

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1948
Summary Calendar

IN THE MATTER OF:
THIN ICE, INC.,

Debtor.

THIN ICE, INC.,

Appellant,

VERSUS

STATE OF TEXAS,
Comptroller of Public Accounts,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1445-X)

(February 25, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

In this appeal from the allowance of a claim in bankruptcy,
the debtor, Thin Ice, Inc., challenges the determination that the

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

State of Texas may charge sales tax on the use of a portion of an ice rink that is rented for the purpose of giving instruction of an educational nature to ice skaters. The state does not exact a tax on the instructional services, acknowledging that they are subject to the educational exemption. The ice rink rents the ice surface to whomever will pay the charge and does not provide the instructional services or limit the use of the ice to instructional activities.

Since 1984, the state has taken the position that a fee paid for the exclusive rental of an ice surface is considered to be the purchase of a taxable amusement service. The state likens the present situation to one in which a bowling alley is rented to a professional bowler so that he can teach bowling lessons. While the charge for the lessons would not be taxable, the charge by the owner of the facility for the use of the bowling lane would be taxable. Skating rinks are listed in 34 TEX. ADMIN. CODE § 3.298(a)(1)(d)(xiii) as an amusement service subject to tax. This regulation was promulgated by the state comptroller pursuant to his legislatively-delegated authority to interpret the state tax code.

We affirm, concluding that the interpretation is by no means unreasonable. We decline to address the debtor's argument that the delegation to the Comptroller violates the state constitution, as this argument is made for the first time on appeal.

The judgment of the district court, affirming the decision of the bankruptcy court, is AFFIRMED.