



**THE ATTORNEY GENERAL
OF TEXAS**

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February 13, 1970

Honorable Robert S. Calvert
Comptroller of Public Accounts
State of Texas
Austin, Texas

Opinion No.M-573

Re: Can new owner of
store operate until
current license expires
without a transfer of
same on Comptroller's
records, and does
Comptroller have author-
ity to transfer store
license when presented
after its expiration
date?

Dear Mr. Calvert:

By recent letter you request of this office an opinion
upon the following stated facts and questions:

In the case of Hurt et al vs. Cooper et al,
110 S.W.2d 896, the Court reached the conclusion
that the Store Tax Law i.e. Chapter 17, Title
122A, Taxation-General, V.A.T.S. was an occupa-
tion tax. The Comptroller allowed a transfer of
the Current License where a firm was purchased
during the year to the new ownership.

Our opinion is requested on the following:

1. Can the new owner operating the purchased
place of business continue to operate under the old
owners license for the current year without the cur-
rent license being transferred on the Comptroller's
record prior to expiration.

2. Does the Comptroller under the Store Tax
Law have the authority to transfer a Store License
when presented after the expiration date of the
license.

The Texas Supreme Court case referred to by you, Hurt et al. v. Cooper et al., 130 Tex. 433, 110 S.W.2d 896 (1937), definitely established that our original Chain Store Tax Law, as then compiled in Article 1111d of Vernon's Annotated Penal Code of Texas, was a constitutionally valid levy of occupation taxes, although denominated therein as license fees. The principle relied upon by such Court to sustain this was their determination that the primary purpose of the fees provided in such statute was raising of revenue and not regulation.

This occupation tax law, substantially unchanged, was carried forward as Chapter 17, Title 122A, Taxation-General V.C.S. in a rearrangement of certain of the taxation statutes by the 56th Legislature at its Third Called Session in 1959.

Articles 17.01 - 17.06 of said Chapter 17 provide requirements for licenses, applications and fees for stores and mercantile establishments coming within the purview of said Chapter, but no provisions are set out for the transfer of a license from the original licensee to a subsequent purchaser of the business. Nevertheless this particular transaction is provided for in Articles 7055 and 7056, of Vernon's Civil Statutes. Such statutes are in pari materia with the occupation tax law in question, and they must be construed with reference to each other. Said Articles appear as follows:

"Art. 7055. Any person, firm, corporation, or association of persons, who shall be the legal owners or holders of any unexpired occupation license issued in accordance with the laws of this State, may transfer the same on the books of the officer by whom the same was issued. Acts 1885 p.27; G.L. vol. 9 p.647."

"Art. 7056. The assignee or purchaser of such unexpired occupation license shall be authorized to pursue such occupation under such unexpired license for and during the unexpired term thereof, provided that such assignee or purchaser shall, before following such occupation, comply in all other respects with the requirements of the law provided for in the original applications for such licenses. Nothing in this law shall be so construed as to authorize two or more persons, firms, corporations or associations of persons to follow the same occupation under one license at the same time. Whenever any person, firm, corporation or association

of persons following an occupation shall be closed out by legal process, the occupation license shall be deemed an asset of said person, firm, corporation or association of persons, and sold as other property belonging to said person, firm, corporation, or association; and the purchaser thereof shall have the right to pursue the occupation named in said license, or transfer it to any other person; provided, such occupation license shall under no circumstances be transferred more than one time."

A full compliance with "the requirements of the law provided for in the original applications for such licenses," as required of the purchaser or assignee by said Art. 7056, would seem to be reasonably satisfied by the purchaser or assignee of such unexpired license making an application or request to the Comptroller for a recognition of a valid transfer or assignment of such license, giving the Comptroller the information required by him to determine the identity and qualifications of the new holder of the assigned license and the name and location of the business or businesses to be operated by such assignee. However, we fail to find any provisions of said statutes authorizing the Comptroller to force the new owner to make such application or request, nor can we find any penalty specifically prescribed for failing to make such application or request. It should be observed that the application or request by the new owner by purchase or assignment for transfer of an unexpired license is not the application contemplated or required by said Article 17.02 for the issuance of an original license. We are not authorized to enlarge the scope of said Article 17.02 so as to make it comprehend a request or application growing out of an assignment or transfer of an unexpired license. See Attorney General Opinion No. 0-1673 (1939).

On the particular point raised by your question No. 1, we find the holding in the early case of Faulkner et al v. Cassidy, 87 S.W. 904 (Tex.Civ.App. 1905 err.ref.) to be strongly persuasive if not controlling. In this case the failure of a purchaser of an unexpired liquor license to have the transfer made on the books and to file an application designating the particular house in which he proposed to conduct his business, and to have such designation made in the license, did not render his bond void. The statutes then in effect concerning the transfer of occupation licenses were identical in terminology with Articles 7055 and 7056. The Court stated in its opinion that:

"The criterion by which the validity of the bond in such cases is to be determined seems to

be, would the license under which the liquor dealer sold protect him from a criminal prosecution for selling liquor without a license?"

In holding the transferred license in question to be valid in the face of non-compliance with the statutes concerning the transfer of such license, the recording of same on the books of the officer by whom it was issued and non-compliance in other respects with the requirements of the law provided for in the original application for such license, the Court, in Faulkner v. Cassidy (supra) in effect, ruled that such requirements are merely directory and not of such dignity or import as to vitiate the rights otherwise conferred by such statutes on the purchasers or assignees of such unexpired licenses transferred for the first time.

In view of the foregoing, it is our opinion that the cogent reasoning of such authority is applicable and decisive of the matter posed in your first question, and such question is thereby answered in the affirmative.

All licenses issued to operate stores or mercantile establishments in this State pursuant to said Chapter 17, expire by the terms of Article 17.04 on the thirty-first day of December of each year, and on or before that date the holders thereof are required to apply for renewal licenses for the next ensuing calendar year. Any holder of such a license which was assigned to him during the current year, who seeks to have such license duly transferred on the Comptroller's records during the time the law provided for him to seek a renewal thereof, is entitled to such transfer, and the Comptroller is authorized to make the same on his records. Penalties are provided by Article 17.04 if applications are made after such due date, or not made at all. There is also prescribed in Article 17.09 of said Chapter 17, Title 122A a criminal misdemeanor penalty for anyone operating such stores or mercantile establishments without having displayed in a conspicuous place in such store or mercantile establishment the license fee receipt for the current year.

It is apparent from the foregoing that the Legislature in enacting the provisions contained in said Articles 17.02 and 17.04 regarding fees and/or penalties for belated or omitted original and renewal applications, had the purpose of collection of revenue rather than regulatory measures foremost in mind, and thereby gave the Comptroller wide powers and authority in the exercise of his duties to collect such taxes and civil penalties.

Unlike a strictly regulatory occupation tax, there are no express provisions in said Chapter 17, Title 122A, for the forfeiture of a license. On the contrary the entire thrust of the statutes seem to require the holding of a license by all who come within the purview of this law.

In view of the clear mandate of the statutes in question to the Comptroller to secure license fees from all such store operators, whether or not application is made by such store operators, it reasonably would appear to follow that the Comptroller, after collecting the fees and penalties, if any due, shall then issue renewal licenses to such store operators. This necessarily entails the recognizing and recording of a license transfer previously made by the original licensee to the present store operator, in order to issue a proper renewal license. This is so regardless of how late the application or request is made, or whether, in fact, it is made at all, but the Comptroller is not empowered to waive the civil penalties accruing by virtue of the recalcitrance of such store operator. It may be pointed out here that the actual transfer of a right or privilege to conduct the business under the original current license necessarily occurs before the license expires. This is done by the seller at the time he assigns the license to the purchaser. It is only the recording of such previous transfer that remains to be done by the Comptroller. If the Comptroller determines that no such transfer occurred, then he can issue only an original license to the applicant upon the payment of the proper fees. It is in this sense that we consider the matters involved in this second question.

Therefore, your second question is also answered in the affirmative.

S U M M A R Y

A person can purchase a business operated under an occupation license issued pursuant to Chapter 17 of Title 122A, Taxation-General, Vernon's Civil Statutes, and operate same until the license expires without such transfer being recorded in the Comptroller's records for the current year, provided such license is transferred or assigned to the purchaser along with

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the business; and the Comptroller has the authority to recognize and record such transfer in his records after the expiration of such license.

Yours very truly,


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