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**Texas Taxes – 2021 Recent Developments**

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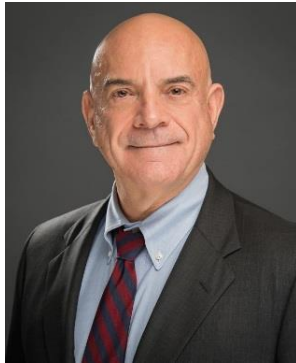


# Texas Taxes

## 2021 Recent Developments

This outline provides information on general tax issues and is not intended to provide advice on any specific legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel.

## Instructor



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Jimmy Martens, trial and appellate attorney, is the founding partner of Martens, Todd & Leonard, a boutique tax litigation law firm located in downtown Austin, Texas. Mr. Martens has handled the trial of tax cases and related appeals all the way through both the Texas Supreme Court and the U.S. Supreme Court.

His recent Texas Supreme Court cases include: *Hegar v. Gulf Copper & Manufacturing Corp.*, No. 17-0894, slip op. (Tex. Apr. 3, 2020), 601 S.W.3d 668 (Tex. 2020); *Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632 (Tex. 2013); *In re AllCat Claims Serv., L.P.*, 356 S.W.3d 455 (Tex. 2011); and *Titan Transp., LP v. Combs*, 433 S.W.3d 625 (Tex. App.—Austin 2014, pet. denied).

His recent appellate cases include: *Combs v. Newpark Res., Inc.*, 422 S.W.3d 46 (Tex. App.—Austin 2013, no pet.); *Hegar v. CGG Veritas Servs. (U.S.), Inc.*, No. 03-14-00713-CV, 2016 WL 1039054 (Tex. App.—Austin Mar. 9, 2016, no pet.) (mem. op.); *Graphic Packaging Corp. v. Hegar*, 471 S.W.3d 138, 140 (Tex. App.—Austin 2015), aff'd, 538 S.W.3d 89 (Tex. 2017); *Hegar v. Gulf Copper and Manufacturing Corporation*, 535 S.W.3d 1 (Tex. App.—Austin 2017, pet. granted); and *OGCI Training, Inc. v. Hegar*, No. 03-16-00704-CV (Tex. App.—Austin Oct. 27, 2017, no pet.).

He focuses his law practice on challenging Texas franchise and sales tax assessments in administrative hearings, state district court, the related courts of appeal and Texas Supreme Court. He is board certified by the Texas Board of Legal Specialization in Tax Law.

Mr. Martens is vice-chair of the Texas State Bar Tax Controversies Committee, a former council member of the Tax Section for the State Bar of Texas and the former chair of the CLE Committee. He is the statewide course instructor for the Texas Society of CPAs. He teaches his Texas Franchise Tax and Texas Sales Tax courses for them annually in the major Texas cities.

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## Introduction

These materials cover critical recent and ongoing developments in Texas sales tax, Texas franchise tax, tax administration, jurisdiction, and procedure during the fourth quarter of 2020 through the third quarter of 2021. They include recent developments in Texas tax cases, the Comptroller's recent rule amendments, legislation proposed during the 2021 special sessions, and other important Texas sales tax and franchise tax developments.<sup>1</sup>

## I. Franchise Tax

### Taxable Entities

#### Veteran-Owned Business

This new law creates a five-year franchise tax exemption for a new veteran-owned business. Each owner must be a natural person who served in and was honorably discharged from a branch of the U.S. armed forces and obtains a verification of their status from the Texas Veterans Commission to provide to the Comptroller. The business must be formed in Texas and first begin doing business after January 1, 2022. [SB 938](#)

**Motor Carriers.** Under Texas law, motor carriers are exempt from occupation taxes measured by gross receipts.<sup>2</sup> In a recent hearing, a motor carrier sought a franchise tax refund, arguing that the franchise tax is an occupation tax measured by gross receipts. The ALJ described the argument that the franchise tax is an occupation tax as “not without merit” because “a franchise tax . . . is very similar to an occupation tax.”<sup>3</sup> The ALJ found that the franchise tax was not an occupation tax, for two reasons. First, franchise tax revenue is not appropriated consistent with occupations tax revenue under the Texas Constitution. Also, an occupation tax is imposed for the privilege of carrying on a business, whereas the franchise tax was imposed “in exchange for the state’s liability shield.”<sup>4</sup>

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<sup>1</sup> Thanks and recognition to Gordon Martens with Martens, Todd & Leonard who prepared these materials from his quarterly Texas Tax update materials he prepares and presents for the Texas Society of CPAs.

<sup>2</sup> Tex. Transp. Code § 20.001.

<sup>3</sup> Comptroller Hearings 115,869; 116,055 (June 20, 2019) *quoting In re Nestle USA, Inc.*, 387 S.W.3d 610, 621 (Tex. 2012).

<sup>4</sup> *Id.*

This issue formed the basis for several refund hearings.<sup>5</sup> As these hearings concluded with Comptroller's decisions denying the refund claims, several transportation companies brought district court lawsuits asserting that the Texas franchise tax is an occupation tax measured by gross receipts from which motor carriers are exempt. Once such suit, *Swift Transportation v. Hegar*, was decided in favor of the Comptroller on December 11, 2020.<sup>6</sup> The taxpayer filed a notice of appeal with the Third Court of Appeals on December 18, 2020.<sup>7</sup> Other cases remain on hold in Travis County District Court pending the outcome of *Swift Transportation*.

## Revenue

**PPP Loan Proceeds Forgiveness.** This new law provides that Payroll Protection Program (PPP) loan forgiveness is not included in total revenue and that qualifying expenses paid with PPP loan proceeds may nevertheless be included in determining compensation or cost of goods sold, provided that the expenses otherwise meet the requirements to qualify for the compensation or cost of goods sold subtraction. The final version of the bill extends the same treatment to shuttered venue operator grants, microloan program recovery assistance, and restaurant revitalization grants. This new law took effect immediately and applies to franchise tax report year 2021 and subsequent report years. [HB 1195](#)

## Cost of Goods Sold (COGS)

**Satellite Radio Service Not Engaged in Sale of Goods.** In *Hegar v. Sirius XM Radio, Inc.* the court found that Sirius was not engaged in the sale of goods and was therefore ineligible to claim the cost of goods sold subtraction.<sup>8</sup> Sirius provides subscription-based satellite radio service, producing most of its radio content exclusively for customers, transmitting content to satellites, and then receiving and unscrambling the satellite signals in its customers' vehicles.

Sirius paid car manufacturers to install satellite-enabled radios in vehicles, hoping to later sell subscriptions to those vehicles' owners. Sirius claimed that it was entitled to amend its cost of

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<sup>5</sup> The Comptroller reached the same result in other hearings involving the same or similar issues. Comptroller Hearing 116,056 (Oct. 8, 2019); Comptroller Hearing 116,615 (Dec. 12, 2019).

<sup>6</sup> See, e.g., *Swift Transportation Co. of Arizona v. Hegar*, D-1-GN-20-001080 (126th Dist. Ct., Travis County, filed Feb. 21, 2020).

<sup>7</sup> Cause no. 03-20-00600-CV.

<sup>8</sup> *Hegar v. Sirius XM Radio, Inc.*, Cause No. 03-18-00573-CV (Tex. App.—Austin, May 1, 2020, pet. granted) (Texas Supreme Court granted review, No. 20-0462). The Third Court of Appeals also rejected an argument by Sirius that it was entitled to apportion its Texas receipts using the location where it produced its content. See **Apportionment** below.

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