

November 1, 2013

Texas Comptroller of Public Accounts
Tax Policy Division
P.O. Box 13528
Austin, Texas 78711-3528

Re: Private Letter Ruling Request
Texas Franchise Tax

Taxpayer Information: Austin Eye Care, LLC
123 1st Street
Austin, TX 78701
Texas Taxpayer Number: 32000000001
EIN: 750000000
State of Formation: Texas

To whom it may concern:

Please be advised that Jones & Jones LLP is duly authorized to represent Austin Eye Care, LLC (referred to as Austin Eye Care) for all relevant tax matters. Attached is an executed Texas Power of Attorney.

The purpose of this letter is to request a private letter ruling from the Texas Comptroller of Public Accounts (Comptroller) to determine if the revenue from the Taxpayer's retail sale of eyeglasses, contact lenses and other related eye care items is considered revenue from retail trade when determining eligibility for the Texas franchise tax 0.5 percent rate as provided in Texas Tax Code Section 171.002.

Statement of Facts

Austin Eye Care is owned 100 percent by Dr. Smith, a licensed optometrist. Dr. Smith offers various optometric services including eye exams. Austin Eye Care also sells eyeglasses, contact lenses and other optical goods.

Austin Eye Care does not grind lenses to prescription. All eyeglass work is performed by a third party.

Historically, Austin Eye Care has filed its Texas franchise tax report using Standard Industrial Classification (SIC) Code 8042, Offices and Clinics of Optometrists, and has calculated its franchise tax using the 1 percent tax rate, as more than 50 percent of its total revenue has been from eye care services.

In 2012, Austin Eye Care's revenue from the sale of eyeglasses, contact lenses and other optical goods has increased to more than 50 percent of total revenue.

Relevant Documents

There are no relevant documents related to this request.

Disclosures

This issue is not under consideration by the comptroller in connection with an audit examination of any type, a refund request, a voluntary disclosure agreement, an administrative hearing, or litigation for Austin Eye Care or any affiliate or related person.

No request has been or will be submitted on the same or a similar issue to a taxing jurisdiction of another state.

Ruling Requested

Austin Eye Care's revenue from the sale of items described in Industry Code 5995, Optical Goods Store, Division G, of the 1987 Standard Industrial Classification Manual, is revenue from retail trade.

Statement of Authorities

Texas Tax Code Section 171.002(b) provides that the rate of the franchise tax is 0.5 percent of taxable margin for those taxable entities primarily engaged in retail or wholesale trade. Under Texas Tax Code Section 171.002(c), an entity is primarily engaged in retail trade if the entity passes three qualifying tests. The first test is determining if the total revenue from the entity's activities in retail trade is greater than the total revenue from its activities in trades other than retail.

In Texas Tax Code Section 171.0001(12), "retail trade" is defined as those activities described in Division G of the 1987 Standard Industrial Classification Manual published by the federal Office of Management and Budget.

SIC Code 5995, Optical Goods Store, falls under Division G, Retail Trade and is described as:

Establishments primarily engaged in the retail sale of eyeglasses and contact lenses to prescription for individuals. Offices of oculists, ophthalmologists, and optometrists are classified in Services, Major Group 80, even if a majority of their

revenues comes from retail sales. Establishments primarily engaged in the retail sale of binoculars, telescopes, and opera glasses are classified in Industry 5999.

SIC Code 8042, Offices and Clinics of Optometrists, falls under Division I, Services and is described as:

Establishments of licensed practitioners having the degree of O.D. and engaged in the practice of optometry. Establishments operating as clinics of optometrists are included in this industry.

If a strict interpretation of Tax Code Section 171.0001(12) is followed, the SIC Manual would be used only for describing retail activities and Austin Eye Care's revenue should be separated into two activities: revenue from the optometry services described in SIC 8042 and revenue from the sale of optical goods, which includes the retail sale of eyeglasses and contact lenses, described in SIC 5995. If the revenue from the sales of optical goods is greater than the revenue from the services provided, Austin Eye Care has met the first qualifying test for the application of the 0.5 percent tax rate.

The tax rules provide no definition of retail trade. Rule 3.584(d)(3) does not provide clear guidance, stating only that, "...A tax rate of 0.5% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade *under Division F or G* of the 1987 Standard Industrial Classification Manual..." (Emphasis added.) There is no specific reference to the "activities described in Division G".

STAR Document 201004446L on Determining if an Entity is Eligible for the 0.5 Percent Rate includes language similar to the rule and likewise does not offer any specific guidance regarding the definition of retail trade.

A review of hearings related to the 0.5 percent rate also did not provide any guidance that is on point to this discussion.

Statement of Authorities Contrary to Requested Ruling

Under a complete reading of SIC Code 5995, its second sentence directs the classification of the retail trade activities to a code outside of Division G or F for a business where optical services are provided in conjunction with the sale of optical goods, *even if the majority of revenue comes from retail sales*. Read as a whole and following the manual's directives, an entity that provides both optical services and the sale of optical goods must classify all its revenue under Services, Major Group 80, and would then be disqualified for the 0.5 percent tax rate.

It must be noted, however, that the federal government allowed a business only one SIC Code to describe its business activity. An entity such as Austin Eye Care, with two sources of revenue, would have to choose one SIC Code over the other for federal classifying purposes, thus the directive to classify its eye care business as a service

instead of retail trade was necessary to have all similar businesses classified under the same SIC Code. The franchise tax statute, however, clearly anticipates that a business may have different sources of revenue and gives directive, in Tax Code Section 171.002(c)(1), to compare the revenue from the different activities to determine if the entity is primarily engaged in retail trade. The SIC Manual's directive to classify offices of oculists, ophthalmologists, and optometrists as a service, even if a majority of their revenues comes from retail sales, is in opposition to the Tax Code's directive in Section 171.002(c)(1) for determining if an entity is primarily engaged in retail trade.

If you have any questions or want to discuss this matter, please do not hesitate to contact me at 512-555-1212.

Respectfully,

William R. Jones
Senior Manager – Jones & Jones, LLP

Enclosures

Sample PLR Request