

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re: § CASE NO. 10-13005(KJC)  
§ Jointly Administered  
UBI LIQUIDATING CORP., et al., §  
§ Chapter 11  
Debtors §

**TEXAS COMPTROLLER OF PUBLIC ACCOUNTS' RESPONSE TO THE TENTH  
OMNIBUS OBJECTION OF THE LIQUIDATING TRUSTEE TO CERTAIN  
OVERSTATED CLAIMS, NO LIABILITY CLAIMS, AND IMPROPERLY CLASSIFIED  
CLAIMS (SUBTANTIVE)**

The Texas Comptroller of Public Accounts ("Texas Comptroller"), appearing through the Texas Attorney General's Office, responds as follows to the Tenth Omnibus Objection of the Liquidating Trustee to Certain Overstated Claims, No Liability Claims, and Improperly Classified Claims (Substantive)(the "Trustee's Objection")[Docket No. 1690]:

**Texas Comptroller's Pending Claims**

1. The Texas Comptroller timely filed an amended priority tax claim in the amount of \$111,277.20 [Claim No. 765] and an amended administrative expense claim in the amount of \$3,168.05 [Claim No. 764] in the Marianne USPR, Inc. ("Debtor") case. Both claims are based on an audit of the Debtor's books and records.

2. The Texas Comptroller also filed an administrative expense claim for Texas franchise tax in the amount of \$23,984.53 [Claim No. 854]. Claim No. 854 was based on an estimate of the Debtor's final Texas franchise tax return. The Debtor subsequently filed the tax return and paid the liability in full.

**Liquidating Trustee's Objection to Tax Claims**

3. The Liquidating Trustee alleges that the Texas Comptroller's administrative expense franchise tax claim [Claim No. 854] is overstated. Because this claim has been paid in

full, the Texas Comptroller does not oppose the entry of an order finding that Claim No. 854 has been satisfied.

4. The Liquidating Trustee alleges that no liability is owed for the Texas Comptroller's administrative expense sales tax claim [Claim No. 764] and the Texas Comptroller's priority sales tax claim [Claim No. 765]. The Texas Comptroller disputes this allegation because these claims are based on a validly conducted state tax audit that has not been refuted.

**Texas Comptroller's Factual and Legal Response the Trustee's Objection**

5. The Texas Comptroller's sales and use tax claims are based on an audit conducted during the bankruptcy case. In order to properly perform the audit, the Texas Comptroller's auditor made numerous attempts to meet with the Debtor's representative (Joel Klemas) to gain access to the Debtor's books and records. Mr. Klemas repeatedly refused to meet with the auditor and failed to provide the requested access. Because no records were provided, the auditor was forced to estimate the audit liability.

6. The Texas Comptroller issued its audit assessment on March 7, 2011. On April 6, 2011, the Debtor, through its tax representative, PricewaterhouseCoopers, LLP (PWC), requested a redetermination of the audit assessment, which initiated an administrative hearing under the Texas Administrative Code.

7. On April 26, 2011, the Comptroller sent PWC a pre-hearing letter, which gave the Debtor an additional 60 days to provide documentation to support its challenges to the audit. When the Debtor did not provide any additional documentation, the administrative hearing was docketed.

8. On July 18, 2012, the Texas Comptroller issued its Position Letter. The Position Letter requested that the audit liability be upheld because the Debtor failed to provide adequate documentation to establish the amount of tax liability it reported to the Texas Comptroller during the audit period.

9. The Debtor did not respond to the Position Letter and did not provide any additional documentation to support its contentions. The Texas Comptroller's audit findings were upheld in an Administrative Decision issued on February 15, 2013. The Debtor had twenty days to file a request for a rehearing of the Administrative Decision, but failed to do so. The Administrative Decision became final on April 1, 2013.

10. As shown above, the Texas Comptroller tried to work with the Debtor to reach a final audit amount acceptable to both parties, but the Debtor never produced the necessary records for the Texas Comptroller to conduct a full audit. The Debtor claimed that the records were not available, which may be a result of the sale of the Debtor's assets in 2010, including the Debtor's books and records.

11. However, the purchase agreement with the asset purchaser, New Ashley Stewart, LLC, specifically provided that the buyer would furnish to the Debtors "such information and assistance as is reasonably necessary ... for any audit by any taxing authority... Such information and assistance shall include providing reasonable access to all of the books and records of the [Debtors]." [Purchase Agreement, Sec. 7.8(d)] Under this contractual provision, the Debtor should have been able to obtain the necessary records from the buyer.

12. *Statutory basis for Comptroller's claim.* The Comptroller is authorized to conduct audits of taxpayers' books and records. *Tex. Tax Code § 151.023.* If the Comptroller has reason to doubt that reported tax amounts are correct, the Comptroller may determine the

proper tax liability from any information that is available to the Comptroller. *Tex. Tax Code § 111.008(a)*.

13. The Texas Tax Code further provides that all gross receipts of a seller are presumed to be subject to sales tax unless a properly completed resale or exemption certificate is accepted by the seller. *Tex. Tax Code § 151.054(a)*. A taxpayer is specifically required to keep records of its gross receipts and records documenting any claimed deduction or exclusion. *Tex. Tax Code §151.025*.

14. In this case, the Debtor failed to keep adequate records as required by state law. The Comptroller used the best records it could find to determine the amount of tax due.

15. The Court must apply the substantive law of the state of Texas to determine if the Comptroller's assessment is correct. The substantive tax law includes the state law's allocation of the burden of proof. Raleigh v. Ill. Dept. of Revenue, 120 S. Ct.1951, 1955 (2000) ("the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it").

16. Under Texas law, the Comptroller's certification of liability is prima facie valid and is afforded a presumption of correctness which may be overcome only by conclusive evidence. *Tex. Tax Code §§ 111.013 & 151.603*; Sundown Farms, Inc. v. State, 89 S.W.3d 291, 293 (Tex.App.-Austin 2002, no pet.); State v. Glass, 723 S.W.2d 325, 327 (Tex.App. – Austin 1987, writ ref'd n.r.e.); Hylton v. State, 665 S.W.2d 571,572 (Tex.App.- Austin 1984, no writ); Baker v. Bullock, 529 S.W. 2d 279,281 (Tex.Civ.App.- Austin 1975, writ ref'd n.r.e.).

17. In Hylton, the taxpayer intentionally destroyed his business records before the Texas Comptroller's audit in order to prevent federal agents from inspecting the records in an investigation unrelated to the Texas Comptroller's audit. At trial, the taxpayer's evidence

primarily consisted of the testimony from the taxpayer and his wife. The trial court upheld the Texas Comptroller's audit assessment and the appellate court affirmed. The appellate court ruled that the taxpayer's evidence was insufficient as a matter of law to overcome the presumed correctness of the Texas Comptroller's certificate of liability. The appellate court noted that "(t)o allow appellant's evidence to overcome the presumption, especially in light of appellant's intentional destruction of his business records, would render meaningless the regulatory scheme requiring a taxpayer to keep and produce records to substantiate exclusions." Hylton, 665 S.W. 2d at 573.

18. Although the Debtor in this case did not destroy its records, its failure to obtain the records from the buyer of its assets (where it had a contractual right to obtain such record) is the practical equivalent. Because the Debtor did not provide records, the Texas Comptroller was entitled to use whatever information was available. The Texas Comptroller properly used that information to generate its audit assessment. Unless the Liquidating Trustee is able to produce additional conclusive documentation as to the Debtor's sales tax liability, the Texas Comptroller's assessment must be upheld.

Accordingly, the Texas Comptroller requests that the Liquidating Trustee's Tenth Omnibus Objection be overruled as to Claim Nos. 764 and 765.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

DANIEL T. HODGE  
First Assistant Attorney General

JOHN B. SCOTT  
Deputy Attorney General for Civil Litigation

RONALD R. DEL VENTO  
Assistant Attorney General  
Chief, Bankruptcy & Collections Division

/s/ John Mark Stern  
JOHN MARK STERN  
Assistant Attorney General  
Bankruptcy & Collections Division  
P. O. Box 12548  
Austin, TX 78711-2548  
Telephone: (512) 475-4868  
Facsimile: (512) 482-8341  
John.Stern@texasattorneygeneral.gov

ATTORNEYS FOR THE TEXAS  
COMPTROLLER OF PUBLIC ACCOUNTS

**CERTIFICATE OF SERVICE**

I certify that on June 10, 2013, a true copy of the foregoing was served by the method and to the following parties as indicated:

By Electronic Means as listed on the Court's ECF Noticing System:

RICHARDS, LAYTON & FINGER, P.A.  
Mark D. Collins  
Paul N. Heath  
L. Katherine Good  
Andrew C. Irgens  
920 North King Street  
Wilmington, DE 19801  
Counsel for the Liquidating Trustee

COOLEY LLP  
Lawrence C. Gottlieb  
Michael Klein  
1114 Avenue of the Americas  
New York, NY 10036-7798  
Counsel for the Liquidating Trust Committee

/s/ John Mark Stern  
JOHN MARK STERN