D-1-GN-22-003403

CAUSE NO. _____

HOUSTON ASTROS, LLC Plaintiff, v. GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS, Defendants.	§ § § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 419TH, DISTRICT COURT _____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PAYMENT UNDER PROTEST PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

The State of Texas unlawfully required payment from Plaintiff, Houston Astros, LLC ("Plaintiff" or "Houston Astros"), in the amount of $470,932.26 of penalties and interest accrued on sales and use tax assessed by the Comptroller of Public Accounts for the State of Texas ("the Comptroller") for the period July 1, 2012, through December 31, 2015 ("the period at issue"). Accordingly, the Houston Astros file this Original Protest Petition pursuant to Chapters 112 and 151 of the Texas Tax Code against Defendants Glenn Hegar, Comptroller of Public Accounts of the State of Texas ("Comptroller"), and Ken Paxton, Attorney General of the State of Texas, seeking a refund of $470,932.26 paid under protest. Defendants are sued in their official capacities.

I. DISCOVERY PLAN

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.3.

II. PARTIES

2. The Houston Astros are an American professional baseball team organized as a limited liability company and based in Houston, Texas. The Houston Astros compete in Major League Baseball (MLB) as a member club of the American League (AL) West division.

3. Defendant Glenn Hegar is Texas Comptroller of Public Accounts ("Comptroller") and may be served with process at Lyndon B. Johnson State Office Building, 111 East 17th Street, Room 113, Austin, Travis County, Texas 78701.

4. Defendant Ken Paxton is Texas Attorney General and may be served with process at 300 West 15th Street, Austin, Travis County, Texas 78701.

III. STATEMENT OF MONETARY RELIEF SOUGHT

5. Plaintiff seeks monetary relief over $250,000 but not more than $1,000,000.

IV. PROCEDURAL MATTERS

6. This is a protest payment suit brought under Tex. Tax Code ("Tax Code") Chapter 112 (Taxpayer's Suits) and Chapter 151 (Sales and Use Tax), to recover $470,932.26 in sales and use tax overpayments, plus audit penalty and

interest, plus statutory interest. A copy of the protest letter is attached to this Original Petition as Exhibit A[1].

7. Plaintiff was audited by the Comptroller for Texas sales and use tax compliance for July 1, 2012 through December 31, 2015 (the "period at issue"). The Comptroller issued a Notice of Audit Results on March 14, 2022. Plaintiff timely requested redetermination and a refund.

8. On February 14, 2022, the Honorable Administrative Law Judge Kathy Pickup issued a Proposal for Decision affirming the assessment.

9. On March 7, 2022, the Comptroller issued a Comptroller's Decision adopting the Proposal for Decision with minor changes and affirming the assessment.

10. On April 29, 2022, the Houston Astros paid $470,932.26 under protest, which represented the penalties and interest accruing from the Comptroller's assessment of sales and use tax.

11. The Travis County District Courts have exclusive, original jurisdiction over this case pursuant to Tex. Gov't Code § 403.201, Tex. Tax Code § 112.001, and Tex. Gov't Code § 2001.038, and venue is proper in Travis County District Court under Tex. Tax Code §§ 111.0102 and 112.001.

[1] All facts and causes of action set forth in Exhibit A are incorporated by reference.

12. Plaintiff has paid all additional tax found due in any deficiency determination that applies to the tax liability periods covered in the tax refund claims.

V. FACTS

13. The Houston Astros are an American professional baseball team organized as a limited liability company and based in Houston, Texas.

14. The Houston Astros compete in Major League Baseball (MLB) as a member club of the American League (AL) West division.

15. The Houston Astros sell tickets to patrons who want the experiences and benefits of attending the Houston Astros' home games.

16. The Houston Astros play their home games at Minute Maid Park, also located in Houston, Texas.

VI. CAUSES OF ACTION

A. TAXABLE ITEMS RESOLD OR TRANSFERRED TO PATRONS

17. Paragraphs 1 through 17 are re-alleged and incorporated by reference.

18. The assessment should be reduced for tax assessed on the charges for taxable items that the Houston Astros purchased for resale.

19. Taxable items include tangible, personal property and taxable services. Tex. Tax Code § 151.010.

20. Texas Tax Code §151.006(a) defines a "Sale for Resale" to include, in relevant part:

> (1) tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it with or as a taxable item as defined by Section 151.010 in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service;
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> (2) tangible personal property to a purchaser for the sole purpose of the purchaser's leasing or renting it in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business to another person, but not if incidental to the leasing or renting of real estate;
>
> (3) tangible personal property to a purchaser who acquires the property for the purpose of transferring it in the United States of America or a possession or territory of the United States of America or in the United Mexican States as an integral part of a taxable service;

(4) a taxable service performed on tangible personal property that is held for sale by the purchaser of the taxable service;

21. Taxable services include, for example, amusement services. *See* Tex. Tax Code §§ 151.0101 and 151.0028.

22. 34 Tex. Admin. Code § 3.298(f)(1) expressly provides that the resale exemption applies when tangible, personal property is purchased with the intent to transfer care, custody, and control of it to a customer.

23. The resale exemption applies, for example, to promotional "giveaway" items and souvenirs that the Houston Astros purchase for the purpose of transferring to customers as part of a taxable amusement service.

24. There is no requirement under the Comptroller's rule that the provider of a taxable service transfer property to its customers as an integral part of that service. *See* 34 Tex. Admin. Code § 3.291(f)(1).

25. The Houston Astros, however, transfer all promotional "giveaway" items and souvenirs to their customers as an integral part of a taxable service.

26. The sole reason that the Houston Astros purchase promotional "giveaway" items and souvenirs is to transfer them to customers as an integral part of a taxable amusement service.

27. The Comptroller contends, in error, that the Houston Astros purchase these items to give away as gifts.

28. The price the Houston Astros charge for tickets to its ball games, however, includes a charge for promotional "giveaway" items and souvenirs that are transferred to fans.

29. Texas Supreme Court precedent belies the notion that the purchaser of an amusement service must pay separately for items they receive without providing additional consideration. *Combs v. Roark Amusement & Vending*, 422 S.W.3d 632 (Tex. 2013) (finding plus toys "won" through crane machines were purchased for resale to customers through taxable amusement service).

30. The Third Court of Appeals likewise found that hotel-room consumables may be purchased for resale to customers in connection a taxable hotel-occupancy service. *DTWC Corp. v. Combs*, 400 S.W.3d 149 (Tex. App.—Austin 2013, no pet.).

31. The Comptroller relies on Comptroller Hearing 29,388 (1993) as a basis to deny the resale exemption for promotional "giveaways" and souvenirs.

32. This 1993 hearing decision is in conflict with the Texas Supreme Court's 2013 decision in *Roark Amusement & Vending* decision and the Third Court of Appeals' 2013 decision in *DTWC Corp*.

33. Comptroller Hearing 29,388 (1993) based its denial of the refund claim on the belief that "the fact that the Houston Astros may have taken the overall cost

of give-aways into account in ticket pricing does not equate to the sale of the give-away items."

34. The *DTWC Corp.* decision, however, found that including the cost of transferred items in the ticket pricing constituted consideration for the hotel consumables that were "given away," and relied on this finding to determine that the resale exemption applied. *DTWC Corp.*, 400 S.W.3d at 154.

35. 34 Tex. Admin. Code § 3.298(f)(1) provides that "[s]ellers of service may issue a resale certificate in lieu of tax to suppliers of tangible personal property only if care, custody, and control of the property is transferred to the client."

36. The Houston Astros transfer care, custody and control of all promotional "giveaway" and souvenir items to their customers.

37. 34 Tex. Admin. Code § 3.298(f)(2) expressly provides that the resale exemption applies when taxable services are purchased with the intent to transfer them as an integral part of a taxable service.

38. Comptroller Rule 3.298(f)(2) further provides "[a] service will be considered an integral part of a taxable service if the service purchased is essential to the performance of the taxable service, and without which the service could not be rendered."

39. The Houston Astros purchase security services, cleaning services and other services as an essential part of their performance of a taxable amusement service, without which the service could not be rendered.

40. The resale exemption applies, for example, to the purchase of security services.

41. The Houston Astros purchase the security services for the purpose of transferring them as an integral part of a taxable amusement service.

42. The price the Houston Astros charge to their customers includes the promotional "giveaway" items and souvenirs the Houston Astros transfer to their customers.

43. The price of the promotional "giveaway" items and souvenirs is a factor the Houston Astros use in setting the ticket price, just as it was a factor that DTWC Corporation used in setting its lodging fee.

44. The patron pays a price for a package that includes the right to attend the game and the souvenir item.

45. As a result, the resale exemption applies to promotional "giveaway" items and souvenirs, including but not limited to T-shirts, memorabilia, and other items that the Houston Astros transfer to their patrons.

46. Patrons cannot receive these items without paying for a ticket to attend the ball game and receive the items.

47. These are unique items that are not available for sale except as a part of a combination admission/souvenir purchase.

48. The Houston Astros' customers receive care, custody, and control of the items.

49. They leave with the items in their possession and thereafter hold complete rights of possession and ownership over them.

50. The Comptroller alleges that the Houston Astros' transfer of souvenirs to their customers is a "gift."

51. The Houston Astros' transfer to their customers souvenirs is not a gift. A gift occurs by transfer without consideration and out of detached and disinterested generosity.

52. The Houston Astros do not transfer souvenirs without receiving consideration.

53. The Houston Astros do not transfer the souvenirs out of detached and disinterested generosity.

54. The Houston Astros transfer the souvenirs, because they are contractually obligated to do so.

55. The Houston Astros' website confirms the contractual obligation. *See* Astros.com, Giveaway Policy, mlb.com/10stros/tickets/promotions (last visited Apr. 27, 2022).

56. Because the ticket holders have purchased the right to receive the souvenirs, they are not gifts, and they qualify for the integral transfer exemption.

57. The souvenirs are unique and are not readily available and thus represent a valuable part of the combined package for admission and tangible personal property.

58. The Houston Astros' transfer of souvenirs to their customers has all the incidents of a sale.

59. The Houston Astros advertise the bobbleheads or other souvenirs as available with the purchase of an admission ticket.

60. This creates a contractual right by the ticketholder to receive a unique souvenir.

61. The patron purchasing the admission knows that this is part of the package they will receive for the taxable admission ticket.

62. The Houston Astros transfer all incidents of ownership, including title, possession, care, custody and control of the souvenir to their customers for consideration.

63. There have been instances of the souvenirs appearing on secondary sales outlets such as eBay within minutes of being purchased from the Houston Astros.

64. There have also been instances where the patron purchased the combined admission/souvenir package and did not attend the game.

65. In that instance, the price paid was exclusively for the souvenir.

66. The Houston Astros receive consideration for these items when their customers pay for a ticket to attend the ball game and receive the items.

67. The Comptroller alleges that the ticket price is the same regardless of whether a souvenir is transferred or not.

68. This statement is not true.

69. The Houston Astros use a dynamic pricing model that adjusts the price of a ticket based on a number of factors including whether an item of tangible personal property is available to be transferred the patron.

70. The souvenirs are offered at less desirable games where one part of the ticket accounts for the right to attend the game and the other part accounts for the right to the souvenir and other tangible personal property or taxable services transferred to the customer.

71. The resale exemption applies, for example, to the purchase of cleaning services.

72. The Houston Astros purchase the cleaning services for the purpose of transferring them as an integral part of a taxable amusement service.

73. The resale exemption applies, for example, to the purchase of items for "giveaway," because the Houston Astros purchased the items for the purpose of transferring care, custody and control them with the taxable amusement service.

74. The resale exemption applies to the purchase of other items, because the Houston Astros either purchased tangible, personal property for the purpose of transferring care, custody and control of it to a customer or purchased services essential to the performance of a taxable service, and without which the taxable service could not be rendered.

75. In each and every instance, the Houston Astros transfer care, custody and control of the tangible, personal property for which the resale exemption is sought. *See* Tex. Tax Code § 151.302.

76. The Comptroller alleges that the Houston Astros failed to provide resale certificates to the auditor in support of these transactions, but the Houston Astros had no legal duty to retain copies of certificates that they, the Houston Astros, had issued to their sellers.

77. The Comptroller, by rule, imposes the certificate recordkeeping duty on the **sellers** of taxable items receiving certificates, not on the customers who issue those certificates.

78. The Houston Astros were customers—purchasers of these exempt items—not the seller.

79. As the purchaser claiming the resale exemption, the Houston Astros' vendors and suppliers were responsible for collecting resale certificates from the Houston Astros; the Houston Astros were simply not responsible for retaining copies of resale certificates they had issued to their sellers. *See* 34 Tex. Admin. Code § Rule 3.285(c)(3)(C) ("The **seller** should obtain a properly executed resale certificate . . . . the **seller** has 60 days from the date written notice is received by the **seller** . . .") (emphasis added).

80. The Comptroller alleges that the Houston Astros have not "identified transactions" and "provided its sales invoices related to those items, which are required to verify [the Houston Astros'] claim."

81. The Houston Astros resell each of the categories of taxable items stated herein to customers who purchase tickets to attend the baseball games.

82. The auditor reviewed the transactions between the Houston Astros and their customers in detail in connection with the Comptroller's audit.

83. Therefore, the documentation supporting this position has been previously provided to the Comptroller.

84. Nevertheless, the Houston Astros hereby make available their books and records for re-examination by the Comptroller on the transactions at issue.

85. Due to volume, the Houston Astros previously submitted a few sample copies of the Houston Astros' purchase and sales invoices. *See* Petitioner's Hearing

Exhibit 1 (Astros Ticket); Petitioner's Hearing Exhibit 2 (DrillingInfo Reception Invoice); and Petitioner's Hearing Exhibit 3 (Staging Solutions Invoice) which are hereby incorporated by reference as though duly set forth at length herein.

86. It is common knowledge that the Houston Astros are a baseball team and sell tickets to their patrons.

87. Presenting to the Comptroller copies of each ticket given to each patron would be impractical and would serve no legitimate purpose.

88. The Comptroller misconstrues the Houston Astros' contention with respect to cleaning services.

89. The Houston Astros do not allege that cleaning services become nontaxable to the Houston Astros, because of customers' expectations of a clean environment.

90. The Houston Astros contend that they purchase otherwise taxable cleaning services with the intent to resell them to their customers.

91. The fact that customers purchase these cleaning services as part of the ticket price is demonstrated by the fact that customers would not pay to attend a ball game if the seats and aisles were filthy.

92. When customers purchase the admission ticket, they are also purchasing cleaning services for the areas they pass through, the areas they see, and the area from which they watch the ball game.

93. Each customer has the contractual right to sit in a clean seat.

94. And further, each has the contractual right to clean surrounding areas, free of trash and debris so that they may view and participate in baseball events and promotional giveaways in a sanitary and healthy environment.

95. The Houston Astros are contractually obligated to transfer these cleaning services to their customers.

96. The cleaning services the Houston Astros purchase are transferred as an integral part of the taxable service the Houston Astros provide to their customers.

97. Customers would not purchase tickets to sit in leftover filth, spilled drinks, and rotting food from previous games, just as they would not purchase tickets to sit in clean seats if there was no baseball game in front of them to watch.

98. If the Houston Astros did not purchase cleaning services to transfer to their customers, the City of Houston would not allow the Houston Astros to conduct sporting events in Minute Maid Park.

99. A service is "integral" to the performance of a taxable service if it is a service "without which the taxable service could not be rendered." 34 Tex. Admin. Code § 3.298(f).

100. As a result, the Houston Astros purchase cleaning services to transfer them as an integral part of performing a taxable amusement service for customers.

101. The Comptroller misconstrues the Houston Astros' contention with respect to security services.

102. The Houston Astros do not allege that security services become nontaxable to the Houston Astros, because of customers' expectations of a safe environment.

103. The Houston Astros contend that they purchase otherwise taxable security services with the intent to resell them to their customers.

104. The fact that customers purchase these security services as part of the ticket price is demonstrated by the fact that customers would not pay to attend a ball game if the stadium was subject to rampant crime or terrorist attacks.

105. Moreover, without these services, the Houston Astros could not play games before their fans.

106. When customers purchase the admission ticket, they are also purchasing security services for the areas they pass through, the area from which they watch the professional sports entertainment event, and the entirety of the stadium grounds.

107. The customer has both the contractual right and reasonable expectation of a safe environment that is free of crime and protected from terrorist attacks so that they may view and participate in baseball events and promotional giveaways in a safe environment.

108. The Houston Astros are contractually obligated to transfer these security services to their customers.

109. The security services the Houston Astros purchase are transferred as an integral part of the taxable service the Houston Astros provide to their customers.

110. Customers would not purchase tickets to sit in a stadium if they or their family members might be assaulted, robbed, or killed in a terrorist attack, just as they would not purchase tickets to sit in safe seats in a safe stadium if there was no baseball game in front of them to watch.

111. If the Houston Astros did not purchase security services to transfer to their customers, the City of Houston would not allow the Houston Astros to conduct sporting events in Minute Maid Park.

112. Major League Baseball will not allow a game to be played without the requisite Federally mandated SAFETY Act protocol. *See* **Section B below (FEDERAL PREEMPTION).**

113. Security services are essential to providing the patrons with the benefits and experiences they pay for when they purchase tickets to the Houston Astros' home games.

114. The Houston Astros could not provide these benefits and experiences without providing security services.

115. Sports teams have both a statutory and contractual duty to provide their patrons with sufficient security services designed to minimize harm that would arise from terrorist attacks, and otherwise keep their patrons safe and free from harm.

116. These services are transferred to the fans.

117. Without fans in attendance, the Houston Astros would not purchase these security services simply to provide them to their own employees.

118. A service is "integral" to the performance of a taxable service if it is a service "without which the taxable service could not be rendered." 34 Tex. Admin. Code § 3.298(f).

119. As a result, the Houston Astros purchase security services to transfer them as an integral part of performing a taxable amusement service for customers.

B. FEDERAL PREEMPTION

120. Paragraphs 1 through 119 are re-alleged and incorporated by reference.

121. The assessment should be reduced for tax assessed on the charges for which federal law or federal regulation preempts state taxation.

122. The federal preemption rule applies, for example, to the purchase of security services.

123. The security requirements for Minute Maid Park are subject to federal law and federal regulation.

124. Therefore, the charges for security services purchased by the Houston Astros are not subject to the Texas sales and use tax.

125. The Houston Astros—and all other professional baseball teams—are prohibited from playing professional baseball games in front of fans without security services that meet federal Support Anti-Terrorism by Fostering Effective Technologies Act (the SAFETY Act) protocols.

126. Federal laws and regulations provide security requirements that apply to stadiums, including Minute Maid Park. Specifically, the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) recognizes that stadiums are high-profile targets of terrorist attacks, because of the possibility that large-scale casualties may be inflected in an area teeming with people.

127. The SAFETY Act is a part of the Homeland Security Act of 2002 and provides extensive federal laws and regulations to prevent terrorist attacks and requires certain entities, such as the Houston Astros, to meet heightened security protocol standards.

128. Patrons who attend sporting events, such as the Houston Astros' home games, purchase tickets to the events with reasonable expectation that the sports teams, such as the Houston Astros, will provide then with sufficient security designed to keep them safe and free from terrorist attack.

129. The Comptroller cites Comptroller Letter 9510L1373F03 (October 10, 1995) for its statement that security services are not integral to the Houston Astros' amusement service.

130. Comptroller Letter 9510L1373F03 (October 10, 1995) fails to recognize that major sporting events are governed by federal law and subject to potential threat from terrorist attack.

131. This letter claims that "people could attend and watch a sporting event or concert even when there is no security service." *Id.*

132. This statement may have been true when it was made, but it is not true for the Houston Astros during the audit period.

133. Neither MLB, the City of Houston nor the federal government allow a major league game to be played without security.

134. Comptroller Letter 9510L1373F03 (October 10, 1995) was issued six years before the devastating terrorist attacks of September 11, 2001 and does not reflect the federal laws and regulations applicable to a Major League baseball game during the period of the audit (July 2012 through December 2015).

135. Homeland Security, in conjunction with Major League Baseball, has mandated certain security requirements for a MLB game to be played in front fans. If these requirements are not met, the game will not be played in front of fans.

136. MLB has consistently held that fan safety is paramount.

137. The day after the May 22, 2017 bombing at an Ariana Grande concert in Manchester (UK), Rob Manfred, the MLB Commissioner stated: "security is our utmost priority . . . there have been a lot of changes in the ballparks in terms of magnetometers, ballpark access, number of security people and we do believe we're providing a safe environment for our fans."[2]

138. This statement demonstrates that security services have only become more essential in recent years.

139. MLB has been quick to cancel games if fan safety cannot be assured. These cancellations include fans being unable to attend due to local civil unrest (April 28, 2015 in Baltimore) or the entire 2020 baseball season as a result COVID-19 concerns.

140. The statement "people could attend and watch a sporting event or concert even when there is no security service" may have been true in 1995, however a MLB game could not be conducted during the audit period without SAFETY Act compliant security. Comptroller Letter 9510L1373F03 (October 10, 1995).

141. Therefore, security services meet the requires of an essential service as defined by Comptroller Rule 3.298(f)(2).

[2] https://www.mlb.com/news/rob-manfred-wants-mlb-games-in-mexico-c232063444 (last visited June 27, 2022).

142. This includes, but is not limited to, canine detection services governed by federal law and other security services mandated by the federal SAFETY Act and other federal laws and regulations.

C. ITEMS TRANSFERRED TO CUSTOMERS

143. Paragraphs 1 through 142 are re-alleged and incorporated by reference.

144. The assessment should be reduced for tax assessed on charges for nontaxable services as well as on taxable items that the Houston Astros purchased for resale or rental.

145. Taxable items include tangible, personal property and taxable services.

146. Texas Tax Code §151.006(a) defines a "Sale for Resale" to include, in relevant part:

> (1) tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it with or as a taxable item as defined by Section 151.010 in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service;
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> (2) tangible personal property to a purchaser for the sole purpose of the purchaser's leasing or renting it in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business to another person, but not if incidental to the leasing or renting of real estate;
>
> (3) tangible personal property to a purchaser who acquires the property for the purpose of transferring it in the United States of

> America or a possession or territory of the United States of America or in the United Mexican States as an integral part of a taxable service;
>
> (4) a taxable service performed on tangible personal property that is held for sale by the purchaser of the taxable service; . . .

147. The resale exemption applies, for example, to the Houston Astros' purchase of A/V services and/or rental of A/V equipment for private event sponsors.

148. The Houston Astros purchase the A/V services and/or rent the A/V equipment for private event sponsors to use in connection with the events they sponsor at Union Station.

149. The Houston Astros do not operate or control the A/V equipment.

150. The A/V equipment is controlled and operated by the A/V providers or private event sponsors.

151. The Houston Astros never sell food or provide catering services to the private events.

152. The following charges are not subject to sales tax, because they represent nontaxable services or items purchased for resale that were procured at the request of the customer and transferred to the customer:

Item	Exam	Vendor	Amount
3768J-153	30	Acme Party Services	$1,204.70
3768J-157	30	Bleisch Production Services	$3,331.00

3768J-158	30	Nordvold Scott	$1,215.00
3768J-295	50	Bleisch Production Services	$37,547.00
3768J-296	50	LD Systems L.P.	$57,149.43
3768J-292	50	Staging Solutions	$69,166.00

153. The Houston Astros occasionally lease Union Station space to customers. In doing so, the Houston Astros does not sell or provide meals.

154. The Houston Astros will arrange for the provision of A/V services or the rental of any additional equipment, primarily AV equipment, that the customer requires.

155. The Houston Astros resells the services or rented equipment to the customer.

156. In such instances, the Houston Astros mark up the vendors' charges, separately state the charges to the customer, and charge sales tax.

157. This ground also pertains to motor vehicle parking services purchased for resale.

158. The Houston Astros were previously advised by an auditor in a prior audit of the Houston Astros that this ground states the proper treatment of such equipment and services.

159. The Houston Astros relied upon the prior auditor's statement to their detriment.

160. The current auditor contends that the Houston Astros are event planners, and that Comptroller Letter 200703903L should apply.

161. One item selected in the auditor's sample was the provision of A/V services purchased by the Houston Astros and resold to DrillingInfo.

162. A/V services for "production management," as stated on the invoice, are not enumerated taxable services under Section 151.0101; therefore, this item should have been removed from the audit.

163. The Houston Astros rented Union Station lobby for $14,000 and DrillingInfo requested A/V services and other equipment in the amount of $92,500.

164. The equipment and services were specified by DrillingInfo, and the Houston Astros agreed to purchase the services and resell them at a 20% mark up to the customer.

165. The Houston Astros charged sales tax on the marked-up amount.

166. At times, other customers request the rental of equipment for their use and operation.

167. The Houston Astros will rent the equipment, mark it up, and re-rent it to their customers.

168. The Houston Astros separate the facility rental from all other charges on the invoice and tax the rental of A/V equipment requested by the customer.

169. The auditor contends that Comptroller Letter 200703903L is indicative of Comptroller policy and requires a venue that hosts an event to charge sales tax to the customer on all items provided and "pay sales tax to suppliers at the time of purchase on the purchase of all consumables, all equipment, and replacement parts for equipment used to provide the service and operate the facility."

170. However, this letter ruling applies to items that are used to perform the service and operate the facility.

171. The A/V equipment is not used by the Houston Astros to perform the service of providing a meeting space or rental of the facility, nor is it used to operate the facility, it is transferred to the customer who operates and uses the equipment as needed.

172. The Houston Astros are simply renting the room out and providing all other items on a separate contract.

173. Under the separate contract rules, the Houston Astros is considered the seller of the items.

174. In fact, Letter Ruling 200703903L states that an event planner may issue a resale certificate when purchasing taxable services such as security, parking, and cleaning provided at an event.

175. However, it states that all items rented or used during or in preparation for an event or any services used by the event planner are taxable at the time of purchase.

176. In the present case, the Houston Astros are not using the A/V equipment, rather it is rented for consumption by the Houston Astros' customer.

177. The customer determines what equipment is needed and is the consumer of the equipment, not the Houston Astros.

178. Items procured for the client are not used by the Houston Astros, but are transferred into the customer's possession and control fall under the Sale/Lease for Resale exemption under Rule 3.285(a)(2)(B).

179. To the extent that the vendor retains operational control of the A/V equipment, the vendor is providing a non-taxable service.

180. Comptroller Hearing No. 112,735 (STAR 201704020H) involves an A/V equipment rental company that rented audio-video (A/V) equipment to hotels.

181. There, the Tax Division disallowed the resale certificates issued by the hotels, finding that the hotels' meeting-room customers did not obtain operational control or possession of the equipment.

182. Alternatively, the Tax Division argued that the hotel acted as a caterer, and the A/V equipment was provided in conjunction with the provision of prepared food and the rental of a room.

183. The taxpayer argued that a sale for resale occurred, because the hotel transferred possession and control of the equipment to its customers and separately stated the marked-up charge on the invoice to its customers.

184. The hotel rented the equipment solely to re-rent it to its customers, just as the Houston Astros have done here.

185. The administrative law judge ("ALJ") in Hearing 112,735 explained in the Decision on Hearing No. 112,735 that the key element of possession is operational control over the tangible personal property.

186. As confirmed in Hearing No. 40,812, a lessee must exercise operational control of the leased property in order to take possession of the property.

187. Operational control is defined as "using, controlling, or operating the tangible personal property."

188. "Use of the property by customers is sufficient to establish the possession element, and use determines operational control."

189. The ALJ in Hearing 112,735 explains that the taxpayer's argument that the customers had possession of the equipment was reasonable; however, there was an additional consideration: the hotel provided food.

190. Therefore, the hotel was acting as a caterer under Rule 3.293(k)(1).

191. The rental of all equipment thus became a part of the sales price of the prepared food, as had been the case in numerous hearings and letter rulings issued by the Comptroller since 1996.

192. The taxpayer had cited *DTWC Corporation v. Combs* in which the Third Court of Appeals agreed that, under the plain meaning of the statute, a hotel qualified for the resale exemption on hotel consumables that were placed in guest rooms.

193. However, DTWC Corporation did not involve or implicate the Comptroller's administrative rule for food and food service, which is what controlled the resolution of the A/V equipment rental issue.

194. Therefore, the ruling in Hearing No. 201704020H was made because the hotel was a caterer and sold food in conjunction with the rental of the equipment.

195. "Event Planner" is not defined in an administrative rule, and the Houston Astros are not selling prepared food in the case at hand; therefore, 34 Tex. Admin. Code § 3.293 does not apply.

196. If 34 Tex. Admin. Code § 3.298 does apply, it is invalid, because it conflicts with the resale statute and *Rylander v. San Antonio SMSA Ltd. Partnership*, 11 S.W.3d 484 (Tex. App.—Austin 2000, no pet.).

197. The Houston Astros neither sell prepared food, nor invoices for it, nor provides the food.

198. If food is served at events, another company is hired by the customer for the provision of the food as controlled by a separate contract.

199. The Houston Astros maintain that the purchase of A/V rental equipment is transferred to the customer for consideration and qualifies as a rental according to 34 Tex. Admin. Code § 3.294(a)(2) or as a non-taxable service.

200. Therefore, equipment transferred and operated by the customer qualifies for the sale for resale exemption in accordance with 34 Tex. Admin. Code § 3.285(a)(2)(B).

201. In addition, in the example provided for DrillingInfo, the A/V equipment is not rented.

202. It is a non-taxable service.

203. Therefore, this transaction is not taxable and should have been removed from the assessment.

204. The Houston Astros have provided invoices for the customers and vendor for the DrillingInfo purchase of audio/visual (A/V) services. *See* Petitioner's Hearing Exhibit 1 (Astros Ticket); Petitioner's Hearing Exhibit 2 (DrillingInfo Reception Invoice); and Petitioner's Hearing Exhibit 3 (Staging Solutions Invoice) which are hereby incorporated by reference as though duly set forth at length herein.

205. A/V services for "production management," as stated on the invoice, are not enumerated taxable services under Tex. Tax Code § 151.0101; therefore, this item should have been removed from the audit.

206. The Houston Astros rented Union Station lobby and DrillingInfo requested A/V services and other equipment in the amount of $92,500.

207. The equipment and services were specified by DrillingInfo, and the Houston Astros agreed to purchase the services and resell them at a 20% mark up to the customer.

208. The Houston Astros charged sales tax to DrillingInfo on the marked-up amount.

209. The Houston Astros did not pay sales tax on the purchase of the services, because the services were non-taxable and, if taxable, were purchased under the resale exemption.

210. The audit schedules indicate that Comptroller Letter 200703903L is indicative of Comptroller policy and requires a venue that hosts an event to charge sales tax to the customer on all items provided and "pay sales tax to suppliers at the time of purchase on the purchase of all consumables, all equipment, and replacement parts for equipment used to provide the service and operate the facility."

211. This letter ruling applies to items that are used to perform the services and operate the facility.

212. The A/V equipment purchased for resale by the Houston Astros, however, is not used by the Houston Astros to perform the service of providing a meeting space or rental of the facility, nor is it used to operate the facility.

213. It is transferred to the customer who maintains operational control of the equipment and operates as the customer sees fit.

214. The Houston Astros are simply renting the room out in one transaction, and reselling all other items in separate transactions under separate contracts.

215. In addition, the services the Houston Astros purchased and resold, including but not limited to those for DrillingInfo, are non-taxable services.

216. Therefore, these nontaxable services should have been removed from the assessment.

D. NEGATIVE ITEMS & SAMPLING ISSUES

217. Paragraphs 1 through 216 are re-alleged and incorporated by reference.

218. Certain items scheduled as taxable in the audit should have been removed or adjusted, because the methodology of handling negative items in the general ledger results in an increase in the error rate greater than in both the sample and the population; the sample was not randomly selected; the population was not homogenous; and the sample was not representative; for the reasons set forth below.

219. Errors identified in item 3768J-156 in Exam 30 (Miss Em Com $2,000.00) and 3768J-161 in Exam 40 (Success Promotions $27,700.00) were eliminated as credits and therefore should not be treated as exemptions.

220. Furthermore, the inclusion of the credit for the Item 3768J-161 as a negative number in the sample base underscores the unfairness of the auditor's interpretation of not allowing any taxpayer relief for negative items.

221. Providing no taxpayer relief causes an increase in the error rate and, therefore, an increase in the extrapolated sales tax assessment.

222. Effectively, the Houston Astros were presented with an extrapolated assessment on an invoice that was removed from the system, and then by including the credit as a reduction in the sample base, further increased that extrapolated assessment.

223. For several months the Houston Astros had an accounting system wherein, when an accounts payable invoice was paid, the original invoice was credited and a new invoice was entered.

224. The data for Miss Em.com contains an error in Exam 30:

Sel Seq	Exam	Document	Purchase Order	GL Date	Company	Amount
90	30	1079332	15001687	4/21/2015	Miss Em.com	2,000.00
		1079332	15001687	4/21/2015	Miss Em.com	-2,000.00

		1079332	15001687	4/21/2015	Miss Em.com	2,000.00

225. For population items 8784, 8785, and 8786, the first item was selected as the 90th item for Exam 30.

226. The item selected from the sample had been removed from the records of the company.

227. The sample for Exam 30 included five selections of negative items that reduced the sample base by $5,566.76, with no offset in the numerator.

228. The Comptroller has maintained that a credit entry cannot generate an error.

229. Unless an offset is made, the impact of reducing the base dollar amount increases the error percentage and, when extrapolated to the population, improperly increases the assessment and is therefore invalid.

230. In Exam 40, the Success Promotions entry and the credit that removed the entry were both selected in the audit sample:

Sel Seq	Exam	Document	Purchase Order	GL Date	Company	Amount
30	40	1069172	14000517	8/24/2014	Success Prom	27,700.00
		1069172	14000517	8/24/2014	Success Prom	1,050.48
89	40	1069172	14000517	8/24/2014	Success Prom	-28,750.48
		1069172	14000517	8/24/2014	Success Prom	28,750.48

231. An invoice was received for $28,750.48 from Success Promotions, and sales tax was not charged.

232. The first two lines above comprised the entry to originally record the invoice. The third entry removed the first two, and the invoice paid was the last item: $27,700.00 + $1,050.48 = $28,750.48

233. In the audit sample, an error was recorded on the invoice that was removed from the books and not paid.

234. In addition, the credit was included in the sample base, which mathematically increases the error rate, which violates generally recognized sampling techniques and Texas Tax Code § 111.0042(d) and (e).

235. The Comptroller has alleged, because the credits are in the population, they should remain in the sample, and since the population is lower, because of the credits, the extrapolation is correct.

236. In doing so, the Comptroller fails to consider that invoice credits are not homogenous with invoice charges.

237. Moreover, mathematically the Comptroller's statement is correct only in the event none of the errors are removed by credits somewhere in the population and all the credits relate to taxable items.

238. Unless the original item is either removed or excluded as error, because it is eliminated, the item appears twice as often and, therefore, has a greater probability of being selected.

239. As it appears twice as often, the sample cannot be random as the Comptroller requires and, thus, any extrapolation onto the sample is undermined.

240. Without relief, if the credits are frequent enough, an error rate of greater than 100% is mathematically possible.

241. For example, if the three items selected comprised the entire sample, the error rate would be as follows:

Sel Seq	Exam	Document	Purchase Order	GL Date	Company	Amount in Sample	Error
90	30	1079332	15001687	4/21/2015	Miss Em. Com	2,000.00	2,000.00
30	40	1069172	14000517	8/24/2014	Success Prom	27,700.00	27,700.00
89	40	1069172	14000517	8/24/2014	Success Prom	-28,750.48	
TOTAL						949.52	29,700.00
ERROR RATE							3,128%

242. The total amount in the sample was $949.52 and the error rate in the sample was $29,700.00 resulting in an error rate of 3,128%.

243. Both statistically and using a common-sense approach, an error rate of more than 100% cannot be a correct outcome.

244. Both statistically and using a common-sense approach that any methodology that could result in an error rate in excess of 100% cannot be correct.

245. Since the invoice was effectively credited in the Houston Astros' system and reentered, the $2,000.00 invoice relates to both 8784 and 8786.

246. The Houston Astros has taken the position the credit offsets the invoice entered before it.

247. In an accounting system, a credit would be entered after the original entry and not before it.

248. That is, in the above error, item 8745 applies to 8784 and not 8786.

249. The Houston Astros has not challenged errors that were selected where the entry was not immediately followed by a credit note, (e.g., item 8786).

250. The Houston Astros maintains on identical entries, the order as reflected in the population is the only reasonable way to determine which item is removed by the credit.

251. If the item is not removed (for example, the $2,000 discussed above), the invoice has twice the probability of being selected.

252. The Comptroller alleges that the Houston Astros did not identify the credits (negative items) and the corresponding debit entries.

253. The Houston Astros identified the credits (negative items) and the corresponding debit entries.

254. These are repeated in the file labeled NEGATIVE ITEMS. *See* Petitioner's Hearing Exhibit 4 (Identified Negative Items) which is hereby incorporated by reference as though duly set forth at length herein.

255. The Comptroller indicates that the Houston Astros have not identified which line item is the original debit balance that the credit is used to offset.

256. The Houston Astros also submitted the excel files of the detail the auditor selected the items from so that the corresponding debit and credit entries can be identified. *See* Petitioner's Hearing Exhibit 5 (Audit Negative Items) which is hereby incorporated by reference as though duly set forth at length herein.

257. The Comptroller does not address the Houston Astros' contentions that the inclusion of both debits and the corresponding credit causes the sample to overstate error when extrapolated to the general population and the auditor's implementation of this policy violates the Comptroller's requirement of a random sample.

258. A random sample is a sample in which each item in the population (or in each dollar range) has an equal chance of being selected.

259. Each transaction that has been removed by a negative item that has been re-entered has three times the likelihood of being selected.

260. The Houston Astros' accounting system cannot correct a mistake in posting without removing the item and re-entering it in the system.

261. One invoice, for example, Miss Em for $2,000.00, was initially entered then removed with a credit (second entry) and entered with the proper accounting (third entry).

262. The Comptroller conducted the audit without determining whether transactions in the sample selected the first, second or third entry in the sample.

263. As a result, the one Miss Em invoice has three times the probability of being selected as another data point, which distorts the sample by tripling the chance of an item being selected.

264. To remedy this, the Comptroller must eliminate the first and second instances of the triple entries, and only the last item should be treated as sample error.

265. The inclusion of negative items also fundamentally increases the extrapolation error rate.

266. Including the absolute value of the credit in the population and not allowing an offset results in a higher error sample error inflating the extrapolated error.

267. For example, if each of the Miss Em entries were selected in the audit sample, the error would be counted twice.

268. A sample population that consisted only of invoices with an error eliminated in the manner of the Miss Em example would result in a 200% error rate.

269. Any methodology that could result in an error rate greater than 100% is fundamentally flawed.

270. For example, Stratum D consisted of 125 items sampled. The total of the items selected was $1,350,608.46.

271. There were 118 positive items that totaled $1,504,770.49 and 7 negative items for a total of ($154,162.03) or 11.4% of the total $1,350,608.46.

272. Therefore, the extrapolated error is overstated by at least 11.4%.

273. Accordingly, the auditor's sample is not representative of a homogenous population and is therefore invalid. Tex. Tax Code § 111.0042(d).

274. Further, the sample was not randomly selected, and the extrapolation to the population for which it was used was distorted.

275. The Comptroller alleges that the auditor verified each sample was representative of the general expense population.

276. The sample, however, is not representative of the general expense population.

277. The auditor did not provide any explanation or analysis demonstrating that the sample was representative.

278. The Houston Astros requested, but did not receive, the analysis or analyses the auditor tested for taxable and non-taxable accounts.

279. The Comptroller also alleges that records were provided without identifying the transactions as non-taxable.

280. The Houston Astros' representative explained to the Comptroller, before and after the sample was selected, that there were a disproportionate number of non-taxable items in the population and in the sample.

281. As explained, the account numbers determine the expense type and expense location.

282. Further analysis of vendors would determine whether the expense would be taxable or non-taxable.

283. The Comptroller was made aware prior to the selection of the items in the population.

284. The Comptroller refused to correct the sample to reflect the population.

285. The Houston Astros submitted spreadsheets indicating the number and dollar amounts of accounts that were included in the sample. *See* Petitioner's Hearing Exhibit 6 (Population Stratum B); Petitioner's Hearing Exhibit 7 (Population Stratum C); Petitioner's Hearing Exhibit 8 (Population Stratum D) which are hereby incorporated by reference as though duly set forth at length herein.

286. The percentage of strata B, C and D items that related to out of state, travel and entertainment (mostly out of state), accounts that sales tax are not assessed on (e.g., advertising) and vendors that are not subject to sales tax (e.g., Houston

Police Department officers working as contract labor) were 56%, 58% and 42% respectively.

287. Therefore, the number of items in each stratum were effectively 55, 52 and 73 respectfully, which distorted the results extrapolated from those small samples and falls well short of the 100 required by the Texas Comptroller's Audit Sampling Manual and general principles of sampling. *See* Petitioner's Hearing Exhibit 9 (Non-taxable Items in Population Sample) which is hereby incorporated by reference as though duly set forth at length herein.

288. The inclusion of these non-taxable amounts in such large amounts rendered the population as non-homogenous and therefore rendered the sample non-representative.

289. Furthermore, extrapolating a sample error to a population that consists of non-taxable items distorts the population error.

290. The Houston Astros have identified a number of the anomalies that are indicative of the sample not being representative and these are repeated in sampling errors file.

291. The sample does not meet the standard Chi Squared test for a representative sample.

292. For an extrapolated assessment to be equitable the sample must be randomly taken from a homogeneous population and the sample needs to be

representative of the population. *See* Petitioner's Hearing Exhibit 10 (Exam 30 Chi Squared Test) which is hereby incorporated by reference as though duly set forth at length herein.

293. The population in this sample is not homogeneous and the factors the auditor tested to be representative did not take into taxable/non-taxable transactions and general ledger characteristics.

294. The auditor should have noticed after reviewing the first sample items that the majority were not taxable in Texas and the population was incorrect.

295. The Comptroller's assessment should be reduced for distortions as a result of the failure to follow the Texas Comptroller of Public Accounts Audit Division Sampling Manual.

296. The Sampling Manual provides that "taxed and non-taxed items should be separated whenever possible." Texas Comptroller of Public Accounts Audit Division Sampling Manual, p. 10 ("Define the Population and Stratify into Sub-populations as Needed").

297. The Comptroller's audit included the four categories that would not be subject to Texas sales/use tax as accounts of interest as part of the sample population related to out of state, travel and entertainment (mostly out of state), accounts that sales tax are not assessed on (e.g., advertising) and vendors that are not subject to sales tax (e.g., Houston Police Department officers working as contract labor).

298. For Exam 30, these amounted to $11,754,491.06 out of the sample population of $21,523,044.25 or 55%.

299. These also accounted for 58% of the sample items.

300. In Exam 30, only 48 of the sample items came from accounts that would be subject to sales tax, well below the Comptroller stated requirement of 100.

301. The strata population is skewed towards invoices at the bottom of the strata however errors were disproportionally occurred in the higher quartiles. Disproportionate amount of the negative items was pulled from accounts not subject to Texas sales tax.

302. A Monte Carlo simulation had a median result 42% below the audit result. This causes a distortion in sample errors, and even more in the sample errors that were not representative.

303. For example, on one error for a purchase at an Apple retail store, the invoice was missing.

304. All other Apple products purchased were through CDW, an Apple products vendor, and sales tax was paid.

305. However, since this error is extrapolated over most non-taxable items in Texas the impact is overstated.

306. The audit included out-of-state accounts that captured expenses exclusively for the spring training in Florida; minor league teams in New York,

Iowa, California, Tennessee, Kentucky, Arizona, and Oklahoma; and a baseball academy in the Dominican Republic.

307. The audit included travel & entertainment accounts that were incurred almost entirely outside of the State of Texas.

308. The majority of these relate to the team travelling to play road games outside Texas.

309. Only one of the twenty-nine teams the Houston Astros play is in Texas. In addition, the only items that would be taxable in Texas would be hotel stays in Arlington, Texas which would be subject to hotel occupancy tax and not sales tax. The players are given a meal money allowance to cover their meal expenses.

310. The audit included contract labor accounts that accounted for player appearance fees, first aid nurses at the stadium, labor recharges from affiliated companies, fire marshals from the City of Houston, disc jockey's, announcers, and other personnel.

311. The Comptroller audit included expense accounts such as advertising expenses which are not subject to Texas sales tax.

312. The Comptroller included vendors that would not be subject to sales tax such as employees for player appearances, payments to a university for a minor league player's tuition, player meal per diems, contributions to charitable

organizations, mileage amounts paid to employees for personal use of their cars, and other items.

313. Substantially all of these transactions are nontaxable, and these categories should not have been commingled with potentially-taxable transactions.

314. The Comptroller audit sampling resulted in a number of irregular results including non-taxable contract labor being disproportionately under sampled (existing 7.3% in the total population but appearing in the sample only 4.8%); non-taxable advertising expense being disproportionately under sampled (existing 1.9% in the total population but not sampled at all); however taxable bats were disproportionately oversampled (existing 1.9% in the total population but sampled 4%); and taxable photography expenses were disproportionately oversampled (existing 0.2% in the total population but sampled 1.25).

315. These distortions alone resulted in an overstatement of the extrapolated sales tax assessment of $ 25,830.63 in Exam 30. These alone caused that Exam assessment to be overstated by 49%.

E. NONTAXABLE AND EXEMPT ITEMS

316. Paragraphs 1 through 315 are re-alleged and incorporated by reference.

317. The Comptroller's assessment should be reduced for tax assessed on nontaxable items.

318. For example, security services purchased are not taxable security services. Security services are taxable under Tex. Tax Code § 151.0101.

319. Taxable "[s]ecurity service" is defined as "service for which a license is required under Section 1702.101 or 1702.102, Occupations Code." Tex. Tax Code § 151.0075.

320. 34 Tex. Admin. Code § §3.333(a) further defines a taxable security service as any services for which a license is required under Texas Occupations Code §§ 1702.101 or 1702.102.

321. The firms that provide the security services to the Houston Astros' fans are governed by the Federal SAFETY Act requirements.

322. Therefore, since the federal requirement pre-empts the state requirement these services are non-taxable.

323. Occupations Code § 1702.101 pertains to investigation company license and 1702.102 governs security service contractor license.

324. The services purchased by the Houston Astros must meet the federal SAFETY Act standards.

325. Comptroller Letter 200802165L (Feb. 20, 2008) addressed the issue of services governed by federal regulations and concluded that services mandated by federal regulation are exempt from Texas sales and use tax.

326. The services purchased by the Houston Astros are also nontaxable to the extent they are provided by persons who have full-time employment as peace officers. 34 Tex. Admin. Code § 3.333(i)(3).

327. The Houston Astros purchase other security services, including but not limited to canine detection services, which do not meet the requirement of a taxable service, because the dogs and dog handlers are governed by the requirements of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives and not Texas Occupations Codes § 1702.101 or 1702.102.

These security services are nontaxable under Comptroller Letter 200802165L (Feb. 20, 2008).

328. The Comptroller's assessment should have been reduced for tax assessed on taxable items for which either the Houston Astros or their vendors paid tax (either directly or upon audit).

329. The Comptroller's assessment should have been reduced for tax charged on items that the Houston Astros returned to their vendors for credit.

330. The Comptroller's assessment should have been reduced for tax charged on items that the Houston Astros purchased for rental or resale or were otherwise exempt from the Texas sales and use tax.

331. The Comptroller's assessment should have been reduced for tax charged on items for which other taxpayers have paid tax, either by self-assessment or upon audit.

F. ADMINISTRATIVE PROCEDURE ACT RULE CHALLENGE

332. Paragraphs 1 through 331 are re-alleged and incorporated by reference.

333. Under Texas Government Code § 2001.038 (the Administrative Procedure Act), the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.

334. The Comptroller may not interpret terms in a manner contrary to the tax code.

335. The Comptroller has adopted administrative rules which impermissibly expand statutory terms imposing tax and impermissibly restrict statutory terms exempting transactions from tax.

336. For example, 34 Tex. Admin. Code §§ 3.285 and 3.298 impermissibly restrict the circumstances in which services qualify for the resale exemption.

337. As another example, 34 Tex. Admin. Code § 3.301 impermissibly restricts the circumstances in which promotional items may be purchased for resale.

338. As a further example, if 34 Tex. Admin. Code § 3.298 applies, the Houston Astros, it is invalid, because it conflicts with the resale statute and *Rylander v. San Antonio SMSA Ltd. Partnership*, 11 S.W.3d 484 (Tex. App.—Austin 2000, no pet.)

339. As a result, the Comptroller's rules and their threatened application should be declared invalid, because it seeks to tax more than the statute allows and attempts to deny the resale exemption when the statute allows it, impairing, or threatening to interfere with or impair the legal rights of the Houston Astros.

340. The rules and their threatened application contravene specific statutory language; runs counter to the general objectives of the statute; or imposes additional burdens, conditions, or restrictions in excess of or inconsistent with relevant statutory provisions. *See Badger Tavern, L.P. v. Hegar*, No. 03-18-00291-CY,2018 WL 4322383, at *4 (Tex. App.-Austin Sept. 1l, 2018, pet. denied) (mem. op.).

341. The rules and their threatened application also violate the Houston Astros' legal right to pay only the tax due under the law and deprives her of her property interests by taxing in excess of what is statutorily allowed.

G. WAIVER OF INTEREST

342. Paragraphs 1 through 341 are re-alleged and incorporated by reference.

343. The Comptroller's Administrative Hearings Section agreed to waive interest for the period March 16, 2020 to November 20, 2020 but did not waive

interest for other periods when interest waiver is warranted, because of the Comptroller's delays.

344. The Houston Astros filed their Petition for Redetermination on May 10, 2018.

345. The Houston Astros made several requests for the Comptroller's Administrative Hearings Section to issue its Position Letter.

346. The Administrative Hearings Section assigned this hearing to a different hearing's attorney, further delaying the Administrative Hearings Section issuing the Position Letter.

347. The Houston Astros had no control over the Administrative Hearings Section's delays and has sought to expedite this matter at every turn.

348. The Houston Astros relied on advice from a Comptroller auditor during a prior audit to the Houston Astros' detriment.

349. As a result, all interest should be waived.

H. ADDITIONAL GROUNDS

350. Paragraphs 1 through 349 are re-alleged and incorporated by reference.

351. The Houston Astros incorporate by reference all grounds in the entire administrative file in Comptroller Hearing No. 116,111 including but not limited to the original pleadings, amended pleadings, exhibits correspondence, motions,

objections, evidence, orders, and any other documents filed in that proceeding or exchanged between the parties.

352. The Houston Astros incorporate by reference all grounds in the entire administrative file in Comptroller Hearing No. 117,142 including but not limited to the original pleadings, amended pleadings, exhibits correspondence, motions, objections, evidence, orders, and any other documents filed in that proceeding or exchanged between the parties.

VII. PRAYER

WHEREFORE, Plaintiff requests that Defendants be cited to appear and answer herein, and that on final hearing, Plaintiff has final judgment for (a) a refund of $470,932.26 in sales and use tax paid under protests, plus (b) audit penalty and interest as authorized by Texas Tax Code § 112.155, (c) statutory interest authorized by Tex. Tax Code § 112.155, (d) costs of court, and (e) such other relief to which the Court determines Plaintiff is entitled.

Respectfully submitted,

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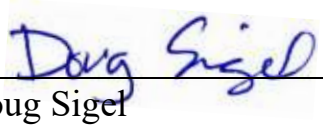
By: 
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April 29, 2022

Via Hand Delivery
Mr. Glenn Hegar
Comptroller of Public Accounts
Attn: Audit Processing
1700 N. Congress, Suite 300
Stephen F. Austin Building
Austin, Texas 78701

Re: Protest Letter for the Houston Astros, LLC
Taxpayer No. 17420511572
Sales and Use Tax Period July 1, 2012 to December 31, 2015

Dear Comptroller Hegar:

Houston Astros, LLC (the "Houston Astros") file this protest letter and accompanying payment as a prerequisite to filing suit in the District Court of Travis County, Texas. This letter sets forth the grounds that the Houston Astros intend to raise in their lawsuit to recover the contested payment.

The Houston Astros enclose their protest payment in the amount of $470,932.26. The Houston Astros intend for the payment to cover the assessment stated in the Comptroller's "Texas Notification of Hearing Results" (the "Notice") dated March 14, 2022 (See **Exhibit A**). This Notice assesses Texas sales and use tax, plus interest, for the tax period of July 1, 2012 through December 31, 2015.

The Houston Astros protest the entire assessment as set forth in the Notice, plus additional interest that has continued to accrue through April 29, 2022. The Houston Astros seek recovery of the entire payment amount of $470,932.26 (the "Protest Payment"). The Houston Astros make the payment under protest and with full reservation of their legal rights to seek recovery of this payment and all subsequent payments, plus statutory interest accruing thereon, in addition to any other legal or equitable relief allowed by law.

Received
APR 29 2022
Audit Processing
Comptroller of Public Accounts

FACTS

1. The Houston Astros are an American professional baseball team organized as a limited liability company and based in Houston, Texas. The Houston Astros compete in Major League Baseball (MLB) as a member club of the American League (AL) West division.

2. The Houston Astros sell tickets to patrons who want the experiences and benefits of attending the Houston Astros' home games. The Houston Astros play their home games at Minute Maid Park, also located in Houston, Texas.

3. Federal laws and regulations provide security requirements that apply to stadiums, including Minute Maid Park. For example, the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) recognizes that stadiums are high-profile targets of terrorist attacks because of the possibility that large-scale casualties may be inflicted in an area teeming with people. The SAFETY Act is a part of the Homeland Security Act of 2002 and provides financial indemnity in case of liability arising from a terrorist attack for entities that meet heightened security protocol standards as approved by the Office of SAFETY Act Implementation.

4. The purpose of the act is to ensure that the threat of liability does not deter potential manufacturers or sellers of effective anti-terrorism technologies from developing and commercializing technologies that could save lives in the prevention or event of terrorist attacks.

5. Patrons who attend sporting events, such as the Houston Astros' home games, purchase tickets to the events with the reasonable expectation that the sports teams, such as the Houston Astros, will provide them with sufficient security services designed to keep them safe and free from terrorist attacks.

6. Security services are essential to providing the patrons with the benefits and experiences they pay for when they purchase tickets to the Houston Astros' games. The Houston Astros could not provide these benefits and experiences without providing security services.

7. Sports teams, such as the Houston Astros, have both a statutory and a contractual duty to provide their patrons with sufficient security services designed to minimize the harm that would arise from terrorist attacks, and otherwise keep their patrons safe and free from harm.

8. The Houston Astros purchase security services for the purpose of meeting the reasonable expectations of patrons, complying with legal and contractual duties, and to keep them safe and free from harm, including terrorist attacks. The Houston Astros have paid Texas sales tax on all of the security services they purchased.

9. Patrons attending sporting events purchase tickets to the events with the reasonable expectation that the sports teams, such as the Houston Astros, will provide them with clean seats and surroundings that are free of trash and debris so that they may view and participate in baseball events in a sanitary and healthy environment.

10. Cleaning services are essential to providing the patrons with the benefits and experiences they pay for when they purchase tickets to the Houston Astros' games. The Houston Astros could not provide these benefits and experiences without providing cleaning services.

11. Sports teams, such as the Houston Astros, have a contractual duty to provide their patrons with clean seats and surroundings that are free of trash and debris so that they may view and participate in baseball events in a sanitary and healthy environment.

12. The Houston Astros purchase cleaning services for the purpose of meeting the reasonable expectations of patrons, complying with contractual duties and to provide them with clean seats and surroundings that are free of trash and debris so that they may view and participate in baseball events in a sanitary and healthy environment. The Houston Astros have paid Texas sales tax on some or all of the cleaning services they purchased.

13. Patrons attending sporting events purchase tickets to the events with the reasonable expectation that the sports teams such as the Houston Astros will, as part of the event experience, provide T-shirts, memorabilia and other items for no charge beyond the payments already made for purchase of the tickets. The Houston Astros label these "giveaways." The patrons expect to wear or use the "giveaway" items to enhance their experiences at the games.

14. In order to induce persons to purchase tickets, the Houston Astros' website advertises to their patrons and to the public at-large their intention to provide, from time-to-time, "giveaways."

15. The Houston Astros purchase T-shirts, memorabilia and other items, all of which the Houston Astros provide to patrons for no additional charge beyond the payments the patrons have already made for tickets to the baseball event. The patrons wear or use the "giveaway" items to enhance their experiences at the games.

16. The Houston Astros transfer care, custody and control of every "giveaway" item to patrons who attend the game. The Houston Astros have paid Texas sales tax on some or all of the T-shirts, memorabilia, and similar other items they purchased.

17. Patrons purchase tickets for entry into the Minute Maid Park for the purpose of attending Houston Astros baseball games and receiving the benefits included in the purchase price of the tickets.

18. Each Houston Astros ticket represents a license granted by the Houston Astros to attend the baseball game at Minute Maid Park (Ballpark) identified on the applicable ticket.

19. One benefit included in the ticket price is the provision of security services sufficient to prevent the patrons from being harmed from persons who may choose the stadium as a location for terrorist attacks that are designed to inflict substantial harm on large numbers of persons.

20. Another benefit included in the ticket price is the provision of cleaning services that are sufficient to allow the patron to attend the event in clean seats and surroundings free of trash and debris so that the patron may view and participate in baseball events in a sanitary and healthy environment.

21. Another benefit included in the ticket price is the right to participate in "giveaways" and "promotions," in which a patron receives or has a chance to receive T-shirts, memorabilia, and other items for no charge beyond the payment already made for purchase of the tickets. The patrons wear or use the "giveaway" items to enhance their experiences at the games.

22. The purchase price of the tickets also includes the right to receive items advertised as "promotional" or "giveaway." This includes, for example, clothing such as Houston Astros T-shirts, Houston Astros ball caps, and similar items.

23. The Houston Astros advertise the safety, cleanliness and "promotional" or "giveaway" items prior to or at the time it sells the tickets to patrons. Accordingly, patrons are aware of their ticket price includes an implied component for these services and benefits at the time they purchase tickets.

24. The purchase price of the tickets includes Texas sales tax. The Texas sales tax is not separately stated on the face of the tickets. Instead, it is imbedded in the ticket price. The face of the tickets states that the ticket price includes the sales tax.

25. The Houston Astros have purchased and paid Texas sales and use tax on other items that the Houston Astros intended to transfer to their patrons in connection with the patrons' purchases of tickets to Houston Astros events.

26. Minute Maid Park contains features and areas beyond that required for the Houston Astros games. Minute Maid Park includes the Union Station Lobby and adjacent meeting rooms. The Union Station Lobby was constructed in 1911 to serve Houston's rail customers. It has been restored to its original condition and it, along with other adjacent rooms, serves as a meeting place for a wide variety of private events.

27. The Houston Astros offer, for a rental charge, the use of rooms or meeting space in Union Square to persons sponsoring private events. The Houston Astros do not provide catering services to private events. An unrelated, third-party vendor provides catering services, equipment set-up and operating services, as well as other property set-up for sponsored, private events. The Houston Astros do not purchase and rebill the third-party vendor's services.

28. Sponsors of private events often rent space in Union Station for their events. The sponsors often require audio/video ("A/V") services or equipment for their private events. Upon request, the Houston Astros will procure the services or rent the audio/video equipment from third-party A/V providers on behalf of the sponsors.

29. Third-party A/V providers deliver the A/V equipment to Union Station, set it up, test it, and either transfer control of it to the private event sponsors or operate it in order to provide A/V services to the private event sponsors. The third-party providers may transfer operational control of one or more specific pieces of A/V equipment (for example remote controls) to the private event sponsors who may use it in connection with the private event. Operational control of the A/V equipment is never transferred to the Houston Astros.

30. The Houston Astros issue valid resale certificates to the third-party A/V service and equipment providers.

31. The third-party A/V providers accept the resale certificates in lieu of the sales tax otherwise due on the bare rental of the third-party audio/video equipment. The third-party A/V equipment providers send to the Houston Astros their invoices containing their charges.

32. Upon receipt, the Houston Astros pay the third-party A/V equipment providers' invoices, mark-up the charges as reflected on those invoices, and rebill the private event sponsors for the marked-up -charges plus sales tax.

33. The Houston Astros collect the amounts charged and related sales tax from the sponsors. The Houston Astros timely remit the tax collected to the Texas Comptroller.

34. The Houston Astros purchased and paid Texas sales and use tax on items that were not subject to the Texas sales and use tax.

35. The Houston Astros purchased items that they returned to their vendors for credit.

36. The Houston Astros purchased and paid Texas sales and use tax on items that were exempt from the Texas sales and use tax.

37. The Houston Astros purchased and paid Texas sales and use tax on items for which other taxpayers have paid Texas sales and use tax, either by self-assessment or upon audit.

38. The Comptroller conducted a compliance audit of the Houston Astros' Texas sales and use tax reporting for the period of July 1, 2012 through December 31, 2015 period ("the Audit Period").

39. The Comptroller's audit treated non-taxable items as taxable.

40. The Comptroller's audit subjected exempt transactions to sales tax.

41. The Comptroller's audit failed to consider that tax was paid by the Houston Astros or others on transactions the audit scheduled as taxable.

42. The Comptroller conducted his audit using sampling techniques to establish an additional tax liability. The Comptroller's sample did not reflect the normal conditions under which the Houston Astros' business operated during the audit period. The sample included transactions that were not representative of the Houston Astros' business operations. The sampling methods were not in accordance with generally recognized sampling techniques.

43. The Comptroller's audit did not stratify the population into separate taxable and non-taxable accounts sub-populations as required in the Texas Comptroller of Public Accounts Audit Division Sampling Manual and requested by the Houston Astros.

44. The Comptroller's audit sampled disproportionately from taxable and non-taxable accounts resulting in a sample that was not representative.

45. The Comptroller's audit did not follow the Texas Comptroller of Public Accounts Audit Division Sampling Manual, including but not limited to failing to properly test whether the sample was representative of the population.

46. On May 10, 2018, the Houston Astros filed a Petition for Redetermination and Statement of Grounds challenging the assessment for the reasons set forth below.

47. On February 14, 2022, the Honorable Administrative Law Judge Kathy Pickup issued a Proposal for Decision affirming the assessment.

48. On March 7, 2022, the Comptroller issued a Comptroller's Decision adopting the Proposal for Decision with minor changes and affirming the assessment.

49. The Comptroller assessed Texas sales and use tax and interest of $470,932.26.

50. The Houston Astros owe none of the additional taxes and interest assessed by the Comptroller. The Comptroller's assessment for the period of July 1, 2012 through December 31, 2015 is in error for the reasons stated below.

51. The Houston Astros incorporate by reference all facts in the entire administrative file in Comptroller Hearing No. 116,111, including but not limited to the original pleadings, amended pleadings, exhibits correspondence, motions, objections, evidence, orders, and any other documents filed in this proceeding or exchanged between the parties.

52. The Houston Astros incorporate by reference all facts in the entire administrative file in Comptroller Hearing No. 117,142 including but not limited to the original pleadings, amended pleadings, exhibits correspondence, motions, objections, evidence, orders, and any other documents filed in that proceeding or exchanged between the parties.

GROUNDS

GROUND I: TAXABLE ITEMS RESOLD OR TRANSFERRED TO PATRONS

53. The assessment should be reduced for tax assessed on the charges for taxable items that the Houston Astros purchased for resale. Taxable items include tangible, personal property and taxable services.

54. Texas Tax Code §151.006(a) defines a "Sale for Resale" to include, in relevant part:

> (1) tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it with or as a taxable item as defined by Section 151.010 in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service;
>
> (2) tangible personal property to a purchaser for the sole purpose of the purchaser's leasing or renting it in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business to another person, but not if incidental to the leasing or renting of real estate;
>
> (3) tangible personal property to a purchaser who acquires the property for the purpose of transferring it in the United States of America or a possession or territory of the United States of America or in the United Mexican States as an integral part of a taxable service;
>
> (4) a taxable service performed on tangible personal property that is held for sale

by the purchaser of the taxable service;

55. Taxable services include, for example, amusement services. See Tex. Tax Code §§151.0101 and 151.0028.

56. Comptroller Rule 3.298(f)(1) expressly provides that the resale exemption applies when tangible, personal property is purchased with the intent to transfer care, custody and control of it to a customer.

57. The resale exemption applies, for example, to promotional "giveaway" items and souvenirs that the Houston Astros purchase for the purpose of transferring to customers as part of a taxable amusement service. There is no requirement under the Comptroller's rule that the provider of a taxable service transfer property to its customers as an integral part of that service. Comptroller Rule 3.291(f)(1). The Astros, however, transfer all promotional "giveaway" items and souvenirs to their customers as an integral part of a taxable service.

58. The sole reason that the Houston Astros purchase promotional "giveaway" items and souvenirs is to transfer them to customers as an integral part of a taxable amusement service.

59. The Comptroller contends, in error, that the Houston Astros purchase these items to give away as gifts. The price the Houston Astros charge for tickets to its ball games, however, includes a charge for promotional "giveaway" items and souvenirs that are transferred to fans.

60. Texas Supreme Court precedent belies the notion that the purchaser of an amusement service must pay separately for items they receive without providing additional consideration. *Combs v. Roark Amusement & Vending*, 422 S.W.3d 632 (Tex. 2013) (finding plus toys "won" through crane machines were purchased for resale to customers through taxable amusement service). The Third Court of Appeals likewise found that hotel-room consumables may be purchased for resale to customers in connection a taxable hotel-occupancy service. *DTWC Corp. v. Combs*, 400 S.W.3d 149 (Tex. App.—Austin 2013, no pet.).

61. The Comptroller relies on Comptroller Hearing 29,388 (1993) as a basis to deny the resale exemption for promotional "giveaways" and souvenirs. This 1993 hearing decision is in conflict with the Texas Supreme Court's 2013 decision in *Roark Amusement & Vending* decision and the Third Court of Appeals' 2013 decision in *DTWC Corp.*

62. Comptroller Hearing 29,388 (1993) based its denial of the refund claim on the belief that "the fact that the Houston Astros may have taken the overall cost of give-aways into account in ticket pricing does not equate to the sale of the give-away items." The *DTWC Corp.* decision, however, found that including the cost of transferred items in the ticket pricing

constituted consideration for the hotel consumables that were "given away," and relied on this finding to determine that the resale exemption applied. *DTWC Corp.*, 400 S.W.3d at 154.

63. Comptroller Rule 3.298(f)(1) provides that "[s]ellers of service may issue a resale certificate in lieu of tax to suppliers of tangible personal property only if care, custody, and control of the property is transferred to the client." The Houston Astros transfer care, custody and control of all promotional "giveaway" and souvenir items to their customers.

64. Comptroller Rule 3.298(f)(2) expressly provides that the resale exemption applies when taxable services are purchased with the intent to transfer them as an integral part of a taxable service.

65. Comptroller Rule 3.298(f)(2) further provides "[a] service will be considered an integral part of a taxable service if the service purchased is essential to the performance of the taxable service, and without which the service could not be rendered."

66. The Houston Astros purchase security services, cleaning services and other services as an essential part of their performance of a taxable amusement service, without which the service could not be rendered.

67. The resale exemption applies, for example, to the purchase of security services. The Houston Astros purchase the security services for the purpose of transferring them as an integral part of a taxable amusement service.

68. The price the Houston Astros charge to their customers includes the promotional "giveaway" items and souvenirs the Houston Astros transfer to their customers.

69. The price of the promotional "giveaway" items and souvenirs is a factor the Houston Astros use in setting the ticket price, just as it was a factor that DTWC Corporation used in setting its lodging fee. The patron pays a price for a package that includes the right to attend the game and the souvenir item.

70. As a result, the resale exemption applies to promotional "giveaway" items and souvenirs, including but not limited to T-shirts, memorabilia and other items that the Houston Astros transfer to their patrons.

71. Patrons cannot receive these items without paying for a ticket to attend the ball game and receive the items. These are unique items that are not available for sale except as a part of a combination admission/souvenir purchase.

72. The Houston Astros' customers receive care, custody, and control of the items. They leave with the items in their possession and thereafter hold complete rights of possession and ownership over them.

73. The Comptroller alleges that the Houston Astros' transfer of souvenirs to their customers is a "gift." The Houston Astros' transfer to their customers souvenirs is not a gift. A gift occurs by transfer without consideration and out of detached and disinterested generosity.

74. The Houston Astros do not transfer souvenirs without receiving consideration. The Houston Astros do not transfer the souvenirs out of detached and disinterested generosity.

75. The Houston Astros transfer the souvenirs because they are contractually obligated to do so. The Houston Astros' website confirms the contractual obligation. See ASTROS.COM, GIVEAWAY POLICY, mlb.com/astros/tickets/promotions (last visited Apr. 27, 2022). Because the ticket holders have purchased the right to receive the souvenirs, they are not gifts, and they qualify for the integral transfer exemption.

76. The souvenirs are unique and are not readily available and thus represent a valuable part of the combined package for admission and tangible personal property. The Houston Astros' transfer of souvenirs to their customers has all the incidents of a sale. The Houston Astros advertise the bobbleheads or other souvenirs as available with the purchase of an admission ticket. This creates a contractual right by the ticketholder to receive a unique souvenir. The patron purchasing the admission knows that this is part of the package they will receive for the taxable admission ticket. The Houston Astros transfer all incidents of ownership, including title, possession, care, custody and control of the souvenir to their customers for consideration.

77. There have been instances of the souvenirs appearing on secondary sales outlets such as eBay within minutes of being purchased from the Houston Astros. There have also been instances where the patron purchased the combined admission/souvenir package and did not attend the game. In that instance, the price paid was exclusively for the souvenir.

78. The Houston Astros receive consideration for these items when their customers pay for a ticket to attend the ball game and receive the items.

79. The Comptroller alleges that the ticket price is the same regardless of whether a souvenir is transferred or not. This statement is not true. The Houston Astros use a dynamic pricing model that adjusts the price of a ticket based on a number of factors including whether an item of tangible personal property is available to be transferred the patron. The souvenirs are offered at less desirable games where one part of the ticket accounts for the right to attend the

game and the other part accounts for the right to the souvenir and other tangible personal property or taxable services transferred to the customer.

80. The resale exemption applies, for example, to the purchase of cleaning services. The Houston Astros purchase the cleaning services for the purpose of transferring them as an integral part of a taxable amusement service.

81. The resale exemption applies, for example, to the purchase of items for "giveaway" because the Houston Astros purchased the items for the purpose of transferring care, custody and control them with the taxable amusement service.

82. The resale exemption applies to the purchase of other items because the Houston Astros either purchased tangible, personal property for the purpose of transferring care, custody and control of it to a customer or purchased services essential to the performance of a taxable service, and without which the taxable service could not be rendered.

83. In each and every instance, the Houston Astros transfer care, custody and control of the tangible, personal property for which the resale exemption is sought. See Tex. Tax Code § 151.302.

84. The Comptroller alleges that the Houston Astros failed to provide resale certificates to the auditor in support of these transactions, but the Houston Astros had no legal duty to retain copies of certificates that they, the Astros, had issued to their sellers. The Comptroller, by rule, imposes the certificate recordkeeping duty on the **sellers** of taxable items receiving certificates, not on the customers who issue those certificates. The Astros were customers—purchasers of these exempt items—not the seller. As the purchaser claiming the resale exemption, the Houston Astros' vendors and suppliers were responsible for collecting resale certificates from the Houston Astros; the Houston Astros were simply not responsible for retaining copies of resale certificates they had issued to their sellers. Comptroller Rule 3.285(c)(3)(C) ("The **seller** should obtain a properly executed resale certificate . . . . the **seller** has 60 days from the date written notice is received by the **seller** . . .") (emphasis added).

85. The Comptroller alleges that the Houston Astros have not "identified transactions" and "provided its sales invoices related to those items, which are required to verify [the Houston Astros'] claim." The Houston Astros resell each of the categories of taxable items stated herein to customers who purchase tickets to attend the baseball games. The auditor reviewed the transactions between the Houston Astros and their customers in detail in connection with the Comptroller's audit. Therefore, the documentation supporting this position has been previously provided to the Comptroller. Nevertheless, the Houston Astros hereby make available their books and records for re-examination by the Comptroller on the transactions at issue. Due to volume, the Houston Astros previously submitted a few sample copies of the

Houston Astros' purchase and sales invoices. See Petitioner's Hearing Exhibit 1 (Astros Ticket); Petitioner's Hearing Exhibit 2 (DrillingInfo Reception Invoice); and Petitioner's Hearing Exhibit 3 (Staging Solutions Invoice) which are hereby incorporated by reference as though duly set forth at length herein.

86. It is common knowledge that the Houston Astros are a baseball team and sell tickets to their patrons. Presenting to the Comptroller copies of each ticket given to each patron would be impractical and would serve no legitimate purpose.

87. The Comptroller misconstrues the Houston Astros' contention with respect to cleaning services. The Houston Astros do not allege that cleaning services become nontaxable to the Houston Astros because of customers' expectations of a clean environment. The Houston Astros contend that they purchase otherwise taxable cleaning services with the intent to resell them to their customers.

88. The fact that customers purchase these cleaning services as part of the ticket price is demonstrated by the fact that customers would not pay to attend a ball game if the seats and aisles were filthy. When customers purchase the admission ticket, they are also purchasing cleaning services for the areas they pass through, the areas they see, and the area from which they watch the ball game.

89. Each customer has the contractual right to sit in a clean seat. And further, each has the contractual right to clean surrounding areas, free of trash and debris so that they may view and participate in baseball events and promotional giveaways in a sanitary and healthy environment.

90. The Houston Astros are contractually obligated to transfer these cleaning services to their customers.

91. The cleaning services the Houston Astros purchase are transferred as an integral part of the taxable service the Houston Astros provide to their customers.

92. Customers would not purchase tickets to sit in leftover filth, spilled drinks, and rotting food from previous games, just as they would not purchase tickets to sit in clean seats if there was no baseball game in front of them to watch.

93. If the Houston Astros did not purchase cleaning services to transfer to their customers, the City of Houston would not allow the Houston Astros to conduct sporting events in Minute Maid Park.

94. A service is "integral" to the performance of a taxable service if it is a service "without which the taxable service could not be rendered." Comptroller Rule 3.298(f).

95. As a result, the Houston Astros purchase cleaning services to transfer them as an integral part of performing a taxable amusement service for customers.

96. The Comptroller misconstrues the Houston Astros' contention with respect to security services. The Houston Astros do not allege that security services become nontaxable to the Houston Astros because of customers' expectations of a safe environment. The Houston Astros contend that they purchase otherwise taxable security services with the intent to resell them to their customers.

97. The fact that customers purchase these security services as part of the ticket price is demonstrated by the fact that customers would not pay to attend a ball game if the stadium was subject to rampant crime or terrorist attacks. Moreover, without these services, the Astros could not play games before their fans. When customers purchase the admission ticket, they are also purchasing security services for the areas they pass through, the area from which they watch the professional sports entertainment event, and the entirety of the stadium grounds.

98. The customer has both the contractual right and reasonable expectation of a safe environment that is free of crime and protected from terrorist attacks so that they may view and participate in baseball events and promotional giveaways in a safe environment.

99. The Houston Astros are contractually obligated to transfer these security services to their customers.

100. The security services the Houston Astros purchase are transferred as an integral part of the taxable service the Houston Astros provide to their customers.

101. Customers would not purchase tickets to sit in a stadium if they or their family members might be assaulted, robbed, or killed in a terrorist attack, just as they would not purchase tickets to sit in safe seats in a safe stadium if there was no baseball game in front of them to watch.

102. If the Houston Astros did not purchase security services to transfer to their customers, the City of Houston would not allow the Houston Astros to conduct sporting events in Minute Maid Park.

103. Major League Baseball will not allow a game to be played without the requisite Federally mandated SAFETY Act protocol (see **GROUND II: FEDERAL PREEMPTION**, below).

104. Security services are essential to providing the patrons with the benefits and experiences they pay for when they purchase tickets to the Houston Astros' home games. The Houston Astros could not provide these benefits and experiences without providing security

services. Sports teams have both a statutory and contractual duty to provide their patrons with sufficient security services designed to minimize harm that would arise from terrorist attacks, and otherwise keep their patrons safe and free from harm.

105. These services are transferred to the fans. Without fans in attendance, the Houston Astros would not purchase these security services simply to provide them to their own employees.

106. A service is "integral" to the performance of a taxable service if it is a service "without which the taxable service could not be rendered." Comptroller Rule 3.298(f).

107. As a result, the Houston Astros purchase security services to transfer them as an integral part of performing a taxable amusement service for customers.

GROUND II: FEDERAL PREEMPTION

108. The assessment should be reduced for tax assessed on the charges for which federal law or federal regulation preempts state taxation.

109. The federal preemption rule applies, for example, to the purchase of security services. The security requirements for Minute Maid Park are subject to federal law and federal regulation. Therefore, the charges for security services purchased by the Houston Astros are not subject to the Texas sales and use tax.

110. The Houston Astros—and all other professional baseball teams—are prohibited from playing professional baseball games in front of fans without security services that meet federal Support Anti-Terrorism by Fostering Effective Technologies Act (the SAFETY Act) protocols.

111. Federal laws and regulations provide security requirements that apply to stadiums, including Minute Maid Park. Specifically, the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) recognizes that stadiums are high-profile targets of terrorist attacks because of the possibility that large-scale casualties may be inflicted in an area teeming with people. The SAFETY Act is a part of the Homeland Security Act of 2002 and provides extensive federal laws and regulations to prevent terrorist attacks and requires certain entities, such as the Houston Astros, to meet heightened security protocol standards.

112. Patrons who attend sporting events, such as the Houston Astros' home games, purchase tickets to the events with reasonable expectation that the sports teams, such as the Houston Astros, will provide them with sufficient security designed to keep them safe and free from terrorist attack.

113. The Comptroller cites Comptroller Letter 9510L1373F03 (October 10, 1995) for its statement that security services are not integral to the Houston Astros' amusement service.

114. Comptroller Letter 9510L1373F03 (October 10, 1995) fails to recognize that major sporting events are governed by federal law and subject to potential threat from terrorist attack. This letter claims that "people could attend and watch a sporting event or concert even when there is no security service." *Id.* This statement may have been true when it was made, but it is not true for the Houston Astros during the audit period. Neither MLB, the City of Houston nor the federal government allow a major league game to be played without security.

115. Comptroller Letter 9510L1373F03 (October 10, 1995) was issued six years before the devastating terrorist attacks of September 11, 2001 and does not reflect the federal laws and regulations applicable to a Major League baseball game during the period of the audit (July 2012 through December 2015).

116. Homeland Security, in conjunction with Major League Baseball, has mandated certain security requirements for a MLB game to be played in front fans. If these requirements are not met, the game will not be played in front of fans. MLB has consistently held that fan safety is paramount.

117. The day after the May 22, 2017 bombing at an Ariana Grande concert in Manchester (UK), Rob Manfred, the MLB Commissioner stated: "security is our utmost priority . . . there have been a lot of changes in the ballparks in terms of magnetometers, ballpark access, number of security people and we do believe we're providing a safe environment for our fans." This statement demonstrates that security services have only become more essential in recent years.

118. MLB has been quick to cancel games if fan safety cannot be assured. These cancellations include fans being unable to attend due to local civil unrest (April 28, 2015 in Baltimore) or the entire 2020 baseball season as a result COVID-19 concerns.

119. The statement "people could attend and watch a sporting event or concert even when there is no security service" may have been true in 1995, however a MLB game could not be conducted during the audit period without SAFETY Act compliant security. Comptroller Letter 9510L1373F03 (October 10, 1995).

120. Therefore, security services meet the requires of an essential service as defined by Comptroller Rule 3.298(f)(2). This includes, but is not limited to, canine detection services governed by federal law and other security services mandated by the federal SAFETY Act and other federal laws and regulations.

GROUND III: ITEMS TRANSFERRED TO CUSTOMERS

121. The assessment should be reduced for tax assessed on charges for nontaxable services as well as on taxable items that the Houston Astros purchased for resale or rental. Taxable items include tangible, personal property and taxable services.

122. Texas Tax Code §151.006(a) defines a "Sale for Resale" to include, in relevant part:

> (1) tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it with or as a taxable item as defined by Section 151.010 in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service;
>
> (2) tangible personal property to a purchaser for the sole purpose of the purchaser's leasing or renting it in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business to another person, but not if incidental to the leasing or renting of real estate;
>
> (3) tangible personal property to a purchaser who acquires the property for the purpose of transferring it in the United States of America or a possession or territory of the United States of America or in the United Mexican States as an integral part of a taxable service;
>
> (4) a taxable service performed on tangible personal property that is held for sale by the purchaser of the taxable service; . . .

123. The resale exemption applies, for example, to the Houston Astros' purchase of A/V services and/or rental of A/V equipment for private event sponsors. The Houston Astros purchase the A/V services and/or rent the A/V equipment for private event sponsors to use in connection with the events they sponsor at Union Station.

124. The Houston Astros do not operate or control the A/V equipment. The A/V equipment is controlled and operated by the A/V providers or private event sponsors. The Houston Astros never sell food or provide catering services to the private events.

125. The following charges are not subject to sales tax because they represent nontaxable services or items purchased for resale that were procured at the request of the customer and transferred to the customer.

Item	Exam	Vendor	Amount
3768J-153	30	Acme Party Services	$ 1,204.70
3768J-157	30	Bleisch Production Services	$ 3,331.00
3768J-158	30	Nordvold Scott	$ 1,215.00
3768J-295	50	Bleisch Production Services	$37,547.00
3768J-296	50	LD Systems L.P.	$57,149.43
3768J-292	50	Staging Solutions	$69,166.00

126. The Houston Astros occasionally lease Union Station space to customers. In doing so, the Houston Astros does not sell or provide meals. The Houston Astros will arrange for the provision of A/V services or the rental of any additional equipment, primarily AV equipment, that the customer requires. The Houston Astros resells the services or rented equipment to the customer. In such instances, the Houston Astros mark up the vendors' charges, separately state the charges to the customer, and charge sales tax.

127. This ground also pertains to motor vehicle parking services purchased for resale.

128. The Houston Astros were previously advised by an auditor in a prior audit of the Houston Astros that this ground states the proper treatment of such equipment and services. The Houston Astros relied upon the prior auditor's statement to their detriment.

129. The current auditor contends that the Houston Astros are event planners, and that Comptroller Letter 200703903L should apply.

130. One item selected in the auditor's sample was the provision of A/V services purchased by the Houston Astros and resold to DrillingInfo.

131. A/V services for "production management," as stated on the invoice, are not enumerated taxable services under Section 151.0101; therefore, this item should be removed from the audit.

132. The Houston Astros rented Union Station lobby for $14,000 and DrillingInfo requested A/V services and other equipment in the amount of $92,500. The equipment and services were specified by DrillingInfo, and the Houston Astros agreed to purchase the services and resell them at a 20% mark up to the customer. The Houston Astros charged sales tax on the marked-up amount.

133. At times, other customers request the rental of equipment for their use and operation. The Houston Astros will rent the equipment, mark it up, and re-rent it to their customers. The Houston Astros separate the facility rental from all other charges on the invoice and tax the rental of A/V equipment requested by the customer.

134. The auditor contends that Comptroller Letter 200703903L is indicative of Comptroller policy and requires a venue that hosts an event to charge sales tax to the customer on all items provided and "pay sales tax to suppliers at the time of purchase on the purchase of all consumables, all equipment, and replacement parts for equipment used to provide the service and operate the facility."

135. The Houston Astros contend that this letter ruling applies to items that are used to perform the service and operate the facility. The A/V equipment is not used by the Houston Astros to perform the service of providing a meeting space or rental of the facility, nor is it used to operate the facility, it is transferred to the customer who operates and uses the equipment as needed. The Houston Astros are simply renting the room out and providing all other items on a separate contract.

136. Under the separate contract rules, the Houston Astros is considered the seller of the items. In fact, Letter Ruling 200703903L states that an event planner may issue a resale certificate when purchasing taxable services such as security, parking, and cleaning provided at an event. However, it states that all items rented or used during or in preparation for an event or any services used by the event planner are taxable at the time of purchase.

137. In the present case, the Houston Astros are not using the A/V equipment, rather it is rented for consumption by the Houston Astros' customer. The customer determines what equipment is needed and is the consumer of the equipment, not the Houston Astros. Items procured for the client are not used by the Houston Astros, but are transferred into the customer's possession and control fall under the sale/lease for resale exemption under Rule 3.285(a)(2)(B). To the extent that the vendor retains operational control of the A/V equipment, the vendor is providing a non-taxable service.

138. Comptroller Hearing No. 112,735 (STAR 201704020H) involves an A/V equipment rental company that rented audio-video (A/V) equipment to hotels. There, the Tax Division disallowed the resale certificates issued by the hotels, finding that the hotels' meeting-room customers did not obtain operational control or possession of the equipment. Alternatively, the Tax Division argued that the hotel acted as a caterer, and the A/V equipment was provided in conjunction with the provision of prepared food and the rental of a room. The taxpayer argued that a sale for resale occurred, because the hotel transferred possession and control of the equipment to its customers and separately stated the marked-up charge on the invoice to its

customers. The hotel rented the equipment solely to re-rent it to its customers, just as the Houston Astros have done here.

139. The administrative law judge ("ALJ") in Hearing 112,735 explained in the Decision on Hearing No. 112,735 that the key element of possession is operational control over the tangible personal property. As confirmed in Hearing No. 40,812, a lessee must exercise operational control of the leased property in order to take possession of the property. Operational control is defined as "using, controlling, or operating the tangible personal property." "Use of the property by customers is sufficient to establish the possession element, and use determines operational control."

140. The ALJ in Hearing 112,735 explains that the taxpayer's argument that the customers had possession of the equipment was reasonable; however, there was an additional consideration: the hotel provided food. Therefore, the hotel was acting as a caterer under Rule 3.293(k)(1). The rental of all equipment thus became a part of the sales price of the prepared food, as had been the case in numerous hearings and letter rulings issued by the Comptroller since 1996.

141. The taxpayer had cited *DTWC Corporation v. Combs* in which the Third Court of Appeals agreed that, under the plain meaning of the statute, a hotel qualified for the resale exemption on hotel consumables that were placed in guest rooms. However, DTWC Corporation did not involve or implicate the Comptroller's administrative rule for food and food service, which is what controlled the resolution of the A/V equipment rental issue. Therefore, the ruling in Hearing No. 201704020H was made only because the hotel was a caterer and sold food in conjunction with the rental of the equipment.

142. "Event Planner" is not defined in an administrative rule, and the Houston Astros are not selling prepared food in the case at hand; therefore, Rule 3.293 does not apply. If Rule 3.298 does apply, the Houston Astros allege it is invalid because it conflicts with the resale statute and *Rylander v. San Antonio SMSA Ltd. Partnership*, 11 S.W.3d 484 (Tex. App.—Austin 2000, no pet.). The Houston Astros neither sell prepared food, nor invoices for it, nor provides the food. If food is served at events, another company is hired by the customer for the provision of the food as controlled by a separate contract.

143. The Houston Astros maintain that the purchase of A/V rental equipment is transferred to the customer for consideration and qualifies as a rental according to Rule 3.294(a)(2) or as a non-taxable service. Therefore, equipment transferred and operated by the customer qualifies for the sale for resale exemption in accordance with rule 3.285(a)(2)(B).

144. In addition, in the example provided for DrillingInfo, the A/V equipment is not rented. It is a non-taxable service. Therefore, this transaction is not taxable and should be removed from the assessment.

145. The Houston Astros have provided invoices for the customers and vendor for the DrillingInfo purchase of audio/visual (A/V) services. See Petitioner's Hearing Exhibit 1 (Astros Ticket); Petitioner's Hearing Exhibit 2 (DrillingInfo Reception Invoice); and Petitioner's Hearing Exhibit 3 (Staging Solutions Invoice) which are hereby incorporated by reference as though duly set forth at length herein.

146. A/V services for "production management," as stated on the invoice, are not enumerated taxable services under Tex. Tax Code § 151.0101; therefore, this item should be removed from the audit.

147. The Houston Astros rented Union Station lobby and DrillingInfo requested A/V services and other equipment in the amount of $92,500. The equipment and services were specified by DrillingInfo, and the Houston Astros agreed to purchase the services and resell them at a 20% mark up to the customer. The Houston Astros charged sales tax to DrillingInfo on the marked-up amount. The Houston Astros did not pay sales tax on the purchase of the services because the services were non-taxable and, if taxable, were purchased under the resale exemption.

148. The audit schedules indicate that Comptroller Letter 200703903L is indicative of Comptroller policy and requires a venue that hosts an event to charge sales tax to the customer on all items provided and "pay sales tax to suppliers at the time of purchase on the purchase of all consumables, all equipment, and replacement parts for equipment used to provide the service and operate the facility."

149. This letter ruling applies to items that are used to perform the services and operate the facility. The A/V equipment purchased for resale by the Houston Astros, however, is not used by the Houston Astros to perform the service of providing a meeting space or rental of the facility, nor is it used to operate the facility. It is transferred to the customer who maintains operational control of the equipment and operates as the customer sees fit. The Houston Astros is simply renting the room out in one transaction, and reselling all other items in separate transactions under separate contracts.

150. In addition, the services the Houston Astros purchased and resold, including but not limited to those for DrillingInfo, are non-taxable services. Therefore, these nontaxable services should be removed from the assessment.

GROUND IV: NEGATIVE ITEMS & SAMPLING ISSUES

151. The Houston Astros contend certain items scheduled as taxable in the audit should be removed or adjusted because the methodology of handling negative items in the general ledger results in an increase in the error rate greater than in both the sample and the population; the sample was not randomly selected; the population was not homogenous; and the sample was not representative; for the reasons set forth below.

152. The Houston Astros contends that errors identified in item 3768J-156 in Exam 30 (Miss Em Com $2,000.00) and 3768J-161 in Exam 40 (Success Promotions $27,700.00) were eliminated as credits and therefore should not be treated as exemptions. Furthermore, the inclusion of the credit for the Item 3768J-161 as a negative number in the sample base underscores the unfairness of the auditor's interpretation of not allowing any taxpayer relief for negative items. Providing no taxpayer relief causes an increase in the error rate and, therefore, an increase in the extrapolated sales tax assessment. Effectively, the Houston Astros was presented with an extrapolated assessment on an invoice that was removed from the system, and then by including the credit as a reduction in the sample base, further increased that extrapolated assessment.

153. For several months, the Houston Astros had an accounting system wherein when an accounts payable invoice was paid, the original invoice was credited and a new invoice was entered. The data for Miss Em.com contains an error in Exam 30:

Sel Seq	Exam	Document	Purchase Order	GL Date	Company	Amount
90	30	1079332	15001687	4/21/2015	Miss Em.com	2,000.00
		1079332	15001687	4/21/2015	Miss Em.com	-2,000.00
		1079332	15001687	4/21/2015	Miss Em.com	2,000.00

154. For population items 8784, 8785, and 8786, the first item was selected as the 90th item for Exam 30. The item selected from the sample had been removed from the records of the company.

155. The sample for Exam 30 included five selections of negative items that reduced the sample base by $5,566.76, with no offset in the numerator.

156. The Comptroller has maintained that a credit entry cannot generate an error. Unless an offset is made, the impact of reducing the base dollar amount increases the error percentage and, when extrapolated to the population, improperly increases the assessment and is therefore invalid.

157. In Exam 40, the Success Promotions entry and the credit that removed the entry were both selected in the audit sample:

Sel Seq	Exam	Document	Purchase Order	GL Date	Company	Amount
30	40	1069172	14000517	8/24/2014	Success Prom	27,700.00
		1069172	14000517	8/24/2014	Success Prom	1,050.48
89	40	1069172	14000517	8/24/2014	Success Prom	-28,750.48
		1069172	14000517	8/24/2014	Success Prom	28,750.48

158. An invoice was received for $28,750.48 from Success Promotions, and sales tax was not charged. The first two lines above comprised the entry to originally record the invoice. The third entry removed the first two, and the invoice paid was the last item:

$27,700.00 + $1,050.48 = $28,750.48

159. In the audit sample, an error was recorded on the invoice that was removed from the books and not paid. In addition, the credit was included in the sample base, which mathematically increases the error rate, which violates generally recognized sampling techniques and Texas Tax Code § 111.0042(d) and (e).

160. The Comptroller has alleged that because the credits are in the population, they should remain in the sample, and since the population is lower because of the credits, the extrapolation is correct. In doing so, the Comptroller fails to consider that invoice credits are not homogenous with invoice charges.

161. Moreover, mathematically the Comptroller's statement is correct only in the event none of the errors are removed by credits somewhere in the population and all the credits relate to taxable items. Unless the original item is either removed or excluded as error because it is eliminated, the item appears twice as often and, therefore, has a greater probability of being selected. As it appears twice as often, the sample cannot be random as the Comptroller requires and, thus, any extrapolation onto the sample is undermined.

162. Without relief, if the credits are frequent enough, an error rate of greater than 100% is mathematically possible. For example, if the three items selected comprised the entire sample, the error rate would be as follows:

Sel Seq	Exam	Document	Purchase Order	GL Date	Company	Amount in Sample	Error
90	30	1079332	15001687	4/21/2015	Miss Em. Com	2,000.00	2,000.00
30	40	1069172	14000517	8/24/2014	Success Prom	27,700.00	27,700.00
89	40	1069172	14000517	8/24/2014	Success Prom	-28,750.48	
TOTAL						949.52	29,700.00
ERROR RATE							3,128%

163. The total amount in the sample was $949.52 and the error rate in the sample was $29,700.00 resulting in an error rate of 3,128%.

164. Both statistically and using a common-sense approach, an error rate of more than 100% cannot be a correct outcome.

165. Both statistically and using a common sense approach that any methodology that could result in an error rate in excess of 100% cannot be correct.

166. Since the invoice was effectively credited in the Houston Astros' system and reentered, the $2,000.00 invoice relates to both 8784 and 8786. The Houston Astros has taken the position that the credit offsets the invoice entered before it.

167. In an accounting system, a credit would be entered after the original entry and not before it. That is, in the above error, item 8745 applies to 8784 and not 8786.

168. The Houston Astros has not challenged errors that were selected where the entry was not immediately followed by a credit note, (e.g., item 8786).

169. The Houston Astros maintains that on identical entries, the order as reflected in the population is the only reasonable way to determine which item is removed by the credit. If the item is not removed (for example, the $2,000 discussed above), the invoice has twice the probability of being selected.

170. The Comptroller alleges that the Houston Astros did not identify the credits (negative items) and the corresponding debit entries.

171. The Houston Astros identified the credits (negative items) and the corresponding debit entries. These are repeated in the file labeled NEGATIVE ITEMS. See Petitioner's Hearing Exhibit 4 (Identified Negative Items) which is hereby incorporated by reference as though duly set forth at length herein.

172. The Comptroller indicates that the Houston Astros have not identified which line item is the original debit balance that the credit is used to offset. The Houston Astros also submitted the excel files of the detail the auditor selected the items from so that the corresponding debit and credit entries can be identified. See Petitioner's Hearing Exhibit 5 (Audit Negative Items) which is hereby incorporated by reference as though duly set forth at length herein.

173. The Comptroller does not address the Houston Astros' contentions that the inclusion of both debits and the corresponding credit causes the sample to overstate error when extrapolated to the general population and the auditor's implementation of this policy violates the Comptroller's requirement of a random sample.

174. A random sample is a sample in which each item in the population (or in each dollar range) has an equal chance of being selected. Each transaction that has been removed by a negative item that has been re-entered has three times the likelihood of being selected.

175. The Houston Astros' accounting system cannot correct a mistake in posting without removing the item and re-entering it in the system.

176. One invoice, for example, Miss Em for $2,000.00, was initially entered then removed with a credit (second entry) and entered with the proper accounting (third entry).

177. The Comptroller conducted the audit without determining whether transactions in the sample selected the first, second or third entry in the sample. As a result, the one Miss Em invoice has three times the probably of being selected as another data point, which distorts the sample by tripling the chance of an item being selected.

178. To remedy this, the Comptroller must eliminate the first and second instances of the triple entries, and only the last item should be treated as sample error.

179. The inclusion of negative items also fundamentally increases the extrapolation error rate. Including the absolute value of the credit in the population and not allowing an offset results in a higher error sample error inflating the extrapolated error. For example, if each of the Miss Em entries were selected in the audit sample, the error would be counted twice. A sample population that consisted only of invoices with an error eliminated in the manner of the Miss Em example would result in a 200% error rate. Any methodology that could result in an error rate greater than 100% is fundamentally flawed. For example, Stratum D consisted of 125 items

sampled. The total of the items selected was $1,350,608.46. There were 118 positive items that totaled $1,504,770.49 and 7 negative items for a total of ($154,162.03) or 11.4% of the total $1,350,608.46. Therefore, the extrapolated error is overstated by at least 11.4%.

180. Accordingly, the auditor's sample is not representative of a homogenous population and is therefore invalid. Tex. Tax Code § 111.0042(d). Further, the sample was not randomly selected, and the extrapolation to the population for which it was used was distorted.

181. The Comptroller alleges that the auditor verified each sample was representative of the general expense population. The sample, however, is not representative of the general expense population. The auditor did not provide any explanation or analysis demonstrating that the sample was representative.

182. The Houston Astros requested, but did not receive, the analysis or analyses the auditor tested for taxable and non-taxable accounts.

183. The Comptroller also alleges that records were provided without identifying the transactions as non-taxable.

184. The Houston Astros' representative explained to the Comptroller, before and after the sample was selected, that there were a disproportionate number of non-taxable items in the population and in the sample. As explained, the account numbers determine the expense type and expense location. Further analysis of vendors would determine whether the expense would be taxable or non-taxable. The Comptroller was made aware prior to the selection of the items in the population. The Comptroller refused to correct the sample to reflect the population.

185. The Houston Astros submitted spreadsheets indicating the number and dollar amounts of accounts that were included in the sample. See Petitioner's Hearing Exhibit 6 (Population Stratum B); Petitioner's Hearing Exhibit 7 (Population Stratum C); Petitioner's Hearing Exhibit 8 (Population Stratum D) which are hereby incorporated by reference as though duly set forth at length herein.

186. The percentage of strata B, C and D items that related to out of state, travel and entertainment (mostly out of state), accounts that sales tax are not assessed on (e.g., advertising) and vendors that are not subject to sales tax (e.g., Houston Police Department officers working as contract labor) were 56%, 58% and 42% respectively. Therefore, the number of items in each stratum were effectively 55, 52 and 73 respectfully, which distorted the results extrapolated from those small samples and falls well short of the 100 required by the Texas Comptroller's Audit Sampling Manual and general principles of sampling. See Petitioner's Hearing Exhibit 9 (Non-taxable Items in Population Sample) which is hereby incorporated by reference as though duly set forth at length herein.

187. The inclusion of these non-taxable amounts in such large amounts rendered the population as non-homogenous and therefore rendered the sample non-representative. Furthermore, extrapolating a sample error to a population that consists of non-taxable items distorts the population error.

188. The Houston Astros have identified a number of the anomalies that are indicative of the sample not being representative and these are repeated in sampling errors file.

189. The sample does not meet the standard Chi Squared test for a representative sample. For an extrapolated assessment to be equitable the sample must be randomly taken from a homogeneous population and the sample needs to be representative of the population. See Petitioner's Hearing Exhibit 10 (Exam 30 Chi Squared Test) which is hereby incorporated by reference as though duly set forth at length herein.

190. The population in this sample is not homogeneous and the factors the auditor tested to be representative did not take into taxable/non-taxable transactions and general ledger characteristics. The auditor should have noticed after reviewing the first sample items that the majority were not taxable in Texas and the population was incorrect.

191. The Comptroller's assessment should be reduced for distortions as a result of the failure to follow the Texas Comptroller of Public Accounts Audit Division Sampling Manual.

192. The Sampling Manual provides that "taxed and non-taxed items should be separated whenever possible." Texas Comptroller of Public Accounts Audit Division Sampling Manual, p. 10 ("Define the Population and Stratify into Sub-populations as Needed")

193. The Comptroller's audit included the four categories that would not be subject to Texas sales/use tax as accounts of interest as part of the sample population related to out of state, travel and entertainment (mostly out of state), accounts that sales tax are not assessed on (e.g., advertising) and vendors that are not subject to sales tax (e.g., Houston Police Department officers working as contract labor). For Exam 30, these amounted to $11,754,491.06 out of the sample population of $21,523,044.25 or 55%. These also accounted for 58% of the sample items. In Exam 30, only 48 of the sample items came from accounts that would be subject to sales tax, well below the Comptroller stated requirement of 100. The strata population is skewed towards invoices at the bottom of the strata however errors were disproportionally occurred in the higher quartiles. Disproportionate amount of the negative items was pulled from accounts not subject to Texas sales tax. A Monte Carlo simulation had a median result 42% below the audit result. This causes a distortion in sample errors, and even more in the sample errors that were not representative. For example, on one error for a purchase at an Apple retail store, the invoice was missing. All other Apple products purchased were through CDW, an Apple

products vendor, and sales tax was paid. However, since this error is extrapolated over most non-taxable items in Texas the impact is overstated.

194. The audit included out-of-state accounts that captured expenses exclusively for the spring training in Florida; minor league teams in New York, Iowa, California, Tennessee, Kentucky, Arizona, and Oklahoma; and a baseball academy in the Dominican Republic.

195. The audit included travel & entertainment accounts that were incurred almost entirely outside of the State of Texas. The majority of these relate to the team travelling to play road games outside Texas. Only one of the twenty-nine teams the Houston Astros play is in Texas. In addition, the only items that would be taxable in Texas would be hotel stays in Arlington, Texas which would be subject to hotel occupancy tax and not sales tax. The players are given a meal money allowance to cover their meal expenses.

196. The audit included contract labor accounts that accounted for player appearance fees, first aid nurses at the stadium, labor recharges from affiliated companies, fire marshals from the City of Houston, disc jockey's, announcers and other personnel.

197. The Comptroller audit included expense accounts such as advertising expenses which are not subject to Texas sales tax.

198. The Comptroller included vendors that would not be subject to sales tax such as employees for player appearances, payments to a university for a minor league player's tuition, player meal per diems, contributions to charitable organizations, mileage amounts paid to employees for personal use of their cars, and other items.

199. Substantially all of these transactions are nontaxable and these categories should not have been commingled with potentially-taxable transactions.

200. The Comptroller audit sampling resulted in a number of irregular results including non-taxable contract labor being disproportionately under sampled (existing 7.3% in the total population but appearing in the sample only 4.8%); non-taxable advertising expense being disproportionately under sampled (existing 1.9% in the total population but not sampled at all); however taxable bats were disproportionately oversampled (existing 1.9% in the total population but sampled 4%); and taxable photography expenses were disproportionately oversampled (existing 0.2% in the total population but sampled 1.25). These distortions alone resulted in an overstatement of the extrapolated sales tax assessment of $ 25,830.63 in Exam 30. These alone caused that Exam assessment to be overstated by 49%.

GROUND V: NONTAXABLE AND EXEMPT ITEMS

201. The Comptroller's assessment should be reduced for tax assessed on nontaxable items.

202. For example, security services purchased are not taxable security services. Security services are taxable under Tex. Tax Code § 151.0101.

203. Taxable "[s]ecurity service" is defined as "service for which a license is required under Section 1702.101 or 1702.102, Occupations Code." Tex. Tax Code § 151.0075.

204. Comptroller Rule §3.333(a) further defines a taxable security service as any services for which a license is required under Texas Occupations Code § 1702.101 or 1702.102. The firms that provide the security services to the Houston Astros' fans are governed by the Federal SAFETY Act requirements. Therefore, since the federal requirement pre-empts the state requirement these services are non-taxable.

205. Occupations Code § 1702.101 pertains to investigation company license and 1702.102 governs security service contractor license.

206. The services purchased by the Houston Astros must meet the federal SAFETY Act standards. Comptroller Letter 200802165L (Feb. 20, 2008) addressed the issue of services governed by federal regulations and concluded that services mandated by federal regulation are exempt from Texas sales and use tax.

207. The services purchased by the Houston Astros are also nontaxable to the extent they are provided by persons who have full-time employment as peace officers. Comptroller Rule 3.333(i)(3).

208. The Houston Astros purchase other security services, including but not limited to canine detection services, which do not meet the requirement of a taxable service because the dogs and dog handlers are governed by the requirements of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives and not Texas Occupations Codes § 1702.101 or 1702.102. These security services are nontaxable under Comptroller Letter 200802165L (Feb. 20, 2008).

209. The Comptroller's assessment should be reduced for tax assessed on taxable items for which either the Houston Astros or their vendors paid tax (either directly or upon audit).

210. The Comptroller's assessment should be reduced for tax charged on items that the Houston Astros returned to their vendors for credit.

211. The Comptroller's assessment should be reduced for tax charged on items that the Houston Astros purchased for rental or resale or were otherwise exempt from the Texas sales and use tax.

212. The Comptroller's assessment should be reduced for tax charged on items for which other taxpayers have paid tax, either by self-assessment or upon audit.

GROUND VI: ADMINISTRATIVE PROCEDURE ACT RULE CHALLENGE

213. Under Texas Government Code § 2001.038 (the Administrative Procedure Act), the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.

214. The Comptroller may not interpret terms in a manner contrary to the tax code.

215. The Comptroller has adopted administrative rules which impermissibly expand statutory terms imposing tax and impermissibly restrict statutory terms exempting transactions from tax.

216. For example, Comptroller Rules 3.285 and 3.298 impermissibly restricts the circumstances in which services qualify for the resale exemption.

217. As another example, Comptroller Rule 3.301 impermissibly restricts the circumstances in which promotional items may be purchased for resale.

218. As a further example, if Comptroller Rule 3.298 applies, the Houston Astros it is invalid because it conflicts with the resale statute and *Rylander v. San Antonio SMSA Ltd. Partnership*, 11 S.W.3d 484 (Tex. App.—Austin 2000, no pet.)

219. As a result, the Comptroller's rules and their threatened application should be declared invalid because it seeks to tax more than the statute allows, and attempts to deny the resale exemption when the statute allows it, impairing, or threatening to interfere with or impair the legal rights of the Houston Astros.

220. The rules and their threatened application contravenes specific statutory language; runs counter to the general objectives of the statute; or imposes additional burdens, conditions, or restrictions in excess of or inconsistent with relevant statutory provisions. *See Badger Tavern, L.P. v. Hegar*, No. 03-18-00291-CY,2018 WL 4322383, at *4 (Tex. App.-Austin Sept. 11, 2018, pet. denied) (mem. op.).

221. The rules and their threatened application also violates the Houston Astros' legal right to pay only the tax due under the law and deprives her of her property interests by taxing in excess of what is statutorily allowed.

GROUND VII: WAIVER OF INTEREST

222. The Comptroller's Administrative Hearings Section agreed to waive interest for the period March 16, 2020 to November 20, 2020 but did not waive interest for other periods when interest waiver is warranted because of the Comptroller's delays.

223. The Houston Astros filed their Petition for Redetermination on May 10, 2018.

224. The Houston Astros made several requests for the Comptroller's Administrative Hearings Section to issue its Position Letter.

225. The Administrative Hearings Section assigned this hearing to a different hearing's attorney, further delaying the Administrative Hearings Section issuing the Position Letter.

226. The Houston Astros had no control over the Administrative Hearings Section's delays and has sought to expedite this matter at every turn.

227. The Houston Astros relied on advice from a Comptroller auditor during a prior audit to the Houston Astros' detriment.

228. As a result, all interest should be waived.

GROUND VIII: ADDITIONAL GROUNDS

229. The Houston Astros incorporate by reference all grounds in the entire administrative file in Comptroller Hearing No. 116,111 including but not limited to the original pleadings, amended pleadings, exhibits correspondence, motions, objections, evidence, orders, and any other documents filed in that proceeding or exchanged between the parties.

230. The Houston Astros incorporate by reference all grounds in the entire administrative file in Comptroller Hearing No. 117,142 including but not limited to the original pleadings, amended pleadings, exhibits correspondence, motions, objections, evidence, orders, and any other documents filed in that proceeding or exchanged between the parties.

Would you please acknowledge receipt of the sum of $470,932.26 paid under protest and the receipt of this letter setting forth the grounds for recovery thereof, and return that receipt to me?

We appreciate your attention to this matter and look forward to hearing from you.

Very truly yours,

MARTENS, TODD & LEONARD

By: _____
Jimmy Martens

Enclosures

ACKNOWLEDGMENT

Receipt of the sum of $470,932.26 paid under protest by Houston Astros, LLC is hereby acknowledged on this the 29 day of April, together with the foregoing Letter of Protest with respect to payment under protest of the remaining taxes and interest due.

COMPTROLLER OF PUBLIC ACCOUNTS

By: Yvonne Williams

Title: Examiner

RETAIN THIS STATEMENT WITH YOUR RECORDS

HOUSTON ASTROS, LLC

OPERATING ACCOUNT • FED ID# 74-2051157
P.O. BOX 288 • HOUSTON, TEXAS 77001-0288 • 713-259-8000

Stub 1 of 1 REMITTANCE ADVICE
Check Date - 4/27/2022 Check No. 204487

INVOICE NUMBER	INVOICE DATE	DESCRIPTION	INVOICE AMOUNT	PAY AMOUNT
TP#17420511572 SEE PROTEST LETTER ATTACHED	4/27/2022	TP#17420511572	470,932.26	470,932.26
			470,932.26	470,932.26

HOUSTON ASTROS, LLC
OPERATING ACCOUNT
P.O. BOX 288 • HOUSTON, TEXAS 77001-0288
713-259-8000

BANK OF AMERICA
DALLAS, TEXAS
82-2
1110
204487

VENDOR NO	DATE	AMOUNT
00204487	1010771 4/27/2022	$***470,932.26

PAY FOUR HUNDRED SEVENTY THOUSAND NINE HUNDRED THIRTY TWO AND 26/100**** VOID AFTER 90 DAYS

TO THE ORDER OF COMPTROLLER OF PUBLIC ACCOUNTS
PO BOX 149359
AUSTIN, TX 78714-9359

⑈204487⑈ ⑆111000025⑆ 4880384707 90⑈

See Other Side For Opening Instructions

HOUSTON ASTROS, LLC
P.O. BOX 288
HOUSTON, TEXAS 77001-0288

COMPTROLLER OF PUBLIC ACCOUNTS
PO BOX 149359
AUSTIN, TX 78714-9359

Received
APR 29 2022
Audit Pro...
Comptroller of P...

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Marissa Yarborough on behalf of Doug Sigel
Bar No. 18347650
marissa.yarborough@ryanlawyers.com
Envelope ID: 66685533
Status as of 7/27/2022 10:33 AM CST
Associated Case Party: HOUSTON ASTROS, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Doug Sigel		doug.sigel@ryanlawyers.com	7/26/2022 3:28:29 PM	SENT
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