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OPINION COMMITTEE



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August 31, 2012

RQ-1080-GA

The Honorable Gregg Abbott
Attorney General of the State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General Opinion (certified mail 70053110000312311451)

Dear General Abbott:

In 2010, citizens in Kendall County complained to members of the Commissioners Court concerning sales taxes being charged by Guadalupe Valley Telephone Cooperative, Inc. (GVTC) for provision of internet service. In addition to the State and County sales taxes, Kendall County customers of GVTC were being billed for sales taxes for a Library District, an Emergency Service District EMS, and an Emergency Service District Fire. There was not then and are not now, any such districts in Kendall County.

This office contacted GVTC and learned that the taxes were for districts located in Comal County. In response to Kendall County's inquiry concerning Comal County taxes being imposed on residents of Kendall County, GVTC contacted the office of the Texas Comptroller of Public Accounts. The Comptroller's office advised GVTC that collection of the sales taxes in question was in accordance with applicable law. This office also contacted the Comptroller's office and was similarly advised.

At the request of the Kendall County Commissioners Court, this office sought your opinion concerning the correctness and legality of the determination by the Texas Comptroller of Public Accounts that sales taxes for a Library District and two Emergency Service Districts located in Comal County and serving only Comal County citizens could be imposed on Kendall County residents.

In the brief submitted with our opinion request, we concluded that the Comptroller's office was misinterpreting the Texas Tax Code concerning internet access service resulting in the improper imposition of Comal County taxes on Kendall County residents.

At the time, you declined to issue an opinion because, as stated by your office, there was litigation pending concerning similar issues.

That litigation - *Combs v. City of Webster*, 311S.W.3rd85 (Tex. App. – Austin, 2009) (Pet. denied Aug. 2011) has now been resolved without establishing any precedent addressing the issues that was the subject of our request in 2010. In the *Combs* case, municipal and local taxing authorities contested the Comptroller's determination that sales taxes for furniture sales should be collected based on the location of the warehouse where the furniture was stored, not the showroom where the transaction to purchase the furniture occurred.

Since Kendall County citizens are still paying taxes to support library and emergency services districts located in Comal County, and such taxes are based on internet services being delivered in Kendall County, the Commissioners Court, on behalf of its citizens, has again requested this office to seek your opinion.

Attorney Elizabeth R. Martin, who assisted in the preparation of the opinion request and brief in 2010 and again is assisting in this matter, advises that there is litigation currently pending involving the Comptroller and the City of Dickinson (*City of Dickinson v. Combs*, cause number D-1-GV-12-000094, AG Case # 123314528). However, the pendency of the *Dickinson* litigation should not prevent the issuance of an opinion by your office, since as in *Combs v. City of Webster*, any decision in *Dickinson* would not be determinative of the matters involved in our opinion request.

Your opinion concerning this matter is respectfully requested.

Respectfully,



Donald W. Allee

Enclosure: Brief

BRIEF IN SUPPORT OF REQUEST
REGARDING TEXAS STATE COMPTROLLER'S ASSESSMENT OF
INTERNET ACCESS SERVICE SALES AND USE TAX

REQUESTING OPINION:

DON ALLEE, COUNTY ATTORNEY
ON BEHALF OF
KENDALL COUNTY, TEXAS

FACTUAL BACKGROUND

Guadalupe Valley Telephone Cooperative, Inc. (GVTC) is a non-profit entity, providing communications and consumer products throughout the Hill Country, this region includes Kendall County, Texas. GVTC has three stores to service their customers.¹ They are as follows;

Smithson Valley Store
36101 FM 3159
New Braunfels, TX 78132

Boerne Store
1221 South Main Street
Boerne, TX 78006

Gonzales Store
427 St. George St.
Gonzales, TX 78629

As GVTC sells products to customers, its sales are subject to sales tax imposed by the state, county and local districts. Of issue to Kendall County are the taxes paid by Kendall County residents to jurisdictions outside of Kendall County.

¹ <http://www.gvtc.com/contactus/index.php>.

GVTC provides telecommunications, internet access service and other services to many residents in Kendall County.² This internet access service is provided via coaxial or fiber optic cables to the GVTC customers.³ These residents must pay sales tax on internet access service provided by GVTC. While their telephone service is subject to sales tax of Kendall County jurisdictions, their GVTC internet access service is taxed by Comal County jurisdictions. In the GVTC bills attached⁴, under the taxes and surcharges for “GVTC Other Services”, items 19 Library District Sales Tax, 20 Emergency Service District EMS and 21 Emergency Service District Fire are collected for Comal County special districts with taxing authority. Also, item 18 on the bills show collection of Comal County Sales Tax.⁵ Kendall County through the County Attorney’s office contacted GVTC and questioned the legality of GVTC collecting Comal County taxes from Kendall County residents. GVTC contacted the Comptroller’s Office for explanation of the sales tax assessment and the agency provided its’ initial interpretation.⁶ Upon communications with a GVTC representative on the Comptroller’s response, Kendall County still had some additional questions and directly contacted the agency.⁷

In response to the inquiry by Kendall County, the Comptroller provided its’ initial email to GVTC which stated that the taxes were collected for Comal County special

² Find service description and billing at <http://www.gvtc.com/residential/index.php>.

³ Id.; (verified with GVTC Account Supervisor Jeanine Hake).

⁴ Exh. A (personal information redacted); (The bills included shows the items as instated in this Brief for the months January 2010 through April 2010. The billing format changed in May 2010 and all of the sales tax amounts are now reported on one line.).

⁵ Per information from Jeanine Hake, GVTC accounting supervisor, as the bills do not specify which districts or county tax is being collected.

⁶ Exh. D.

⁷ Exh. B.

districts because the internet service provider (ISP) is located in Comal County.⁸ The Comptroller's office then emailed a response to Kendall County stating that in consideration of the legislature's amendment of TEX. TAX CODE §321.203, the local sales tax due on internet access service prior to June 19, 2009 was "the place of business from which the service was delivered" or the ISP.⁹ The agency further found that after June 19, 2009, "if the order was placed in person at a GVTC place of business" the sales tax due was at that location.¹⁰ It is the position of Kendall County that the Comptroller's office is incorrectly interpreting the statutes and as a result the determination of tax location, hence imposed tax, is incorrectly assessed for Comal County jurisdictions. It is Kendall County's position that the controlling statute provides that the customer's point of delivery is the correct location of sale. Furthermore, Kendall County asserts that the legislature passed laws allowing for local sales tax with clear provisions providing that local taxing entities were to be created by citizens affected by the districts and that the citizens subjected to any local taxes would have a voice, i.e. vote, in the implementation and any change to the taxes. Imposition of local taxes on citizens not afforded representation rights is outside the scope of the statutes creating the entities granted tax powers. Kendall County poses the following questions to the Texas Attorney General.

QUESTION

1. Is the Texas Comptroller of Public Accounts correct in determining the location of sale and, correspondingly, the taxing jurisdictions that may impose sales tax for internet access service?

⁸ Exh. D. para. 3, 10.

⁹ Exh. C, pg. 3, 3rd para. from the bottom.

¹⁰ Exh. C, pg. 3, 3rd para. from the bottom.

2. If the Texas Comptroller is correct in determining the location of sale, is the imposition of Comal County taxes on Kendall County residents constitutional?

LOCAL JURISDICTIONS EMPOWERED TO TAX CITIZENS

Pertinent to the discussion is consideration of the legislation creating the jurisdictions authorized to collect the sales tax. Kendall County would ask that the Attorney General consider the statutory framework enacted by the legislature that provides for the creation of the underlying governmental authorities imposing the taxes and whether the purposes of the legislature are undermined by the Comptroller's interpretation of the statutes and the resulting implementation of local taxes on citizens outside the jurisdictional boundaries of the county and the local taxing jurisdictions.

COMAL COUNTY

The first entity to which Kendall County residents are paying sales tax is Comal County. County governments are created under the Tex. LOCAL GOV'T. CODE, CHAP 71. These county governments are subsequently authorized under TEX. TAX CODE, CHAP. 323 to enact a sales and use tax.¹¹ In order to adopt sales and use tax under this chapter, the county holds an election in which the qualified voters of the county may approve the adoption of the tax if the majority votes in favor of adoption.¹² The other local entities levying a sales tax on Kendall County residents are similarly created by the voters within the jurisdictional boundaries of the districts.

BULVERDE LIBRARY DISTRICT

Another governmental entity to which Kendall County residents are paying sales tax is the Bulverde Library District. Library districts, such as this one, are specifically

¹¹ TEX. TAX CODE §323.101.

¹² Id.

created under LOCAL GOV'T. CODE, CHAP. 326. The library districts are governed by TEX. TAX CODE CHAP. 323 in imposing, computing, administering and governing tax authorized for library districts.¹³ The Library District is allowed to levy sales and use tax if the citizens approve of the creation of the district and the tax. In consideration of the tax burden imposed by the internet access service sales and use tax, it is important to understand the originating requirements in creating these districts.

In providing for the existence of library districts, the legislature intended the majority of citizens, burdened and served by a library district, agree with the creation as well as the implementation of sales and use tax assessed for a library district. The enabling statute requires petition, hearing and a majority of the citizens to vote in favor of the creation of the district.¹⁴ Further requiring impacted citizen agreement, the legislature enacted additional law requiring any sales and use tax imposed by a library district to be approved by a majority of the voters within the district.¹⁵ The legislature intended for citizens to determine if a district should be created and if a tax could be imposed by the district as shown by the steps put in place by these statutes giving citizens the power to approve or disapprove of the library district and the sales and use tax. Furthermore, library districts are governed by a board of trustees who are elected by citizens within the district.¹⁶ Thus the voters have direct control of the representatives operating the library district which taxes and serves them. This statutory framework is directly contradicted

¹³ TEX. LOC. GOV'T. CODE, § 326.092.

¹⁴ TEX. LOCAL GOV'T. CODE, §§326.021-326.029 (setting forth the requirements for the creation of a library district).

¹⁵ TEX. LOCAL GOV'T. CODE, §326.092.

¹⁶ TEX. LOCAL GOV'T. CODE, §§326.041, 326.043 (stating the trustees shall be elected annually and serve two year terms.)

by the Comptroller's position that citizens without a vote on either issue, in this case Kendall County residents, are intended to be taxed by entities which have no accountability to the taxpayers.

COMAL COUNTY EMERGENCY SERVICE DISTRICTS

Emergency service districts are created in the same manner. The Comal County Emergency Service Districts were created under TEX. HEALTH & SAFETY CODE, CHAP. 775, 776. Chapter 776 was consolidated with Chapter 775 during the 2011 Legislative Session but the districts maintained the same statutory scheme. The code provides that the TEX. TAX CODE CHAP. 323 applies in imposing, computing, administering and governing tax for emergency services districts.¹⁷ Again the legislative framework creating these entities provides steps to allow citizens within the districts to have a voice in the district's creation and operation.

As seen in the creation of the library districts, the legislature intended the majority of citizens, effected by emergency services district, agree with the creation as well as the implementation of sales and use tax assessed for emergency service districts. Here again, the statute requires petition, hearing and a majority of the citizens to vote in favor of the creation of the district.¹⁸ As seen in the library district situation, the legislature enacted additional law requiring any sales and use tax imposed by an emergency service district to be approved by a majority of the voters within the district.¹⁹ The same argument applies to these districts that the legislature intended for citizens to determine if a district

¹⁷ TEX. HEALTH & SAFETY CODE, §775.0751.

¹⁸ TEX. HEALTH & SAFETY CODE, §§775.001-775.019.

¹⁹ TEX. HEALTH & SAFETY CODE, §775.0752 (providing for approval of sales and use tax in compliance with TEX. TAX CODE Chapter 323.)

should be created and if a tax could be imposed by the district as shown by the steps put in place giving citizens the power to approve the emergency service districts and the power to approve or disapprove of any sales and use tax to be imposed by the emergency service district. Again the Comptroller's position that citizens without a vote on either issue are intended to be taxed by the entities under the legislature's authorization contradicts the underlying statutory framework which created the districts.

TEXAS COMPTROLLER'S POSITION

"Internet access service, including such service provided via landlines or by a telecommunications company, is not the same thing as telecommunications services for Texas sales and use tax purposes."²⁰ This is the Comptroller's statement which the agency supports by reference to TEX. TAX CODE §151.00394 and 151.0103.²¹ Upon citation to those two sections and with reference to "one rule of statutory construction"²², the agency determines that Chapter 151 is the controlling statute for internet access service and telecommunications service definitions. The agency further assumes that since the definitions set forth are different, the computation and assessment of the tax owed on internet access service cannot be similar to the computation and assessment of the tax on telecommunications. Even if it is conceded that the two are defined differently, there is no authority cited or found to support the Comptroller's legal finding. Differently defined items can be taxed the same way. Definitions do not determine how an item is taxed, just how it is defined. Kendall County argues that internet access service may be taxed in the same manner as telecommunications service if supported

²⁰ Exhibit C – Comptroller's response to Kendall County, 3rd para.

²¹ Exhibit C – 7th-9th para.

²² Exh. C – 4th par.

within the TEX. TAX CODE. The Comptroller's office has used the wrong interpretative template to arrive at the conclusion that internet access service cannot be taxed in a similar manner as telecommunications service because the definitions are mutually exclusive.

LIMITED SALES, EXCISE, AND USE TAX ACT

To begin analysis of the Comptroller's finding, we look at TEX. TAX CODE, Chapter 151, the Limited Sales, Excise, and Use Tax Act, which is the basis of the agency's logic. This act provides unique tax treatment for some assets subject to sales and use tax. There is a specific need within this chapter of the Tax Code to differentiate between "internet access service" and "telecommunications services" as well as "data processing service" and "information service" because this chapter provides for different exemptions. For example, there is an exemption from some level of taxation for internet access service as seen in §151.325.²³ Similarly, §151.323 allows for exemption for some telecommunication services.²⁴ Under this act, twenty percent (20%) of data processing service value and information service is exempt from taxes.²⁵ The definitions are specifically exclusionary in this chapter due to the application of exemptions; but nowhere within this chapter is there an indication that the definitions control determination of where a sale occurs; and therefore what jurisdictions are authorized to levy sales and use tax. The Comptroller is right in finding a distinction between

²³ TEX. TAX CODE §151.325 (exempting the first twenty-five (\$25) of internet access service from sales and use tax.)

²⁴ TEX. TAX CODE §151.323 (exempting long distance telecommunications not originating or direct to a Texas billing address and some F.C.C. regulated broadcasts from sales and use tax.)

²⁵ TEX. TAX CODE §151.351.

telecommunications services and internet services under this chapter, but Kendall County asserts that the agencies inference that the definitions are conclusively determinative of location of sale is wrong.

As further support for Kendall County's position, §151.002 sets forth the applicability of definitions in the chapter.²⁶ "The definitions and other provisions of this chapter relating to the collection, administration, and enforcement of the taxes imposed by this chapter, including the requirements for sales tax permits, apply to the parties to a sale of a taxable item that is exempted from the taxes imposed by this chapter but that is subject to the taxes imposed by a city under Chapter 321 of this code."²⁷ This clearly provides a limitation on the applicability of the definitions in chapter 151. These definitions in light of the exemptions applicable to the different services are directly relevant, however, the Comptroller's extrapolation of these definitions to find that the sales location for application of sales and use tax cannot be the same for telecommunications and internet access service is not supported by a reading of the plain language of this chapter of the Tax Code. Kendall County asserts that internet access services can be subjected to sales and use tax in the same manner as telecommunications services if supported by the tax laws. Considering other assertions by the Comptroller, Kendall County finds other statements that it considers incorrect.

COUNTY SALES AND USE TAX ACT

The Comptroller states that the guidelines for the taxes at issue here are found in Chapter 321 of the Tax Code.²⁸ However, the cited chapter is the Municipal Sales and

²⁶ TEX. TAX CODE §151.002.

²⁷ TEX. TAX CODE §151.002 (emphasis added).

²⁸ Exh. C, para. 8.

Use Tax Act. The appropriate chapter for this matter is Chapter 323, the County Sales and Use Tax Act. As set out in the previous parts of this brief, the local taxes questioned by Kendall County are taxing jurisdictions regulated by the County Sales and Use Act. The agency citation, Section 321.203(b)-(e) of the Municipal Sales and Use Tax Act, has a corresponding section in the County Sales and Use Tax Act at Section 323.203. Assuming the Comptroller would make the same “consummation of sale” assertions under the County Sales and Use Tax Act, the following discussion will analyze the agency’s arguments within the context of the appropriate corresponding County Sales and Use Tax Act section.

The Comptroller finds that §321.203 (f)-(n), comparatively §323.203 (f)-(m), provides “specific directions concerning where the sale of certain services” are “consummated”. However, as the Comptroller is looking at the Municipal Sales and Use Tax Act instead of the controlling County Sales and Use Tax Act, the agency overlooks the provision within the act which applies in this case. As stated in the Factual Background, the internet access services is provided by either a coaxial or fiber optic cable system. Under the statute applicable to counties, consummation of sale of services delivered through a cable system is at the point of delivery to the consumer.²⁹ The plain language of the statute conforms with the legislature’s intent that citizens subjected to a tax have a vote in the county or district imposing a tax upon them. Anticipating an argument that the term “cable system” means only “cable television system”, Kendall

²⁹ TEX. TAX CODE, § 323.203 (j)(stating “sale of services delivered through a cable system is consummated at the point of delivery to the consumer”).

County analyzed the history of the statute and found the following. House Bill 2424 in the 78th Legislative Session, amended Section 58 as follows:³⁰

SECTION 58. Section 323.203(j), Tax Code, is amended to read as follows: (j) The sale of [~~cable television~~] services delivered through a cable system is consummated at the point of delivery to the consumer.³¹

The amendment expanded the section to apply not only to cable television but to all services delivered through a cable system. Thus considering that argument, the internet access service for Kendall County residents is provided by a cable system and, in accordance with the TEX. TAX CODE CHAP. 323, the location for the sale of services is the customer's location.³² Therefore, Kendall County residents should pay sales and use taxes for internet access services to Kendall County and local districts encompassing the customer's locations. Additionally, the internet access service is delivered from the provider, GVTC, to the customer at the customer's location.

GVTC DELIVERS IAS FROM MODEM AT CUSTOMER'S LOCATION

While Kendall County argues that the internet access service is controlled as set forth in the preceding section, it also argues against the Comptroller's determination that GVTC's ISP is the location from which service is delivered. Unique to this matter is that there is no tangible item being passed from a retailer to a customer. As a result, the Comptroller has difficulty recognizing that the retailer is delivering the service from GVTC's location at the customer residence or business. GVTC is providing a customer

³⁰ Acts 2003, 78th Leg., ch. 209, Sec. 58, eff. Oct. 1, 2003.

³¹ Acts 2003, 78th Leg., ch. 209, Sec. 58, eff. Oct. 1, 2003.

³² TEX. LOC. GOV'T. CODE, § 326.091.

the ability to access its internet system and to deliver the service, GVTC provides a modem at the customer's location.

In this matter considering internet access service provided by GVTC, the following facts appear to be guiding the Comptroller's interpretation. GVTC has more than one place of business in Texas; therefore TEX. TAX CODE 323.203(b) does not apply. TEX. TAX CODE 323.203(c) applies according to the Comptroller if a customer walks into the GVTC store in Boerne, Texas, located in Kendall County, and orders internet access service.³³ In that case, the Kendall County taxing districts are owed the sales and use tax revenue. But if the customer calls the Boerne store by telephone and places an order for internet access service, the Comptroller finds that Tex. Tax Code 323.203(c-1)(1) applies and the Comal County taxing districts are owed the sales and use tax revenue.³⁴ Thus according to the Comptroller, imposition of the Comal County tax on Kendall County residents hinges on the customer's decision to physically order the service at the GVTC Boerne location, or use the convenience of a telephone to order the service. Such a determination is not logical. Accordingly, the Comptroller's office is incorrect in finding that the ISP is the location from which GVTC delivers the internet access service.

Within the context of internet access service, the Comptroller finds that GVTC is shipping the item from the ISP to the purchaser. Therefore, the ISP location is the point of sale and the location where the sales tax should be assessed.³⁵ However, the Comptroller has not considered that GVTC's internet access service is delivered from a modem owned by GVTC at each customer's location. When accessing GVTC internet

³³Exh. C, pg. 3.

³⁴ Exh. C, pg. 3; Exh. D pg. 3.

³⁵ Exh. C, pg. 3, para.7.

access service, the customer is provided with a modem by GVTC, the modem connects to GVTC's cable system and is located at the customer's location. GVTC delivers the internet access service to the customer from the GVTC modem when the customer plugs the computer cable into the GVTC modem and logs onto the system. When a customer terminates internet access service with GVTC, GVTC receives the modem back but its cable system remains at the customer's location if a reconnection is ever required. Thus the retailer is actually delivering service from the modem located at the customer's location and the sale is therefore consummated at that location. When using the correct determination of delivery location, the "consummation of sale" provision³⁶ in the Tex. Tax Code harmonizes with the legislature's intent in creating taxing districts and/or entities accountable to voters within those districts.

CONCLUSION

The Comptroller's office is misinterpreting the TEX. TAX CODE with regards to internet access service and the implementation of the sales and use tax. The definitions provided in the code do not provide that services cannot be similarly taxed if the same manner of taxation is provided for in the TEX. TAX CODE. The TEX. TAX CODE, § 323.203 (j) provides that consummation of sale of services delivered through a cable system is at the point of delivery to the consumer. Therefore customers in Kendall County should be subject only to Kendall County taxes and the sales tax collected should be rendered to Kendall County. In the alternative, as GVTC delivers the internet access service to its' customers through a modem at their location, the Kendall County residents should pay only Kendall County taxes. Thus under either interpretation, the sales taxes

³⁶ TEX. TAX CODE, § 323.203.

are to be collected for and rendered to Kendall County. Furthermore, the enabling statutes creating the entities with the power to tax, favor interpretation of the statutes to accomplish the purpose of the legislature to empower citizens with voting rights to hold the entities accountable.

Respectfully Submitted,

Oralle

Kendall County Attorney