

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SALT



SUBJECT

NEVADA ISSUES COMMERCE TAX REGULATIONS DEFINING “ENGAGING IN BUSINESS” AND “INTANGIBLE INVESTMENTS,” SITUS OF GROSS RECEIPTS, REPORTING REQUIREMENTS, AND OTHER PROVISIONS

SUMMARY

Effective June 28, 2016, Nevada adopts regulations to accompany the Commerce Tax that was enacted in June 2015, and which applies to taxable years beginning on or after July 1, 2015. [See the BDO SALT alert](#). The regulations address the definitions of “engaging in business” and “intangible investments,” reporting requirements (including for an entity that falls under the four million dollars Nevada gross revenue threshold), the situs of gross receipts, the method for determining business category, the Payroll Tax credit, and a penalty waiver in the event the taxpayer relied on its most recent federal income tax or Commerce Tax return.

DETAILS

Background

Starting with the taxable period beginning July 1, 2015, Nevada imposes the Commerce Tax measured by the Nevada gross revenue of a business entity engaging in business in the state if the entity has Nevada gross revenue in excess of four million dollars during a taxable year. Nevada gross revenue is generally defined as gross revenue (as adjusted for various deductions) situated to the state. The rate of tax, which ranges from 0.051 percent to 0.331 percent, depends on the designated business category. A taxable year for all purposes is a 12-month period beginning on July 1 and ending on June 30, and returns and payments are due 45 days after year end (excluding an extension).

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Engaging in Business

The statute defines “engaging in business” to include such activities as commencing, conducting, or continuing a business, and the exercise of corporate or franchise powers regarding a business. The regulation expands on the definition in the statute by listing approximately 20 activities that may constitute engaging in business in the state, including: (i) entering the state to purchase, place, or display advertising for the benefit of another person; (ii) using a business entity’s own vehicles to deliver items into the state, which the business entity sold; (iii) holding inventory in the state, including consigned goods or materials sent to the state to be stored while awaiting orders for the shipment of materials; (iv) having employees or representatives in the state conduct the taxpayer’s business; (v) having an independent contractor or agent in the state to promote the sale of goods or services; and (vi) engaging in any other activity that constitutes nexus under the U.S. Constitution.

Reporting Requirements

The regulation clarifies that an entity doing business in the state that has Nevada receipts under the four million dollar gross revenue threshold must file a return. However, the regulation permits such an entity to file an abbreviated report that only includes the following: (i) the name, address, and Nevada tax identification number of the entity; (ii) the NAICS code that corresponds with the entity’s primary business; (iii) the taxable year; and (iv) an affirmation that the entity’s Nevada receipts for the taxable year were less than four million dollars. In addition, the regulation imposes the electronic registration, reporting, payment, and record retention requirements applicable to other taxes to the Commerce Tax.

Situs of Gross Receipts from Services

For Commerce Tax purposes, Nevada generally requires a taxpayer to source receipts from the sale of a service to the state to the extent the purchaser received benefit from the service in Nevada. The regulation provides specific rules for the situs of receipts of approximately 50 services under this general rule, including accounting and financial, computer programming, data processing, legal, management consulting, and web hosting services.

Intangible Investments

Nevada exempts a business from its Commerce Tax if it confines its activities in the state to the owning, maintenance, and management of “intangible investments.” The regulation specifies that an intangible investment includes an interest in any entity, including an S corporation, a partnership, or limited liability company.

Method of Determining Business Category

A taxpayer must designate its business category (based on NAICS classification) on its initial return for purposes of applying the proper tax rate on its initial and subsequently filed returns. For a taxpayer engaged in more than one business category, the business category in which the highest percentage of the taxpayer’s Nevada gross revenue is generated is the one that is designated.

The regulations allow a taxpayer that engages in more than one business to elect to use one of the following two methods to determine its business category: (i) the business category with the greatest percentage of the taxpayer’s Nevada gross revenue for the taxable year for which the initial return is filed; or (ii) the business category with the greatest average percentage of the taxpayer’s Nevada gross revenue for the three fiscal years immediately preceding the filing of the initial return. In addition, the regulations provide procedural rules for filing a written request for change in business category, including the due date for the request (i.e., “on or before the date on which the Nevada Commerce Tax Return for the taxable year”), the contents of the request, and the required time period for the Department of Taxation to respond (i.e., 60 days or a deemed approval applies).

Payroll Tax Credit

Nevada allows an employer to take a credit against the Nevada Payroll Tax, a two percent excise tax imposed on the wages paid by the employer, equal to 50 percent of the Commerce Tax paid for the preceding taxable year.

The regulation both expands and limits the credit under certain circumstances. The regulation expands the credit by authorizing a business entity that qualifies as a payroll provider to take a credit against its payroll tax for 50 percent of the Commerce Tax paid by each qualifying member of the affiliated group. The regulation limits the credit to the extent an employer has a Commerce Tax deficiency.

For purposes of the credit, the regulation generally defines a payroll provider as an employer that is a member of an affiliated group that provides payroll services and reports and pays wages on behalf of one or more members of the affiliated group. In this case, a qualifying member of the affiliated group is generally a member that would be subject to the payroll tax if the employees were treated as employees of the member rather than as employees of the payroll provider.

Penalty Waiver

In addition to the traditional grounds for penalty waiver (e.g., a late payment caused by circumstances beyond the control of the taxpayer despite the exercise of ordinary care and without intent), the regulation allows the Department to waive or reduce penalties and interest where the Department determines that the late payment was made because the taxpayer relied upon its most recent federal income tax return or Commerce Tax return to calculate Nevada gross revenue.

Compromise, Penalties, and Voluntary Disclosure

The regulation applies the compromise, penalties, and voluntary disclosure provisions of general application under Chapter 360 of the Nevada Administrative Code to the Commerce Tax.

BDO INSIGHTS

- ▶ Nevada adopted the Commerce Tax regulations just in time for the first report due August 15, 2016. A taxpayer unprepared for this due date may request a 30 day extension of time to pay the tax. A taxpayer with an extension that pays the tax due during the extension period may avoid penalties and late charges, but the taxpayer must still pay interest on the amount due as of the original filing/payment date at the rate of 0.75 percent per month until the tax is paid. For the initial year of the Commerce Tax, the Department must waive penalty or interest for a taxpayer's failure to timely file a report or pay if: (i) the taxpayer is compliant before February 15, 2017; (ii) the failure occurred despite the taxpayer's exercise of ordinary care; and (iii) the noncompliance was not intentional or the result of willful neglect.
- ▶ Currently, Nevada appears to adopt a physical presence nexus standard for purposes of the Commerce Tax. However, given the provision in the regulation that extends the definition of "engaging in business" to "any other activity that constitutes sufficient nexus to subject the business entity to the commerce tax in a manner consistent with the United States Constitution," and pending litigation in other states regarding the application of an economic nexus standard to sales and use and gross receipts taxes, this could change.
- ▶ Taxpayer's typically shrink at the thought of having to pay more taxes. However, for apportionment purposes, a taxpayer subject to an income tax in another state may be able to avoid assigning sales of tangible personal property to Nevada customers to the state of origin under a throwback rule if subject to the Commerce Tax.

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