

BILL ANALYSIS

C.S.H.B. 593
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Ways & Means
Committee Report (Substituted)

BACKGROUND AND PURPOSE

CSHB 593 transfers to the State Office of Administrative Hearings (SOAH) all contested cases involving the collection, receipt, administration, and enforcement of taxes imposed under Title 2, Tax Code, and any other tax, fee, or other amount that the comptroller is required to collect, receive, administer, or enforce under other law.

Historically, administrative law judges employed by the comptroller presided over these cases and recommended findings of fact and conclusions of law to the comptroller. Because these judges were employees of the comptroller and one of the parties in these cases was a division of the comptroller, many believed that the impartiality of these judges appeared to be less than ideal.

Pursuant to an interagency contract between the comptroller and SOAH under Chapter 2003, Government Code, the administrative law judges were transferred to SOAH earlier this year. CSHB 593 would codify the transfer of the judges and make related statutory changes concerning the administrative tax dispute resolution process.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the comptroller in SECTION 3 of this bill.

ANALYSIS

SECTION 1. Adds Section 111.00455 to the Tax Code to require SOAH's tax division to conduct any contested case hearing as provided by Section 2003.101, Government Code, in relation to the collection, receipt, administration, and enforcement of: (1) a tax imposed under Title 2, Tax Code; and (2) any other tax, fee, or other amount the comptroller is required to collect, receive, administer, or enforce under a law outside that title.

Section 111.00455(b) excludes the following from the list of contested hearings to be conducted by SOAH:

- a show cause hearing or any hearing not related to the collection, receipt, administration or enforcement of the amount of a tax or fee imposed, or the penalty or interest associated with that amount, except for a hearing under Tax Code Sections 151.157(f) (suspension or revocation of customs brokers' licenses), 151.1575(c) (customs brokers penalties), 151.712(g) (civil penalty on persons certifying exports), 154.1142 (civil penalty for sale of cigarettes to minors), and 155.0592 (civil penalty for sale of tobacco products to minors);
- a property value study hearing under Subchapter M of Chapter 403, Government Code;
- a hearing in which the issue relates to: (A) Chapters 72-75, Property Code; (B) forfeiture of a right to do business; (C) a certificate of authority; (D) articles of incorporation; (E) a penalty imposed under Section 151.7031, Tax Code for failure to report on three or more occasions; (F) the refusal or failure to settle under Section 111.101, Tax Code; or (G) a request for or revocation of an exemption from taxation; and
- any other hearing not related to the collection, receipt, administration, or enforcement of the amount of a tax or fee imposed, or the penalty or interest associated with that amount.

A reference in law to the comptroller that relates to the performance of a contested case hearing described by Section 111.00455(a) means the tax division of SOAH.

SECTION 2. Makes a conforming amendment to Section 2003.0411(c), Government Code, concerning the addition of Section 2003.101, Government Code, by SECTION 3 of the bill.

SECTION 3. Adds Subchapter D to Chapter 2003, Government Code.

Section 2003.101(a) requires SOAH to establish a tax division to conduct hearings relating to contested cases involving the collection, receipt, administration, and enforcement of taxes, fees, and other amounts as prescribed by Section 111.00455, Tax Code.

Section 2003.101(b) provides that an administrative law judge in the tax division is classified as a "master administrative law judge II". Also provides that Section 2003.0411, Government Code, concerning the appointment procedures for senior and master administrative law judges does not apply to Section 2003.101.

Section 2003.101(c) authorizes an administrative law judge in the tax division of SOAH to conduct hearings for other state agencies if there are no cases in the division and the comptroller approves. The tax division is required to provide advance written notice to the comptroller. SOAH is required to reimburse the comptroller for the time spent by the judge on the case. The comptroller is authorized to revoke approval to conduct hearings for other state agencies at any time.

Section 2003.101(d) provides that an administrative law judge, including a temporary administrative law judge, must : (1) be a U.S. citizen; (2) be an attorney in good standing with the State Bar of Texas; (3) have been licensed to practice law in Texas for at least seven years; (4) have substantial experience in tax cases in making the record suitable for administrative review or otherwise; and (5) have devoted 75 percent of the person's legal practice to Texas state tax law in at least five of the past ten years before the date on which the person begins employment in the tax division.

Section 2003.101(e) authorizes the comptroller to change a finding of fact or conclusion of law made by an administrative law judge or vacate or modify an order issued by the judge only if the comptroller: (1) determines that the judge (A) did not properly apply or interpret applicable law, then existing comptroller rules or policies, or prior administrative decisions or (B) issued a finding of fact that is not supported by a preponderance of the evidence; or (2) determines that a comptroller policy or a prior administrative decision on which the judge relied is incorrect.

Section 2003.101(f) requires the comptroller to state in writing the specific reasons and legal basis for such a determination.

Section 2003.101(g) provides that an administrative law judge, on the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, may impose appropriate sanctions against a party or its representative for: (1) filing a motion or pleading that is groundless and either brought in bad faith, for the purpose of harassment, or for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding; (2) abuse of the discovery process in seeking, making, or resisting discovery; or (3) failure to obey an order of the judge or comptroller.

Section 2003.101(h) provides that the sanctions may include, as appropriate and justified, issuance of an order: (1) disallowing further discovery of any kind or of a particular kind by the offending party; (2) holding that designated facts be deemed admitted for purposes of the proceeding; (3) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence; (4) disallowing requests for relief, in whole or in part, by the offending party and excluding evidence in support of such requests; and (5) striking pleadings or testimony, or both, wholly or party or staying further proceedings until the order is obeyed.

Section 2003.101(i) provides that for each hearing conducted under Section 2003.101, an administrative law judge shall issue a proposal for decision that includes findings of fact, conclusions of law, and the legal reasoning and other analysis considered by the judge in reaching the decision. Each finding of fact or conclusion of law must be independent and impartial and based on state law and the evidence presented at the hearing.

Section 2003.101(j) prohibits the comptroller from attempting to influence the findings of fact or the administrative law judge's application of the law except by evidence and legal argument. A judge conducting a hearing under Subchapter D may not directly or indirectly communicate in connection with an issue of fact or law with a party or its representative except: (1) on notice and opportunity for each party to participate; or (2) to ask questions that involve ministerial, administrative, or procedural matters that do not address the substance of the issues or position taken in the case.

Section 2003.101(k) provides that appearances in hearings conducted for the comptroller by SOAH may be by: (1) the taxpayer; (2) an attorney licensed to practice law in this state; (3) a certified public accountant; or (4) any other person designated by the taxpayer who is not otherwise prohibited from appearing.

Section 2003.101(l) provides that the comptroller is represented by an authorized representative in all hearings conducted for the comptroller by SOAH.

Section 2003.102(a) provides that the tax division is subject to the Texas Sunset Act, Chapter 325, Government Code. Section 2003.102(b) provides that the Sunset Advisory Commission shall evaluate the division every two years and present to the legislature at each regular legislative session a report on that evaluation and the commission's recommendations in relation to the division. Section 2003.102(c) requires the commission to submit its first report to the 82nd Legislature. Section 2003.102(d) provides that during the regular legislative session at which the commission presented its report and recommendations, the legislature may continue the tax division for a period not to exceed two years. If the division is not continued, the division is abolished and Subchapter D and Section 111.00455 expire on September 1 of the odd-numbered year in which the regular legislative session occurred.

Section 2003.103 requires the tax division to conduct all hearings under Subchapter D in a timely manner and must use every reasonable means to expedite a case upon the comptroller's request. The section, however, is not intended to impair the independence of SOAH in conducting a hearing under Subchapter D.

Section 2003.104 requires SOAH to keep confidential any information that identifies a taxpayer who participates in a case under Subchapter D, including the taxpayer's name and social security number. The provision to SOAH of information that is confidential under any law, including Section 111.006, 151.027, or 171.206, Tax Code, does not affect the confidentiality of that information, and SOAH shall maintain that confidentiality. A hearing conducted under Subchapter D is confidential and not open to the public.

Section 2003.105 requires SOAH to charge the comptroller a fixed annual fee rather than an hourly rate for services rendered by SOAH to the comptroller. SOAH and the comptroller shall negotiate the amount of the fee biennially to coincide with the comptroller's legislative appropriations request.

Section 2003.106 requires the comptroller to provide input to SOAH to assist it regarding the comptroller's priorities and public policy needs. This is intended to assist SOAH in providing efficient services under Subchapter D and not impair SOAH's independence in conducting a hearing under that subchapter.

Section 2003.107 provides that on comptroller request, SOAH must provide to the comptroller: (1) a list of the administrative law judges, including temporary administrative law judges, who have heard cases in the tax division in the past year; (2) the qualifications of the judges; and (3) any other information the comptroller considers necessary in evaluating the performance of the judges hearing cases in the tax division.

Section 2003.108 requires SOAH to provide the comptroller a monthly status report that lists pending cases and provides information on any case that exceeds the comptroller's time lines for issuing a proposal for decision or an agreed order. At least quarterly, SOAH shall review with the comptroller and appropriate SOAH staff the status of pending cases under Subchapter D. SOAH also shall provide a quarterly report to the comptroller on services performed by SOAH for the comptroller under Subchapter D.

Section 2003.109 authorizes the comptroller to adopt rules to provide for the referral to the tax division of issues related to a case described by Section 111.00455, Tax Code, to resolve a procedural or other preliminary dispute between the comptroller and a party. After such a referral, the tax division shall docket the case and assign an administrative law judge under Section 2003.101. If additional proceedings are required after the consideration of the procedural or other preliminary dispute, the tax division shall appoint the same judge to hear the case.

SECTION 4. The changes in law made by this Act that relate to the procedures governing a hearing before SOAH's tax division apply only to a case that is filed with SOAH on or after the effective date of this Act. Procedures relating to a case filed with SOAH before the effective date of this Act shall continue to be used in a hearing as those procedures existed immediately before that date, or as provided by an interagency cooperation contract entered into between the comptroller and SOAH in effect immediately before that date.

SECTION 5. Provides for the bill's immediate effect upon receiving the required vote. Otherwise, the bill takes effect September 1, 2007.

EFFECTIVE DATE

This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

Generally, the substitute provides a more comprehensive approach to the transfer of comptroller hearings to SOAH than does the filed version.

With the exception of hearings under 151.157(f), 151.1575(c), 151.712(g), 154.1142, and 155.0592, Gov't Code, show cause hearings are not considered contested cases to be transferred to SOAH. The filed version does not include hearings under 154.1142 and 155.0592, Gov't Code, in this list.

SECTION 3 of the substitute adds Government Code Section 2003.101 creating the tax division within SOAH (SECTION 2 of the filed bill does this in a new Government Code Section 2003.0491). Subsection (b) of the substitute provides that an administrative law judge (ALJ) in the tax division is classified as a master administrative law judge II (SECTION 2 of the substitute contains conforming provisions relating to this change). No similar provision is in the filed bill.

In Subsection (c) the substitute provides that if there are no cases in the tax division, and subject to the prior approval of the comptroller, an ALJ in the tax division may conduct hearings for other state agencies. The comptroller shall first be notified in writing, and the office must reimburse the comptroller at an appropriate hourly rate for time spent on other cases. Moreover, the comptroller may revoke approval to conduct hearings for other agencies at any time. The filed version provides only that an ALJ may conduct hearings for other agencies as time allows.

Subsection (d) of the substitute adds an eligibility requirement for ALJ or temporary judges: To be eligible to preside at a tax division hearing the ALJ must have substantial experience in making a record suitable for administrative review or otherwise. The filed version lacks this requirement. The substitute requires a judge to have devoted at least 75 percent of their legal practice to Texas state tax law in at least five of the previous ten years before the date on which

the person begins employment in the tax division. The filed version requirement is devoted 75 percent of their legal practice to Texas state law in each of the five years before the date on which the person begins employment in the division. The filed version allows SOAH to transfer a senior or master administrative law judge to the tax division provided they meet an alternative set of experience requirements. The substitute makes no provision for this.

Subsection (e) and (f) of the substitute allows the comptroller to change a finding of fact or conclusion of law made by the ALJ or vacate or modify an order issued by the ALJ only under certain circumstances, and to do so in writing. The filed version is silent on this subject.

In Subsection (h), the substitute removes the following as possible sanctions in an administrative proceeding: charging all or any part of the expense of discovery against the offending party or its representative; punishing the offending party or its representative for contempt to the same extent as a district court; and requiring the offending party or its representative to pay the reasonable expenses, including attorney's fees, incurred by other parties because of the sanctionable behavior.

The substitute also adds Subsection (i) to require the ALJ to issue an independent and impartial proposal for decision that includes findings of fact; conclusions of law; legal reasoning; and other analysis considered by the judge. The proposal must be based on state law and the evidence presented at the hearing. The filed version is silent on this.

Subsection (j) of the substitute provides that the comptroller may not attempt to influence the findings of fact or the ALJ's application of the law except by evidence and legal argument. An ALJ conducting a hearing may not directly or indirectly communicate in connection with an issue of fact or law with a party or its representative except under limited circumstances. The filed version did not address this.

Subsection (k) of the substitute addresses who may make appearances in hearings conducted for the comptroller by SOAH, and Subsection (l) provides that the comptroller is represented by an authorized representative in all hearings conducted for the comptroller by the office. The filed version of the bill is silent on these topics.

The substitute adds Section 2003.102, Gov't Code, to provide that the tax division is subject to Chapter 325, Gov't Code (Texas Sunset Act). The substitute also adds new provisions concerning the timeliness of hearings and the confidentiality of certain information and tax division hearings.

Like the filed version of the bill, the substitute requires that SOAH charge the comptroller a fixed annual fee rather than an hourly rate for services. The substitute, however, removes a section in the filed version which provides that the amount of the fee shall be based on a laundry list of costs associated with conducting hearings and issuing proposals for decision.

The substitute also adds new provisions regarding the comptroller's priorities and public policy needs, tax division review by the comptroller, and required reporting. The substitute also authorizes the comptroller to adopt rules to resolve certain procedural issues or other preliminary disputes between the comptroller and a party under certain circumstances. The filed version is silent on these subjects.

Finally, the substitute allows for early adoption with the required votes.