

Nevada Legislature Approves New “Commerce Tax” and Other Tax Law Changes

June 5, 2015

Overview

On June 1, 2015, the Nevada Senate gave final approval to Senate Bill 483 (“SB 483”), which was passed by the Nevada Assembly on May 31, 2015.¹ The bill represents a compromise over competing tax plans and now awaits Governor Sandoval’s signature. Governor Sandoval is expected to sign the bill,² and has until June 12, 2015, to act upon the bill, at which point it would become law.³ If enacted, effective July 1, 2015, SB 483 would impose a new “commerce tax” on each “business entity” engaged in business in Nevada with Nevada-situated gross revenue exceeding \$4,000,000 in a taxable year. If a business entity’s Nevada gross revenue exceeds \$4,000,000, the excess would be subject to tax at various rates that depend upon the industry in which the business entity is “primarily engaged.”⁴

The pending law would also:

- Amend the Nevada payroll-based tax on financial institutions and the payroll-based business tax
- Increase the excise tax imposed on cigarettes
- Increase the annual state business license fee applicable to certain corporations organized under Nevada law and foreign corporations authorized to transact business in Nevada
- Make various changes regarding the proceeds of minerals tax
- Extend permanently the 0.35 percent Local School Support Tax portion of the state-level sales and use tax

In this Tax Alert we summarize these pending Nevada tax law changes and provide some taxpayer considerations.

We also summarize Assembly Bill 380 (“AB 380”), which was approved by the Governor on May 27, 2015, and includes sales and use tax affiliate nexus and remote seller “click-through” nexus provisions that are effective beginning on July 1, 2015 and October 1, 2015, respectively.⁵

Nevada Commerce Tax

If enacted into law, effective on July 1, 2015,⁶ SB 483 would impose a new annual “commerce tax” for the privilege of “engaging in a business”⁷ in Nevada.⁸ The tax would apply on an entity-by-entity basis on “each business entity whose ‘Nevada gross revenue’ in a taxable year exceeds \$4,000,000.”⁹ For this purpose, the term “business entity” is defined to include a “corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust, professional association, joint stock company, holding company and any other person engaged in business.”¹⁰ Various entities would be excluded from the definition, including persons or entities that Nevada is prohibited from taxing under the Nevada or U.S. Constitution; certain “natural person[s]” unless engaged in business and required to file specified Internal Revenue Form 1040s; certain government entities, nonprofits, credits unions, grantor trusts, estates, and real estate mortgage investment conduits; certain real estate investment trusts; business entities organized under Nev. Rev. Stat. Chaps. 82 or 84;

¹ Pending SB 483, as enrolled, is available [here](#).

² It appears likely that the Governor will sign SB 483, as indicated by his Jun. 1, 2015, press release available [here](#).

³ Nev. Const. Art. 4, § 35, Nev. Rev. Stat. Ann. § 218D.675.

⁴ SB 483, Sec. 23.

⁵ AB 380, 78th (2015) Session, Chap. 219 (approved by Governor on May 27, 2015); enrolled version available [here](#).

⁶ SB 483, Sec. 114.2(b).

⁷ The pending law defines the terms “engaging in a business” broadly as “commencing, conducting or continuing a business, the exercise of corporate or franchise powers regarding a business, and the liquidation of a business which is or was engaging in a business” See, *Id.*, at Sec. 6.

⁸ *Id.*, at Sec. 1, amending Tit. 32 Nev. Rev. Stat. by adding a new chapter consisting of provisions set forth in SB 483 Secs. 2-61.

⁹ *Id.* at Sec. 20.1.

¹⁰ *Id.* at Sec. 4.1.

entities that meet the definition of a “passive entity” under Nevada law; persons whose Nevada activities are confined to owning, maintaining, and managing “intangible investments”¹¹ owned by such persons or by certain “statutory trusts or business trusts;” and persons who take part in “exhibition[s]” held in Nevada for which a state business license is not required.¹²

The tax would be imposed on “Nevada gross revenue,” which is determined starting with the total “gross revenue” of the business entity, making certain permitted deductions, and situsing the resulting amount based upon applicable sourcing rules. “Gross revenue” is defined as “the total amount realized by a business entity from engaging in business in this State, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income”¹³ Gross revenue does not include “amounts realized from the sale, exchange, disposition or other grant of the right to use trademarks, trade names, patents, copyrights and similar intellectual property;” the “value of goods or services provided to a customer on a complimentary basis;” cash discounts taken by a customer; amounts realized from transactions specified in Internal Revenue Code (“I.R.C.”) §§ 118, 331, 332, 336, 337, 338, 351, 355, 368, 721, 731, 1031, or 1033; amounts indirectly realized from a reduction of an expense or deduction; the value of deductible donations (under I.R.C. 170(c)) to certain nonprofit organizations; and amounts not considered revenue under generally accepted accounting principles.¹⁴

SB 483 would provide various deductions from gross revenue, including the following:

- Dividends and interest received upon federal or Nevada (or political subdivisions thereof) bonds or securities;
- Revenue amounts used to calculate certain industry-specific taxes in the gaming (Nev. Rev. Stat. § 463.370, “Fees for State and County Gaming Licenses”) and mining (Nev. Rev. Stat. §§ 362.100-362.240, “Net Proceeds of Minerals”) industries;
- An amount equal to the excise tax paid on liquor for businesses required to pay tax under Nev. Rev. Stat. Ch. 369 (“Intoxicating Liquor: Licenses and Taxes”);
- Certain amounts related to business entities required to pay tax under Nev. Rev. Stat. Ch. 680B, (“Insurance “Fees and Taxes”);
- The amount of the premiums used to calculate tax imposed under Nev. Rev. Stat. § 694C.450 (“Captive Insurers”), and Nev. Rev. Stat. § 685A.180 (“Nonadmitted Insurance”);
- Certain payments received by healthcare providers and by a health care institutions;
- Certain payments received by employee leasing companies;
- “Pass-through revenue” received by a business, which includes, among other revenue items, revenue received by a business entity that is part of an affiliated group from another member of the affiliated group;
- The tax basis of securities and loans sold, as determined for federal income taxation;
- Interest other than interest on credit sales;
- Dividends and distributions from corporations and distributive receipts and income from pass-through entities;
- Receipts for the sale, exchange, or other disposition of an asset described in I.R.C. §§ 1221 or 1231;
- Receipts from certain hedging transactions and loan repayments;
- Certain proceeds from certain insurance policies, litigation damages, bad debts expensed, customer returns and refunds, and cash discounts;
- Certain amounts realized from the sales of an account receivable; and
- Certain income from a passive entity.¹⁵

The resulting adjusted gross revenue of the business entity from real property and tangible personal property would then be sitused to Nevada based on the applicable sourcing provisions, which generally provide for market-based sourcing.¹⁶ Adjusted gross revenue from services would be sitused to Nevada “in the proportion that the purchaser’s benefit in this State . . . bears to the purchaser’s benefit everywhere with respect to . . . [the] purchased

¹¹ “Intangible investments” are defined for this purpose to include “stocks, bonds, notes and other debt obligations, including, without limitations, debt obligations of affiliated corporations, real estate investment trusts, patents, patent applications, trademarks, trade names and similar types of intangible assets or an entity that is registered as an investment company under . . . 15 U.S.C. §§ 80a-1 *et seq.*” See, SB 483, Sec. 4.2(m).

¹² SB 483, Sec. 4.2(a)-(n).

¹³ *Id.* at Sec. 8.1.

¹⁴ *Id.* at Sec. 8.3.

¹⁵ *Id.* at Sec. 21.1(a)-(aa).

¹⁶ *Id.* at Sec. 22(1)(a)-(d).

[services].”¹⁷ The proposed law also provides that if the sourcing rules do not “fairly represent the extent of the business conducted in this State by a business entity, the Department may authorize the business entity to . . . use . . . an alternative method of situsing gross revenue to this State.”¹⁸

Under the proposed law, if the business entity’s resulting Nevada gross revenue exceeds \$4,000,000, the excess would be subject to tax at various rates that depend upon the industry in which the business entity is “primarily engaged.”¹⁹ For this purpose, a business entity would be treated as “primarily engaged” in the business category in which the highest percentage of its Nevada gross revenue is generated.²⁰ There are 26 different business categories that correspond to various NAICS codes and have corresponding rates as follows:²¹

Business Category	Rate	Business Category	Rate
Agriculture, Forestry, Fishing, and Hunting	0.063%	Finance and Insurance	0.111%
Mining, Quarrying, and Oil and Gas Extraction	0.051%	Real Estate and Rental and Leasing	0.250%
Utilities and Telecommunications	0.136%	Professional, Scientific, and Technical Services	0.181%
Construction	0.083%	Management of Companies and Enterprises	0.137%
Manufacturing	0.091%	Administrative and Support Services	0.154%
Wholesale Trade	0.101%	Waste Management	0.261%
Retail Trade	0.111%	Educational Services	0.281%
Air Transportation	0.058%	Health Care and Social Assistance	0.190%
Truck Transportation	0.202%	Arts, Entertainment, and Recreation	0.240%
Rail Transportation	0.331%	Accommodation	0.200%
Other Transportation	0.129%	Food Services and Drinking Places	0.194%
Warehousing and Storage	0.128%	Other Services	0.142%
Publishing, Software, and Data Processing	0.253%	Unclassified	0.128%

Each business entity is required to designate on its initial report the business category in which it is primarily engaged.²² Once the designation has been made on the initial report, it may not be changed unless the business applies to the Nevada Department of Revenue (“Department”) to change the designation and the Department determines that the business is no longer primarily engaged in the designated business category.²³

If enacted, the commerce tax would be due annually within 45 days of the end of the taxable year, which is defined as “the 12-month period beginning on July 1 and ending on June 30 of the following year.”²⁴ The bill authorizes the Department to grant a 30-day extension for good cause upon written application.²⁵ Thus, the due date for all business entities would appear to be August 14th, with an extension potentially available to September 13th.

¹⁷ *Id.* at Sec. 22(1)(f). Note that transportation services are sitused in Nevada if both the origin and destination points are in the state. See, *Id.* at Sec. 22(1)(e).

¹⁸ *Id.* at Sec. 22.2.

¹⁹ *Id.* at Sec. 23.

²⁰ *Id.* at Sec. 15.

²¹ *Id.* at Secs. 24 through 49.

²² *Id.* at Sec. 20.3.

²³ *Id.*

²⁴ *Id.* at Secs. 12 and 20.

²⁵ *Id.* at Sec. 20.

For ASC 740 purposes, the commerce tax would be treated as a non-income tax not subject to deferred tax accounting.

Considerations Regarding the Commerce Tax

Although SB 483 remains pending, taxpayers may wish to consider the following:

- The legislation requires “[e]ach business entity engaging in a business in [Nevada] during a taxable year” to file a commerce tax return.²⁶ The tax therefore applies on a separate entity basis, and since the term “business entity” is defined to include entities that might be disregarded for federal income tax purposes (e.g., single member limited liability companies),²⁷ taxpayers should consider the number of separate returns that they may be required to file as a result of their entity structure.
- The legislation defines “[t]axable year” as “the 12-month period beginning on July 1 and ending on June 30 of the following year”²⁸ and provides that a “business entity’s method of accounting for gross revenue for a taxable year for the purposes of determining the amount of the commerce tax owed by the business entity must be the same as the business’s method of accounting for federal income tax purposes”²⁹ As such, AB 483 appears to require taxpayers to compute Nevada gross revenue for the 12-month period from July 1st through June 30th consistent with the method of accounting used for federal income tax purposes, regardless of what the business entity’s tax year is for federal income tax purposes. Taxpayers should consider how they currently collect and report financial data and how their current practices may affect their compliance with this requirement.
- For purposes of determining the applicable rate, if a business entity is engaged in business in more than one business category, the business entity is “deemed to be primarily engaged in the business category in which the highest percentage of its *Nevada* gross revenue is generated.”³⁰ “Nevada gross revenue” means the gross revenue attributable to Nevada under the relevant sourcing provisions.³¹ Taxpayers with gross revenue potentially falling into multiple business categories will need to consider the highest percentage of gross revenue attributable to Nevada, rather than the highest percentage of all gross revenue, in order to determine the correct business category for commerce tax purposes.
- Taxpayers should carefully consider the appropriate business category for each entity doing business in Nevada because once the business entity designates a business category on the initial report, the designation may not be changed unless the business applies to the Department to change the business category and the Department determines that the business is no longer primarily engaged in the designated business category.³²

Proposed Amendments to Payroll-based Tax on Financial Institutions and Business Tax

SB 483 would also amend the Nevada tax on financial institutions and the business tax, both of which are based on payroll. These amendments would include the allowance of a credit against the tax equal to 50 percent of the commerce tax paid by the employer in the preceding taxable year.³³ The credit may only be used for any of the four calendar quarters immediately following the end of the taxable year for which the commerce tax was paid.³⁴ Any unused credit for each quarter may be carried forward but not beyond the fourth calendar quarter immediately following the end of the taxable year for which the commerce tax was paid, and a taxpayer is not entitled to a refund of any unused credit.³⁵ These changes would be effective July 1, 2015.³⁶

SB 483 would also amend the Nevada business tax based on payroll by increasing the existing tax rate on general businesses from 1.17 percent of total wages in excess of \$85,000 paid by the employer each calendar quarter to

²⁶ *Id.* at Sec. 20.

²⁷ *Id.* at Sec. 4.

²⁸ *Id.* at Sec. 12.

²⁹ *Id.* at Sec. 50.

³⁰ *Id.* at Sec. 15 (emphasis added).

³¹ *Id.* at Sec. 9.

³² *Id.*

³³ *Id.* at Sec. 68.4, adding Nev. Rev. Stat. § 363A.130.4; and Sec. 70, adding Nev. Rev. Stat. § 363B.110.4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ SB 483, Sec. 112.

1.475 percent of total wages in excess of \$50,000 paid by the employer each calendar quarter.³⁷ This change would be effective July 1, 2015.³⁸

Also, SB 483 would require a reduction in the rate applicable to the tax on financial institutions and the business tax to the extent that the total revenue collected by Nevada with respect to both these taxes and the commerce tax exceeds certain thresholds.³⁹

Additional Changes Contained in Pending SB 483

Among other changes, the pending law would also:

- Increase the excise tax imposed upon cigarettes from 80 cents per pack to \$1.80 per pack.⁴⁰ This change would be effective July 1, 2015.⁴¹
- Increase the annual state business license fee from \$200 per year to \$500 per year applicable to: (a) corporations organized under Nevada law Chapters 78 (Private Corporations), 78A (Close Corporations), or 78B (Benefit Corporations); and (b) foreign corporations authorized to transact business in Nevada under Chapter 80. This change would be effective July 1, 2015.⁴²
 - The proposed law would also maintain the existing \$200 per year business license fee applicable to other business entities.⁴³
- Make various changes regarding the net proceeds of minerals tax, including:
 - Require businesses subject to the tax on the net proceeds of minerals (pursuant to Nev. Rev. Stat. §§ 362.100 to 362.240) to pay the tax based on payroll pursuant to Nevada law Chapter 363A at a rate of 2 percent (the same rate currently imposed on financial institutions).⁴⁴ This change would be effective July 1, 2015.⁴⁵
 - Extend the advance payment requirements through June 30, 2016.⁴⁶
 - Delay from January 1, 2016, until January 1, 2017, the effective date of the deduction available with respect to the tax on the net proceeds of minerals for certain amounts expended for healthcare.⁴⁷
- Make permanent the 0.35 percent Local School Support Tax portion of the state-level sales and use tax, which was set to expire on June 30, 2015.⁴⁸

AB 380 Affiliate Nexus and Remote-seller “Click-through” Nexus Provisions

AB 380 was signed into law May 27, 2015. Effective July 1, 2015, the new law creates a presumption that a retailer is required to impose, collect, and remit Nevada sales and use taxes if the retailer is:

- Part of a controlled group of business entities that has a component member who has physical presence in Nevada; and
- The component member with such physical presence engages in certain enumerated activities.⁴⁹

A retailer may rebut this presumption by providing proof that the component member with physical presence in Nevada did not engage in any activity in Nevada that was significantly associated with the retailer’s ability to establish or maintain a market in the state for the retailer’s products or services.⁵⁰

Effective on October 1, 2015, the new law creates a presumption that a retailer is required to impose, collect, and remit Nevada sales and use taxes if:

³⁷ *Id.* at Sec. 70, amending Nev. Rev. Stat. § 363B.110.1.

³⁸ SB 483, Sec. 112.

³⁹ *Id.* at Sec. 62.

⁴⁰ *Id.* at Secs. 71 through 73, amending Nev. Rev. Stat. §§ 370.165, 370.260, 370.350.

⁴¹ SB 483, Sec. 113.

⁴² *Id.* at Sec. 114.2(b).

⁴³ *Id.* at Sec. 74, amending Nev. Rev. Stat. § 76.100.2(c); and Sec 75, amending Nev. Rev. Stat. § 76.130.

⁴⁴ SB 483, Sec. 67, amending Nev. Rev. Stat. § 363A.030.

⁴⁵ SB 483, Sec. 114.2(b).

⁴⁶ SB 483, Sec. 103.

⁴⁷ *Id.* at Sec. 106.

⁴⁸ *Id.* at Sec. 104.

⁴⁹ SB 380, Secs. 2 and 5.

⁵⁰ *Id.*

- The retailer enters into an agreement with a Nevada resident under which the resident receives certain consideration for referring potential customers to the retailer through a link on the resident's Internet website or otherwise; and
- The cumulative gross receipts from sales by the retailer to customers in Nevada through all such referrals is in excess of \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September and December.⁵¹

A retailer may rebut this presumption by providing proof that each resident with whom the retailer has an agreement did not engage in any activity that was significantly associated with the retailer's ability to establish or maintain a market in Nevada for the retailer's products or services during the preceding four quarterly periods.⁵²

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⁵¹ *Id.* at Secs. 3 and 6.

⁵² *Id.*