

To: Deonne Contine, Executive Director Nevada Tax Commission

From: Mike Hillerby and Shelly Capurro, Kaempfer Crowell

Subject: July 7, 2015 Commerce Tax Workshop, Issues of Concern

Date: July 21, 2015

Differing fiscal years:

Companies looking for guidance on issue of commerce tax year being July 1- June 30 vs. most company tax years are Jan. 1-Dec. 31.

Various entities and common pay agents:

Due to business model, entities may not be able to capture MBT credit they are due, since payroll is handled and paid by separate entity. Consolidated tax form discussed.

Texas issued a formal "recover cost fee" guidance. This guidance is how a company may show cost recovery on a billing statement, such as which category the fee may appear and how the fee may be named or referred to on a statement. Is this going to be necessary or done in Nevada?

Texas Tax Policy News , Vol. xx No. 8, 08/01/2010

Date Issued: 08/01/2010

SALES TAX

Charges to Customers to Recover Texas Franchise Taxes Paid by a Seller

The Texas franchise tax is imposed on most companies that are chartered or organized in Texas or that are doing business in this state. Taxes, like other business expenses such as payroll and insurance, are part of a company's overhead cost of doing business. Many companies incorporate this cost into the prices they charge for their services or goods. A company may, however, choose to charge customers a separately stated fee as a way to recover this cost.

STAR document 201008847L addresses such a charge made by a phone company on billing invoices sent to customers. The Comptroller determined that such a charge, referred to as a "Recovery Charge," is permissible as long as certain parameters are maintained.

A company choosing to bill customers a Recovery Charge may explain to its customers that the charge is made in order to recoup money paid by the company for taxes imposed on it. The company may not, however, represent the charge as a tax imposed directly on the customer. To this end, the Recovery Charge must not appear in the "Government Fees and Taxes" (or similar section) of the customer's bill, invoice or contract. Further, the company should disclose that the Recovery Charge is not a tax the company is required to collect from its customers by law.

If a company collects amounts that are represented to the customer as being a tax on the customer, then those amounts must generally be paid to the state. See Texas Tax Code Section 111.016(a) which provides that, "any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable to the state for the full amount collected plus any accrued penalties and interest on the amount collected."

The company may use the term "State Cost-Recovery Fee" to describe any charge it assesses to recoup costs of the Texas franchise tax.

It should avoid using any of the following terms (or variations of them) to describe its Recovery Charge:

- Reimbursement;
- Texas Margin Fee Reimbursement;
- Texas State Margin Fee Reimbursement;
- Gross Receipts;
- Franchise Tax;
- Margin Fee; or
- Texas Margin Fee.

Although the matter is not addressed in the STAR letter mentioned above, the Recovery Charge is part of the total sales price of a taxable item sold by the company. Therefore, it is subject to sales tax in the same manner as the item sold.

Texas Tax Policy News, Vol. xx No. 10, 10/01/2010

Date Issued: 10/01/2010

FRANCHISE TAX

Charges to Customers to Recover Texas Franchise Taxes Paid by a Seller

The Texas franchise tax is imposed on most companies that are chartered or organized in Texas or that are doing business in this state. Taxes, like other business expenses such as payroll and insurance, are part of a company's overhead cost of doing business. Many companies incorporate this cost into the prices they charge for their services or goods. A company may, however, choose to charge customers a separately stated fee as a way to recover this cost.

STAR document 201008847L addresses such a charge made by a phone company on billing invoices sent to customers. The Comptroller determined that such a charge, referred to as a "Recovery Charge," is permissible as long as certain parameters are maintained.

A company choosing to bill customers a Recovery Charge may explain to its customers that the charge is made in order to recoup money paid by the company for taxes imposed on it. The company may not, however, represent the charge as a **tax** imposed directly on the customer. To this end, the Recovery Charge must not appear in the "Government Fees and Taxes" (or similar section) of the customer's bill, invoice or contract. Further, the company should **disclose** that the Recovery Charge is not a tax the company is required to collect from its customers by law.

If a company collects amounts that are represented to the customer as being a tax on the customer, then those amounts must generally be paid to the state. See Texas Tax Code Section 111.016(a), which provides that, "any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable to the state for the full amount collected plus any accrued penalties and interest on the amount collected."

The company may use the term "State Cost-Recovery Fee" to describe any charge it assesses to recoup costs of the Texas franchise tax.

It should avoid using any of the following terms (or variations of them) to describe its Recovery Charge:

- reimbursement;
- Texas margin fee reimbursement;
- Texas state margin fee reimbursement;
- gross receipts;
- franchise tax;
- margin fee; or
- Texas margin fee.

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Texas Policy Letter Ruling No. 201008847L, 08/06/2010

Date Issued: 08/06/2010

Tax Type(s): Franchise Tax

August 6, 2010

Dear Ms. *****:

This is in response to your inquiry regarding line item descriptions related to certain surcharges and fees included on COMPANY's customer billing invoices ("Recovery Charges").

Specifically, you seek confirmation that COMPANY and its affiliates ("COMPANY") may collect and retain such Recovery Charges from its customers as long as COMPANY does not represent (within the meaning of Tex. Tax Code Ann. Section 111.016) to the consumer that these amounts are taxes imposed on the consumer. You also seek confirmation that the phrase "State Cost-Recovery Fee" is an acceptable way to describe the Recovery Charges.

The Comptroller's Office recognizes that a company may elect to collect and retain certain charges from its customers as a way of recovering its business costs, so long as the company does not represent to the customer that these changes are taxes imposed on the customer. This letter does not prohibit COMPANY from explaining to its customers that amounts charged by COMPANY are to recover taxes that are imposed on COMPANY.

Your letter correctly points out that Recovery Charges should not be described as taxes that are imposed on the consumer. Indeed, if a seller collects and retains amounts that are represented to the customer as being a tax on the customer, then those amounts must generally be paid over to the state. See Tex. Tax Code Ann. Section 11.016 (a) (2008) (providing that "[a]ny person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the state and is liable to the state for the full amount collected plus any accrued penalties and interest on the amount collected").

This letter confirms that your proposed use of the line item description "State Cost-Recovery Fee" does not trigger liability under the Comptroller's enforcement authority, including Sections 111.011 and 111.016, Tax Code . We offer the following guidance:

First, any such Recovery Charge must not appear in the section of the customer's bill entitled "Government fees and Taxes" COMPANY should not represent, directly or by labeling, that the Recovery Charge is a tax or government fee which the State of Texas obligates consumers to pay, and should disclose to its customers, as part of COMPANY's explanation of the Recovery Charge, that the Recovery Charge is not a tax that COMPANY is required to collect from its customers by law.

Second, COMPANY should not use the word "reimbursement" to describe any line item charge assessed by COMPANY to recoup costs of the Texas franchise tax or to describe any line item charge represented to be related to the Texas franchise tax. In addition, COMPANY should avoid using any of the following phrases, or any variation thereof, as a description of the amounts charged by COMPANY to recover COMPANY's Texas franchise tax liability: "Texas Margin Fee Reimbursement," "Gross Receipts," "Franchise Tax," "Margin Fee," "Texas Margin Fee," unless a state or federal law, or rule, or regulation or Comptroller letter ruling specifically required or allows COMPANY to use such phrases (or description), or requires or allows COMPANY to assess or impose the franchise tax on its customers. COMPANY should not make representations to its customers that are inconsistent with this letter.

This opinion is based on the facts presented. Other facts, though similar, may yield different results. If we can assist you by providing additional information, you may contact me at Kevin.koller@cpa.state.tx.us or (800) 531-5441, ext. 5-0613.

Sincerely,

Kevin Koller

Assistant Direct of Tax Administration

ACCESSION NUMBER: 201008847L

SUPERSEDED: N

DOCUMENT TYPE: L

DATE: 08/06/2010

TAX TYPE: FRANCHISE

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