

The Texas Franchise Tax

(When does it apply to Out of State Entities?)

By: Coleman Jackson, A Legal Services Company

(1) A foreign corporation is liable for the franchise tax if it is authorized to do business in Texas or if it is actually doing business in Texas.

(2) A corporation is doing business in Texas, for the taxable capital component of the franchise tax, when it has sufficient contact with Texas to be taxed without violating the United States Constitution. A corporation may be subject to the taxable capital component, but not subject to the earned surplus component, because of Public Law 86-272.

(3) Some specific activities which constitute doing business in Texas are:

(1) contracting: performance of a contract in Texas regardless of whether the corporation brings its own employees into the state, hires local labor, or subcontracts with another;

(2) providing services:

(A) providing any service in Texas, regardless of whether the employees, independent contractors, agents, or other representatives performing the services reside in Texas;

(B) maintaining or repairing property located in Texas whether under warranty or by separate contract; or

(C) installing, erecting, or modifying property in Texas;

(3) inventory in the state: having an inventory in Texas or having spot inventory for the convenient delivery to customers, even if the bulk of orders are filled from out of state;

(4) solicitation: having employees, independent contractors, agents, or other representatives in Texas, regardless of whether they reside in Texas, to promote or induce sales of the foreign corporation's goods or services;

(5) dealings in real estate: holding, acquiring, leasing, or disposing of any property located in Texas;

(6) shows and performances: the staging of shows, theatrical performances, or other events within Texas;

(7) transportation:

(A) carrying passengers or freight (any personal property including oil and gas transmitted by pipeline) from one point in Texas to another point within the state, if pickup and delivery, regardless of origination or ultimate destination, occurs within Texas; or

- (B) having facilities and/or employees, independent contractors, agents, or other representatives in Texas, regardless of whether they reside in Texas:
 - (i) for storage, delivery, or shipment of goods;
 - (ii) for servicing, maintaining, or repair of vehicles, trailers, containers, and other equipment;
 - (iii) for coordinating and directing the transportation of passengers or freight; or
 - (iv) for doing any other business of the corporation;

- (8) franchisors: entering into one or more contracts with persons, corporations, or other business entities located in Texas, by which:
 - (A) the franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor; and
 - (B) the operation of a franchisee's business pursuant to such plan is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate;

- (9) processing: assembling, processing, manufacturing, or storing goods in Texas;

- (10) advertising: entering Texas to purchase, place, or display advertising when the advertising is for the benefit of another and in the ordinary course of business (e.g., the foreign corporation makes signs and brings them into Texas, sets them up, and maintains them);

- (11) contracting for processing and shipment: sending materials to a Texas manufacturer, processor, repairer, or printer to be processed and stored in completed form awaiting orders for their shipment;

- (12) foreign corporations as partners:
 - (A) acting as a general partner in a general partnership that is doing business in Texas;
 - (B) acting as a general partner in a limited partnership that is doing business in Texas. (A foreign corporation that is a limited partner in a limited partnership is not doing business in Texas);

- (13) loan production activities: soliciting sales contracts or loans, gathering financial data, making credit checks, or performing other financial activities in Texas through employees, independent contractors, or agents, regardless of whether they reside in Texas;

- (14) holding companies: maintaining a place of business in Texas or managing, directing, and/or performing services in Texas for subsidiaries or investee corporations;

- (15) place of business: maintaining a place of business in Texas;
- (16) federal enclaves: doing business in any area within Texas, even if the area is leased by, owned by, ceded to, or under the control of the federal government;
- (17) consignments: having consigned goods in Texas;
- (18) delivering: delivering into Texas items it has sold;
- (19) leasing: leasing tangible personal property which is used in Texas.

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