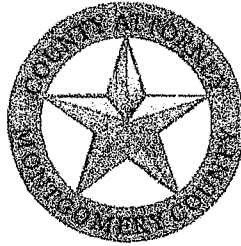


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OPINION COMMITTEE



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**RQ-0070-KP**

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November 9, 2015

Honorable Ken Paxton  
Attorney General, State of Texas  
Attention: Opinion Committee  
opinion.committee@texasattorneygeneraly.gov

*Via Email*

***RE: Ability of the Texas Comptroller to implement a local sales and use tax adoption of 1/2% approved by voters of an emergency service district notwithstanding the Order calling for a sales tax election failed to exclude territory of a small economic development zone (currently not collecting sales tax revenue) where the sales tax was already capped at 2%.***

Dear General Paxton:

The County Attorney of Montgomery County, Texas on behalf of and at the request of Montgomery County Emergency Service District #7, respectfully requests an opinion regarding whether there is a procedure or mechanism by which the Texas Comptroller may recognize the Montgomery County Emergency Service District #7 sales tax increase of 1/2% approved by voters on May 9, 2015; notwithstanding the fact that the Order calling for the sales tax election failed to exclude the territory of East Montgomery County Improvement District Economic Development Zone No. 4 where the sales tax was already capped at 2%.

**BACKGROUND FACTS:**

On January 9, 2015, the Board of Commissioners of Montgomery County Emergency Service District #11 ("ESD #11") by Order called for an election to be held on May 9, 2015 to consider a proposition for the adoption of the local sales and use tax in the territory of the ESD #11 at the rate of 1/2%. In compliance with Section 775.0751 (c-1) of the Texas Health and Safety Code, the Order excluded the territories of the cities of Splendora and Patton Village where the sales and use tax was already capped at 2% (*See Exhibit "A"*). This proposition passed at the election held on May 9, 2015.



On May 18, 2015, the ESD #11 Board of Commissioners canvassed the election results and declared that the sales and use tax proposition passed, thereby authorizing the issuance of a district-wide sales and use tax of 1/2% for those territories in ESD #11 outside the territories of the City of Splendora and the City of Patton Village (*See Exhibit "B"*). However, ESD #11 failed to recognize that in addition to the cities of Splendora and Patton Village, the Order calling for an election should have excluded the East Montgomery County Improvement District ("EMCID") Economic Development Zone No. 4 ("EDZ #4") also located within the ESD #11 territory. The EDZ #4 already had established a 1/2% sales and use tax which combined with the East Montgomery County Improvement District A ("EMCID A") sales tax rate of 1 1/2% (also in the ESD #11 territory) resulted in a zone that had a total local sales and use tax of 2% prior to the May 9, 2015 election. Passage of the ESD #11 1/2% district-wide sales and use tax therefore resulted in a small portion of the ESD #11 territory where the EDZ #4 overlapped to exceed the local 2% cap.

Concurrent with the passage of the sales tax election on May 9, 2015 the voters of both Emergency Service District #7 and ESD #11 approved a proposition for the consolidation of both districts thereafter to be known as Montgomery County Emergency Service District No. 7 ("ESD #7"). The tax consultant for the newly consolidated ESD #7 presented the notice of the May 9 local sales and use tax election to the Texas Comptroller while still unaware of the EDZ #4 sales tax rate. Shortly thereafter the Texas Comptroller replied by letter dated August 7, 2015 that the Texas Comptroller would be unable to implement the sales tax increase for the *entire* territory because of the EDZ #4 local sales tax (*see Exhibit "C"*).

When this was brought to the attention of the EMCID board of directors, the board offered to pass a resolution supporting the ESD #11 local sales tax election and take any legal steps available to ensure application of the sales and use tax. Attempts have already been made by counsel of the newly formed ESD #7 to solicit an exception from the Texas Comptroller with the cooperation of the EMCID. However, the Texas Comptroller's Office has expressed the opinion that no action by the EMCID board relating to the EZD #4 sales tax, even if applied retroactively, would contradict the Texas Comptroller's opinion that the ESD #11 election included a territory that exceeded the statutorily capped 2% and therefore the sales and use tax cannot be instituted *anywhere* within the district (*See Exhibit "D"*).

The Texas Comptroller's office has confirmed that it is not aware of any Texas Attorney General opinions that have addressed the issue of whether a taxing entity can retroactively withdraw its sales and use tax collections from a territory that is already capped at 2% or at a minimum if a district like the ESD #7 can preserve the approved proposition for a sales tax rate increase in areas outside those already capped at 2%. In addition, research conducted by attorneys for the ESD #7, and verified by this office after speaking with representatives within the Texas Comptroller's office, shows that the EDZ #4 currently has no organizations or businesses within its boundaries that are registered, collecting, or submitting sale tax revenue to the Texas Comptroller. Therefore, the result is a relatively small zone with a rate that has not, and currently does not produce any sale tax revenue is impeding and overriding a voter approved



election to implement a necessary and needed 1/2% sales tax which covers a substantial area of the newly consolidated ESD #7.

In summary, and in an effort to avoid another costly election for the ESD #7, we respectfully request an Opinion as to the following:

- 1) Absent any participation by the EMCID board to withdraw its right to local sales and use tax collections in the EDZ #4 that was capped at 2%, may the ESD #7 impose, and should the Texas Comptroller recognize, the additional 1/2% sales tax in all areas where the EDZ #4 sales tax rate does not overlap;
- 2) Are there any mechanisms that would permit the EMCID to retroactively withdraw its right to sales and use tax collections in the EDZ #4 ensuring no part of the district exceeds the 2% cap, thereby allowing the Texas Comptroller to recognize the new 1/2% sales tax; and
- 3) Since the EDZ #4 currently has no organizations or businesses within its boundaries that are registered, collecting, or submitting sales tax revenue to the Texas Comptroller, are there any other avenues statutorily available to retroactively exclude EDZ #4 from the election held May 9, 2015?

On behalf of the Montgomery County Emergency Service District #7 and the citizens it serves we thank you for your time and attention to this matter and look forward to any guidance you and your office may be able to provide.

Respectfully,

JD Lambright  
Montgomery County Attorney