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AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SALT

SUBJECT

NEVADA IMPOSES A NEW COMMERCE TAX ON BUSINESSES WITH NEVADA GROSS REVENUE EXCEEDING $4 MILLION AND CREATES NEXUS REBUTTABLE PRESUMPTIONS FOR SALES AND USE TAX PURPOSES

SUMMARY

On May 27, 2015 and June 9, 2015, Nevada Governor Brian Sandoval (R) signed into law Assembly Bill 380 ("A.B. 380") and Senate Bill 483 ("S.B. 483"), respectively. S.B. 483 imposes a gross receipts tax (the "Commerce Tax") on a business entity with Nevada gross revenue exceeding $4 million. In addition, S.B. 483 increases the business license fee to $500 for corporations and reverses the previously legislated fee for all other businesses, makes the 2.6% Local School Support Tax permanent, extends the Net Proceeds of Minerals Tax prepayment requirement until June 30, 2016, and with respect to the Modified Business Tax, increases the tax rate and decreases the exemption amount for certain taxpayers. A.B. 380 subjects an out-of-state retailer to a rebuttable sales and use tax collection and remittance responsibility presumption where the retailer has a referral agreement with an in-state resident, or is a member of a controlled group and a component member of the group engages in an activity significantly associated with the retailer's ability to establish and maintain a market in Nevada.

DETAILS

The "New" Commerce Tax

Imposition. Effective July 1, 2015, S.B. 483 imposes the Commerce Tax on the Nevada gross revenue of a business entity engaging in a business in the state that has Nevada gross revenue that exceeds $4 million during a taxable year. A taxable year for all purposes is a twelve (12) month period beginning on July 1 and ending on June 30.

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Taxable Entities. A "business entity" for Commerce Tax purposes includes, among others, a corporation, partnership, sole proprietorship, limited liability company, and generally any other business entity engaged in business in the state. However, the following types of business entities are excluded from the tax: (i) governmental entities; (ii) organizations that qualify for exemption from federal income tax under Internal Revenue Code section 501(c); (iii) estates of natural persons and grantor trusts all of the grantors and beneficiaries of which are natural persons; (iv) certain real estate investment trusts (or REITs); (v) a limited liability company, partnership, or non-business trust that derives at least 90% of its federal gross income from certain investment activities and no more than 10% of its federal gross income from conducting an active trade or business; and (vi) a business entity that confines its in-state activities to the owning, maintenance and management of intangible investments, including stocks, bonds, patents, trademarks, and trade names.

Gross Revenue. "Gross revenue" for these purposes generally means the total amount realized by a business entity (without deduction for the cost of goods sold or other expenses incurred), including: (i) the fair market value of property or services received; (ii) the fair market value of debt forgiven or transferred; (iii) amounts realized from the performance of services; (iv) amounts realized from the sale, exchange, or other disposition of the business entity's property; and (v) amounts realized from another person's possession of the property or capital of a business entity.

Exclusions from Gross Revenue. The following, among others, may be excluded from "gross revenue:" (i) the value of cash discounts allowed by the business entity and taken by a customer; (ii) the value of goods or services provided to a customer on a complimentary basis; (iii) regardless of the federal income tax classification of the business entity, amounts realized from certain reorganization-type transactions; (iv) amounts realized from the sale, exchange, disposition or grant of the right to use a trademark, trade name, patent, copyright, or other similar intellectual property; (v) amounts indirectly realized from a reduction of an expense or deduction; and (vi) amounts that are not considered revenue under generally accepted accounting principles.

Deductions from Gross Revenue. The following, among others, may be deducted from "gross revenue": (i) interest and dividends attributable to federal and Nevada state and local bonds or securities; (ii) certain taxes and fees paid to the state and the amount of income/receipts used to determine certain other taxes; (iii) payments received by an employee leasing company from a client company for wages, payroll taxes on those wages, employee benefits and workers' compensation benefits for employees leased to the client company; (iv) pass-through revenue; (v) the federal income tax basis of securities and loans sold by the business entity; (vi) interest income other than interest on credit sales; (vii) dividends and distributions from corporations and pass-through entities; (viii) receipts from the sale, exchange or other disposition of an asset described in Internal Revenue Code sections 1221 and 1231; (ix) receipts from certain hedging transactions; (x) proceeds attributable to the repayment, maturity or redemption of the principal of a loan, bond, mutual fund, certificate of deposit, or marketable instrument; (xi) proceeds from the issuance of stock, options and warrants; (xii) customer returns and refunds; and (xiii) bad debts expensed for federal income tax purposes.

Nevada Gross Revenue. "Nevada gross revenue" is gross revenue (after exclusions and deductions) from Nevada sources that exceeds $4 million. (*See the chart below.)*

RECEIPT FROM …	SOURCE TO NEVADA IF …
… Rents and royalties from real property	… The property is located in the state
… Sale of real property	… The property is located in the state
… Rents and royalties from tangible personal property	… The property is located or used in the state
… Sale of tangible personal property	… The property is delivered or shipped to a buyer in the state
… Sale of transportation services	… The origin and the destination point of the transportation are in the state
… Other service revenue	… Based upon the ratio of the purchaser's benefit derived from the service in the state to the purchaser's benefit derived from the service everywhere
… Revenue not otherwise described in this section	… The receipt is from business conducted in the state

Tax Rates. Commerce Tax rates, which vary depending upon a business entity's 2012 industry category, and are generally based on the North American Industry Classification System (or NAICS), range from 0.051% to 0.331%. (*See the chart below.)* If a business entity is engaged in business in more than one industry category, its industry category for Commerce Tax filing purposes is the industry category in which the highest percentage of its Nevada gross revenue is generated. After designating an industry on its initial report, a business entity may only change its industry category, and hence its rate, with approval from the Department of Taxation.

INDUSTRY CATEGORY	NAICS CODE	TAX RATE
Agriculture, Forestry, Fishing, and Hunting	11	0.063%
Mining, Quarrying, and Oil and Gas Extraction	12	0.051%
Utilities and Telecommunications	22 & 517	0.136%
Construction	23	0.083%
Manufacturing	31,32, & 33	0.091%
Wholesale Trade	42	0.101%
Retail Trade	44 & 45	0.111%
Air Transportation	481	0.058%
Truck Transportation	484	0.202%
Rail Transportation	482	0.331%
Other Transportation	483, 485, 486, 487, 488, 491, & 492	0.129%
Warehousing and Storage	493	0.128%
Publishing, Software, and Data Processing	511, 512, 515, & 518	0.253%
Finance and Insurance	52	0.111%
Real Estate and Rental, and Leasing	53	0.250%
Professional, Scientific, and Technical Services	54	0.181%
Management of Companies and Enterprises	55	0.137%
Administrative and Support Services	561	0.154%
Waste Management and Remediation Services	562	0.261%
Educational Services	61	0.281%
Healthcare and Social Assistance	62	0.190%
Arts, Entertainment, and Recreation	71	0.240%
Accommodations	721	0.200%
Food Services and Drinking Places	722	0.194%
Other Services	81	0.142%
Unclassified	None	0.128%

Reporting Requirements. Within forty-five (45) days following the end of a taxable year, a taxpayer must report and pay the Commerce Tax due. A taxpayer may apply for one thirty (30) day extension to pay the tax. A taxpayer with an extension that pays the tax due during the extension period may avoid penalties and late changes, but the taxpayer must still pay interest on the amount due as of the original filing/payment date at the rate of 0.75% per month until the tax is paid.

Initial Year Grace Period. The Department must waive penalty or interest for a taxpayer's failure to timely file a report or pay the Commerce Tax 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.

Sales and Use Tax Rebuttable Presumptions

Under A.B. 380, effective July 1, 2015, a retailer that is part of a "controlled group" is presumed to be subject to a sales and use tax collection and remittance responsibility if a "component member" of the "controlled group" has a physical presence in Nevada and engages in any of the following activities in the state: (i) sells a similar line of products or services as the retailer under a same or a similar business name; (ii) maintains an office, distribution facility, warehouse or storage place, or similar place of business in Nevada to facilitate delivery of tangible personal property sold by the retailer; (iii) uses the same or substantially similar trademarks, service marks or trade names as the retailer; (iv) delivers, installs, assembles or performs maintenance services for the retailer's Nevada customers; (v) facilitates the retailer's delivery of tangible personal property to customers in Nevada through pickups at an office, distribution facility, warehouse, storage place or similar place of business maintained by the component member; or (vi) conducts any other activity in Nevada significantly associated with the retailer's ability to establish and maintain a market in Nevada. For these purposes, "controlled group" and "component member" have the same meanings as provided under Internal Revenue Code Section 1563, but may include business entities that are not corporations.

Also under A.B. 380, effective October 1, 2015, a retailer is presumed to be subject to a sales and use tax collection and remittance responsibility if, during any four-quarter period ending on the last day of March, June, September and December, it grosses more than $10,000 in sales to Nevada customers referred to the retailer by Nevada residents, whether by an Internet website or otherwise, that have a referral agreement with the retailer pursuant to which the retailer receives consideration for such referrals.

Both of the foregoing presumptions may be rebutted via proof that the activities of the component member or resident are not significantly associated with the retailer's ability to establish or maintain a market in Nevada.

Modified Business Tax Rate Increases and Exemption Decrease

Previous legislation scheduled the Modified Business Tax rate imposed on non-financial institutions to decrease on July 1, 2015 from 1.17% to 0.63% on quarterly wages that exceed $85,000. Effective July 1, 2015, S.B. 483 increases the rate imposed on non-financial institutions (other than mining companies) to 1.475% and increases the rate paid by mining companies to 2%. In addition, S.B. 483 reduces the quarterly exemption amount to $50,000 with respect to all non-financial institutions (other than mining companies). However, if revenue from all business taxes exceeds projections by more than 4%, the Modified Business Tax rates may eventually be reduced to as low as 1.17%.

After the first year of the implementation of the Commerce Tax, S.B. 483 allows a taxpayer to use 50% of its Commerce Tax liability as a credit against, and to the extent of, its Modified Business Tax liability. Unused credit may be carried forward, but not beyond the fourth calendar quarter immediately following the end of the taxable year in which the Commerce Tax was paid.

Other Changes

Business License Fee. Previous legislation scheduled the current $200 Secretary of State annual business license fee to drop to $100 in 2016. Effective July 1, 2015, S.B. 483 increases the fee to $500 for corporations. With respect to all other businesses, S.B. 483 reverses the previously legislated fee drop.

Local School Support Tax. In 2009, Nevada temporarily raised its Local School Support Tax (which combined with the Basic City-County Relief Tax, Supplemental City-County Relief Tax, and state rate comprise the state's current 6.85% sales tax) to 2.6%. The temporary 2.6% Local School Support Tax was set to return to the pre-2009 rate of 2.25% (a 0.35% decrease) at the end of the 2015 fiscal year. Effective July 1, 2015, S.B. 483 permanently adopts the 2.6% Local School Support Tax rate.

Net Proceeds of Minerals Tax. Also in 2009, Nevada required taxpayers to begin prepaying the Net Proceeds of Minerals Tax – a requirement that was set to expire on June 30, 2015. S.B. 483 extends the prepayment requirement until June 30, 2016.

BDO INSIGHTS

- Business entities with more than $4 million of Nevada gross revenue may now be subject to an entirely new tax. A taxpayer that chose to do business in Nevada, particularly because of the absence of an income tax, may need to reevaluate its tax structure.
- Business entities that are subject to the Commerce Tax should note that the first payment and return due date (excluding an extension) under the tax is not until August 15, 2016. For the initial year of the Commerce Tax, a taxpayer unable to report or pay by the due date may avoid penalties of interest by taking advantage of the grace period, provided the statutory requirements are met.
- A retailer that is unable to overcome one of the new sales and use tax rebuttable presumptions due to a referral agreement with one or more Nevada residents, or because an in-state "component member" helps to establish and maintain a market for the retailer in Nevada, may find itself subject to a significantly higher Nevada tax burden or an exposure.
- Non-financial institutions, including mining and non-mining companies, currently subject to the Modified Business Tax may find themselves subject to more tax than before due to the rate increases. Non-financial institutions (other than mining companies) that were not subject to the Modified Business Tax due to the previous $85,000 quarterly exemption amount may now find themselves subject to the tax because of the now lower $50,000 quarterly exemption amount. For example, the Nevada legislature is anticipating the lower exemption amount will increase the number of taxpayers subject to the Modified Business Tax from 13,492 to 18,607.
- Although the now permanent changes to the Local School Support Tax and the Net Proceeds of Minerals Tax have been in place for several years, a taxpayer that anticipated the previously legislated sunset to take place with respect to one or more of those provisions may need to adjust for permanent change.