

Nevada issues draft regulations for newly-enacted Commerce Tax

Overview

On June 10, 2015, Governor Brian Sandoval signed Nevada Senate Bill 483 (SB 483) enacting a new “Commerce Tax,” effective July 1, 2015.¹ On September 9, 2015, the Nevada Department of Taxation (Department) held a Public Workshop to discuss the Proposed Regulation of the Nevada Tax Commission (draft regulations) pertaining to the new tax.² The draft regulations include provisions:

- Clarifying the definition of a “taxable entity” and the related filing requirements;
- Providing that an employer can only claim a credit against its Modified Business Tax (MBT) liability for 50 percent of the Commerce Tax liabilities that have actually been paid;
- Defining the process for reporting and changing a business’s North American Industry Classification System (NAICS) code designation and corresponding Commerce Tax rate;
- Providing that a business entity may itemize a “Commerce Tax recovery charge” on an invoice or receipt under certain circumstances; and
- Amending certain Nevada regulations to allow a “payroll provider” to claim a credit against MBT liability equal to 50 percent of the Commerce Tax liability paid by it and members of its affiliated group.

The Department will hold another Public Workshop for interested parties on September 25, 2015, to discuss regulations related to SB 483.³

This Tax Alert summarizes the draft regulations, which are subject to change based on revision by the Department and public input. Once revisions have been addressed, the draft regulations will be submitted as proposed regulations to the Nevada Tax Commission for adoption.

Clarifying the term “taxable entity” and the related filing requirements

The draft regulations provide that the Commerce Tax is imposed on an entity-by-entity basis, and that each “taxable entity” must file an annual return even if that entity has no tax liability.⁴ Accordingly, a taxable entity with less than \$4 million of Nevada gross revenue (i.e., the threshold amount that, when exceeded, will trigger tax liability) would still be required to file an annual Commerce Tax return. As specified in the draft regulations, a “taxable entity” would include both persons and entities “engaging in a business.”⁵ The draft regulations provide further that the Department may determine that an entity is taxable based upon certain activities conducted within Nevada, including, but not limited to:

- Entering Nevada to purchase, place, or display advertising, which is done for the benefit of another and in the ordinary course of business;
- Having consigned goods or inventory in Nevada;
- Performance of a contract in Nevada, regardless of whether the taxable entity brings its own employees into the state, hires local labor, or subcontracts with another;
- Delivering into Nevada items the business entity has sold;⁶
- Having employees or representatives in Nevada engaged in the business of the taxable entity;
- Entering into certain franchising arrangements with persons, corporations, or other business entities located in Nevada;
- Maintaining a place of business in Nevada or managing, directing, and/or performing services in Nevada for subsidiaries or investee entities;

¹ For a summary of the Commerce Tax, see Jun. 10, 2015, Tax Alert available [here](#).

² The draft regulations are available [here](#).

³ The Notice for the upcoming Public Workshop is available [here](#).

⁴ Draft regulation, Sec. 1 (p. 1).

⁵ *Id.* at Secs. 2-3 (p. 1); see also SB 483, Secs. 4 and 6.

⁶ Further clarification is needed regarding whether this excludes deliveries via common carrier.

- Having inventory in Nevada or having spot inventory for the convenient delivery to customers, even if the bulk of orders are filled from outside of Nevada;
- Leasing tangible personal property in Nevada;
- Soliciting sales contracts or loans, gathering financial data, making credit checks, collecting accounts, repossessing property or performing other financial activities in Nevada through employees, independent contractors, or agents, regardless of whether they reside in Nevada;
- Acting as a general partner in a general or limited partnership doing business in Nevada (Note: a foreign taxable entity that is a limited partner in a limited partnership is not doing business in Nevada, provided that is the limited partner's only connection with Nevada);
- Maintaining a place of business in Nevada;
- Assembling, processing, manufacturing, or storing goods in Nevada;
- Holding, acquiring, leasing, or disposing of any property located in Nevada;
- Providing services in Nevada;
- Sending materials to Nevada to be stored while awaiting orders for their shipment;
- Holding or participating in shows, performances, sporting events, or other events within Nevada;
- Having employees, independent contractors, agents, or other representatives in Nevada, regardless of whether they reside in Nevada, to promote or induce sales of the entity's goods or services;
- Having a telephone number that is answered in Nevada; and
- Providing certain transportation services in Nevada.⁷

Commerce Tax credit toward MBT liability

The draft regulations specify that an employer who incurs Commerce Tax liability cannot claim the full MBT credit until the Commerce Tax liability is satisfied.⁸ If the employer partially pays the Commerce Tax liability, the employer would be able to claim the MBT credit for up to half the amount of Commerce Tax liability actually paid, and may amend previously filed MBT returns accordingly.⁹

Process for reporting and changing the NAICS code designation and related tax rate

The draft regulations would require a business to designate its NAICS code and corresponding tax rate on its initial Commerce Tax return; this designation is subject to review and request for additional information by the Department.¹⁰ To change a business's NAICS code, the business would be required to apply using a form to be supplied by the Department, along with all information necessary to justify the change, at the same time that it files its subsequent Commerce Tax return.¹¹ The Department would be required to make a determination within 60 days, and may request more information or assess liability if a change in NAICS code and tax rate results in underreporting of tax liability.¹²

Commerce Tax recovery charge

The proposed regulations specify that although the Commerce Tax is a tax on a business's gross revenue, and cannot be passed on directly to a customer, a business may itemize a "Commerce Tax recovery charge" on a sales invoice or receipt if certain conditions are met.¹³

Payroll providers

As specified in the proposed regulations, a single member of an affiliated group that is designated by the group to provide payroll services for the other members of the affiliated group would be able to apply to the Department to be designated as a "payroll provider."¹⁴ Once approved by the Department, the payroll provider may claim an amount equal to 50 percent of the total Commerce Tax liability incurred by the payroll provider and other affiliated group members as a credit against its total MBT liability.¹⁵ In order to qualify, the designated payroll provider must provide supporting documentation and forms as the Department may require; the affiliated group must be engaged

⁷ Draft regulation, at Sec. 4(a)-(u) (pp. 1-4). Note that this list is not exhaustive.

⁸ *Id.* at Sec. 1 (p. 4).

⁹ *Id.* at Secs. 2-3 (pp. 4-5).

¹⁰ *Id.* at Sec. 1 (p. 5).

¹¹ *Id.* at Sec. 2 (p. 5).

¹² *Id.* at Secs. 3-4 (p. 5).

¹³ *Id.* at Secs. 1-2 (p. 6).

¹⁴ *Id.* at Sec. 5 (p. 7).

¹⁵ *Id.* at Sec. 7 (p. 8).

in the same business or similar businesses; and it must be determined that each affiliated group member would have otherwise incurred MBT liability if each member provided payroll services to its own employees.¹⁶ These requirements would be subject to continued review by the Department, which may revoke payroll provider status if the payroll provider no longer meets the criteria in subsequent years.¹⁷

Other considerations

As noted previously, the Department will hold another Public Workshop for interested parties on September 25, 2015, to discuss regulations related to SB 483.¹⁸

Contacts

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¹⁶ *Id.* at Sec. 6.1 (p. 7).

¹⁷ *Id.* at Sec. 6.2 (p. 8).

¹⁸ Notice of the Public Workshop is available [here](#).