

Nevada Legislature Takes No Action on Margin Tax Initiative, thus Placing the Measure on the 2014 Ballot; Revisions to Taxation of Mining also Proposed

March 19, 2013

Overview

In February 2013 we issued an External Tax Alert wherein we: (1) summarized an initiative petition that seeks to amend the Nevada Revenue and Taxation Code to add a new Texas-style, state-level margin tax; (2) described Nevada's initiative process; and (3) reviewed the Nevada Supreme Court's decision that upheld the margin tax initiative, thus sending the matter to the Nevada Legislature for further consideration. In today's External Tax Alert we provide an update on the status of the margin tax initiative (referred to as Initiative Petition 1, "IP1" by the Nevada Legislature¹), including the Nevada Legislature's failure to act regarding the proposed tax, thus placing the measure on the 2014 ballot. We also provide a summary of the proposed margin tax and we describe a potential alternative tax measure that seeks to change how the mining industry is taxed.

Proposed Margin Tax to be Put Before Voters in 2014

Following a contentious court battle that went all the way to the Nevada Supreme Court, the margin tax initiative was sent to the Nevada Legislature for further consideration.² The Nevada Constitution provides that a "statute or amendment to a statute proposed [by initiative petition] . . . shall be enacted or rejected by the legislature without change or amendment within 40 days."³ If the Legislature rejects the measure or fails to act within the 40-day time limit, the Nevada Secretary of State must submit the measure to voters in 2014.⁴ As of the expiration of the 40-day period (March 15, 2013), the Legislature had taken no action regarding the initiative, thus the proposed margin tax will be placed on the 2014 ballot.⁵ If approved by Nevada voters, liability for the tax would begin to accrue on January 1, 2015.⁶

Summary of the Proposed Margin Tax

Patterned after the Texas Margin Tax, the proposed Nevada tax, if approved by voters, would be imposed at a rate of 2 percent on a base (taxable margin) calculated on the lesser of: (1) 70 percent of total revenue, or (2) total revenue minus the cost of goods sold or compensation.⁷ With some general exceptions for tax exempt organizations and certain passive entities, all businesses that exceed a \$1 million gross revenue threshold would be subject to the tax.⁸ Business entities that are part of an affiliated group engaged in a unitary business would be required to file a combined group return.⁹

If the proposed new tax is approved by voters, the administration of the tax would be paid for initially from funds generated by a temporary increase in the Modified Business Tax on financial institutions¹⁰ from 2 percent to 2.29 percent beginning January 1, 2015, further increased temporarily to 2.42 percent beginning July 1, 2015, and then reduced back down to 2 percent beginning July 1, 2016.¹¹ Financial institutions paying the Modified Business Tax

¹ The margin tax initiative (IP1) is available at: <http://leg.state.nv.us/Session/77th2013/Bills/IP/IP1.pdf>.

² *The Education Initiative PAC v. Committee to Protect Nevada Jobs and Ross Miller, Nevada Secretary of State*, 293 P.3d 874 (Nevada Supreme Court, No. 61996, Jan. 31, 2013).

³ Nev. Const. art. 19, §2(3).

⁴ *Id.*

⁵ See legislative history at: <http://leg.state.nv.us/Session/77th2013/Reports/history.cfm?ID=234>, which provides: "Mar. 17, 2013, Pursuant to Nevada Constitution, no further action allowed. On 2014 ballot pursuant to Article 19, section 2 of the Nevada Constitution."

⁶ IP1, § 83.2(a).

⁷ IP1, §§ 22, 23.

⁸ IP1, § 22. Note, however, casino gaming revenue would be exempt, although casinos would appear to be subject to the tax with respect to their hotel, entertainment, and restaurant revenue. IP1, § 24.6(b).

⁹ IP1, § 27.

¹⁰ The Modified Business Tax on financial institutions is a quarterly payroll excise tax measured by wages paid. See, Nev. Rev. Stat. § 363A.130.

¹¹ IP1, §§ 50-52, 83.2 (a)-(c).

would be allowed a credit against the margin tax.¹² A similar credit would be available to other taxpayers that pay the regular, generally-applicable Modified Business Tax per Nev. Rev. Stat. § 363B.110.¹³

Potential Alternative Tax Measure Addressing Taxation of Mining

Although the Nevada Legislature did not act upon the margin tax initiative, on March 5, 2013 six Republican state senators proposed a potential alternative tax measure that focuses on the mining industry. Specifically, the six senators suggested that Democrats should help Republicans pass Senate Joint Resolution 15 (“SJR 15”), an existing measure that “Proposes to amend the Nevada Constitution to remove the separate tax rate and manner of assessing and distributing the tax on mines and the proceeds of mines.”¹⁴ Essentially, SJR 15 proposes to repeal the constitutional limitations on the taxation of mining.¹⁵ The apparent goal of proponents of SJR 15 is to have this resolution appear on the 2014 ballot, thus giving voters the choice of two competing tax measures, with the one receiving the greater number of votes becoming law.

If SJR 15 makes it to the 2014 ballot and if both it and the proposed margin tax are approved by voters, there is a potential procedural question regarding whether both measures would become law or whether only the measure receiving the greater number of votes would be adopted. Article 19, section 2(3) of the Nevada Constitution provides that if the Legislature rejects a statute or amendment that is the subject of a proposed initiative, the Governor may recommend and the Legislature may propose an alternative measure. If the Governor approves the alternative measure, then that measure along with the rejected statute or amendment shall be submitted to the voters for approval or disapproval. If both measures are approved by the voters, Article 19, section 2(3) of the Nevada Constitution provides that the measure that receives the most votes will become law. As applied to SJR 15 and the proposed margin tax, there may be an issue regarding whether this constitutional mechanism for putting two measures before the voters -- with the measure that garners the greater vote count becoming law -- should apply or whether the two measures should be treated separately -- with the possibility that both could be enacted into law. The potential issue arises due to the Legislature’s failure to expressly reject the margin tax initiative (as contrasted with what the Legislature did in this instance, namely, failing to act on the measure); that this inaction could potentially be viewed as not satisfying the procedures set forth in Article 19, section 2(3) of the Nevada Constitution and thus preclude the Legislature from proposing SJR 15 as an alternative measure to the proposed margin tax.¹⁶

Contacts

If you have questions regarding the proposed margin tax, the potential alternative measure that focuses on taxation of mining, or other Nevada tax matters, please contact any of the following Deloitte Tax LLP professionals.

Fred Paladino
Director
Deloitte Tax LLP, Las Vegas
apaladino@deloitte.com
(213) 688-1879

Dave Rennie
Senior Manager
Deloitte Tax LLP, Los Angeles
drennie@deloitte.com
(213) 688-3386

Dennis Fox
Senior Manager
Deloitte Tax LLP, Costa Mesa
defox@deloitte.com
(714) 436-7860

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¹² IP1, § 22.4.

¹³ *Id.*

¹⁴ SJR 15 is available at: http://leg.state.nv.us/Session/76th2011/Bills/SJR/SJR15_EN.pdf. SJR 15 is an existing measure that was passed by the Legislature once in the 76th (2011) Legislative Session (enrolled on Jun. 13, 2011, file No. 44, see, <http://leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=1134>). The resolution would have to be passed by the Legislature a second time and then placed on the ballot and approved by voters in order to become law.

¹⁵ See, Nev. Const. art. 10, §§1(1), 5.

¹⁶ Note that even if SJR 15 is *not* treated as an alternative measure to the proposed margin tax, with only the measure that receives the greater number of votes becoming law (as provided by Article 19, section 2(3) of the Nevada Constitution), SJR 15 could still be put before voters and, if approved, enacted into law. For more on this and other related issues that may potentially cause SJR 15 to not satisfy the procedures set forth in Article 19, section 2(3) of the Nevada Constitution, see, Sean W. McDonald, “One thing is clear,” *Amicus Nevada, Political and Legal Musing for Nevada* (Mar. 10, 2013), available at: <http://amicusnevada.wordpress.com/2013/03/10/one-thing-is-clear-destined-for-supremes/>.

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