internet/cable providers, and provide qualified data center exemptions

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In brief

Effective September 1, 2013, Texas enacted three significant sales and use tax changes:

- The Comptroller may not disregard a taxpayer's business location for local tax purposes when the business provides significant business services.
- Cable, internet access, and telecommunication service providers may qualify for a sales and use tax refund for property used in providing its services to customers.
- Purchases of certain tangible personal property related to qualified data centers are exempt from sales and use tax.

In detail – Limiting Comptroller's power to disregard businesses locations

Current Texas law provides that the Comptroller can disregard the business location of a retailer if that location exists: (1) to avoid sales and use tax or (2) to rebate a portion of the sales and use tax to the taxpayer.

Effective September 1, 2013, [S.B. 1533](#) provides that the

Comptroller may not disregard a business if the business provides significant business services (beyond processing invoices) including logistics management, purchasing, inventory control, or other vital business services.

The takeaway

As described in the Texas Senate's analysis of S.B. 1533, the Comptroller's power to disregard a business location was intended to address the

establishment of a billing office as a means to move the sales tax from a jurisdiction with a higher sales tax rate to a jurisdiction with a lower tax rate. S.B. 1533 expresses the legislative intent that traditional purchasing companies with significant economic presence should not be disregarded. While the bill is arguably an expression of existing legislative intent, the bill provides that its changes

do not affect tax liability accruing prior to enactment. Nevertheless, taxpayers that have had a business disregarded may consider challenging such determination if the business had a significant economic presence.

The bill also modifies the Comptroller's power to disregard a business location due to the existence of a sales tax rebate provided to the taxpayer. S.B. 1533 provides that the business must 'exist solely' for the purpose of obtaining a rebate in order for the Comptroller to disregard the entity. Accordingly, a location with economic substance should be able to engage in a rebate with a locality without the Comptroller having the power to disregard the entity.

In detail – Sales and use tax refund for cable television, internet, and telecommunication property.

Effective September 1, 2013, [H.B. 1133](#) creates a sales and use tax refund for tangible personal property used by taxpayers to provide cable television, internet access, or telecommunication services. Property directly used or consumed in the provision, creation, or production of a data processing service or information service is not eligible for the refund. If the total amount of refunds from all taxpayers in a calendar year exceeds \$50 million, qualified taxpayers will receive a pro rata amount of \$50 million.

The takeaway

H.B. 1133 does not give such service providers a sales and use *exemption* for these items – they must pay sales or use tax on such purchases and then seek a refund of the tax from the Comptroller. There is no indication in H.B. 1133 for how the refund process will be administered. Providers of cable, internet, or telecommunication services should be aware of this new refund and monitor state communications for guidance on how to apply for the refund. Additionally, taxpayers should note that this refund is limited to state sales and use tax - local sales and use taxes are not eligible - and the refund is not applicable to property concerning data processing and information services.

In detail – Temporary data center sales and use tax exemptions

Effective September 1, 2013, [H.B. 1223](#) generally provides a sales and use tax exemption for certain purchases of tangible personal property "necessary and essential to the operation of a qualified data center." Important elements of the exemption include the following.

- Property must be purchased for installation at, incorporation into, or use in a qualified data center by a qualified owner.
- Qualified property includes electricity, electrical systems, cooling systems, emergency generators, hardware or

distributed mainframe computers or servers, data storage devices, and software.

- The exemption does not apply to office equipment or supplies, maintenance or janitorial supplies or equipment, equipment or supplies used in sales or transportation activities, and property not otherwise exempt that is incorporated into real estate or into an improvement of real estate.
- Taxpayers must apply to and be certified by the Comptroller to qualify for the exemption.
- Generally, to qualify a taxpayer must: (1) create at least 20 qualifying jobs and (2) make \$200 million of capital improvements over a five-year period.
- The exemption is available for 10 years if the capital improvement is between \$200 million and \$250 million. The exemption is available for 15 years if the capital improvement is over \$250 million.

The takeaway

The author of H.B. 1223 suggested that Texas is losing the opportunity to attract major data center projects due to the absence of state sales tax incentives. Taxpayers intending to fund large data center projects should understand the incentives offered by Texas and the administrative requirements necessary to qualify for benefits.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact::

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