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July 6, 2015

VIA FACSIMILE 775-684-2020

Deonne E. Contine  
Executive Director  
State of Nevada  
Department of Taxation  
1515 College Parkway, Suite 115  
Carson City, NV 89706

Re: Workshop on Proposed Regulation pertaining to Senate Bill 483

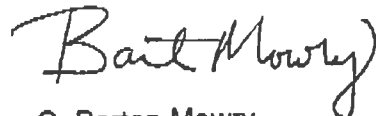
Dear Ms. Contine,

Please find attached my comments and observations concerning issues that the proposed regulations need to address in implementing the Commerce Tax. Unfortunately my schedule prevents me from attending in person, but I do request that this letter and my comments be made a part of the record.

By way of background, since 1976 I have been a licensed Certified Public Accountant in Nevada; since 1979, I have been a licensed attorney in the State of Nevada. In addition to earning a Juris Doctor, I also earned a LL.M. degree (Taxation) from New York University, Graduate School of Law. Much of my law practice is focused on tax matters.

Kindly include this letter and the attached comments and observations as part of the formal record on the workshop. Please contact me with any questions.

Respectfully Submitted,



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Commerce Tax (SB 483) - Comments for Clarifications in Regulations

July 6, 2015

**1. Sections 4.1 and 4.2 [Definition of "business entity" regarding Trusts versus Business Trusts].**

Comment: The intent of these sections taken together is to include active businesses, but not passive entities. Business Trusts, which are active business entities, are included while typical or "garden variety" type trusts are not specifically excluded. Some like grantor trusts are, but not all typical estate and gift tax planning type trusts are grantor trusts. These types of trusts should likewise be excluded from being considered a "business entity" unless the trust is required to file a Schedule C (Form 1040), Profit or Loss from Business or a Schedule F (Form 1040) Profit or Loss from Farming.

**2. Section 4(2)(m) [Exceptions to "business entity"]. This subsection provides –**

*"A person whose activities within this State are confined to the owning, maintenance and management of the person's intangible investments..."*

Comment: This is one of the enumerated exceptions to the "business entity" definition and is presumably meant to exclude entities that are not engaged in commerce in Nevada per se but are investing their own portfolio investments. The exception turns on "intangible investments" but does not adequately define what "intangible investments" are. It states a few examples of what intangible investments can be ("intangible investments" includes, without limitation, investments in stocks, bonds, notes and other debt obligations..."), but this is only a short list. We suggest clarifying "intangible investments" by stating they are investment assets that are not physical in nature and include "securities" as defined under the Securities Act of 1933, contract rights and intellectual property.

Comment: A second clarification would be to exclude a person who is owning, maintaining and managing the intangible investments as a licensed or unlicensed family trust company under NRS 669A. These types of persons have legal ownership to trust assets (although not necessarily beneficial ownership) and exist for the purpose of managing private family wealth on a non-commercial basis.

**3. Section 11(1)(a) [Types of pass-through revenue]. This subsection provides –**

*"Revenue received by a business entity that is required by law or fiduciary duty to be distributed to another person or governmental entity;"*

Comment: This is one of the deductions from gross revenue under Section 21 and presumably addresses the situation where gross revenue is received by a business entity but must be distributed to another person. These amounts must be distributed by "law or fiduciary duty". However, it is difficult to see why amounts which are required to be distributed by contract should not be similarly included. For example, amounts received by a partnership that under the terms of the partnership agreement to distribute to its partners should be treated as "pass-through revenue".

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**4. Section 11(1)(f) [Types of pass-through revenue]. This subsection provides –**

*“Revenue received from a business entity that is party of an affiliated group from another member of the affiliated group.”*

**Section 11(2)(a) [Definition of “affiliated group”] –**

*“Affiliated group’ means a group of two or more business entities, including, without limitation, a business entity described in subsection 2 of section 4 of this act, each of which is controlled by one or more common owners or by one or more members of the group.”*

Comment: These provisions are intended to eliminate revenues passing between affiliated entities within the same control group. The definition of affiliated group ties to the business entity definition, and it appears to include entities that would otherwise be excluded under Section 4(2), such as a passive entity. However, defining “business entities” by reference to Section 4(2) is awkward because entities under that subsection are not, by definition, business entities to begin with. We suggest clarifying that for purposes of Section 11(2)(a) business entities include the entities that would otherwise be excluded by reason of Section 4(2).

Comment: It is unclear how the statute determines control in the case of a business entity that is a trust. Currently, “controlled by” means “the direct or indirect ownership, control or possession of 50 percent or more of a business entity”. However, in the case of a trust, there is no ownership of the entity, only ownership of the assets. A useful clarification would be that in the case of a trust, “controlled by” means the trustee or trustees together to the extent they have the power to direct the administration of the trust.

**5. Section 14(1)(b) [Definition of “passive entity”]. This subsection provides –**

*“During the period for which the gross revenue of the business entity is reported pursuant to section 20 of this act, at least 90 percent of the business entity’s federal gross income consists of the following income:*

- (1) Dividends, interest, foreign currency exchange gains, periodic and nonperiodic payments with respect to notional principal contracts, option premiums, cash settlements or termination payments with respect to a financial instrument, and income from a limited-liability company;*
- (2) Capital gains from the sale of real property, gains from the sale of commodities traded on a commodities exchange and gains from the sale of securities; and*
- (3) Royalties, bonuses or delay rental income from mineral properties and income from other nonoperating mineral interests; and...”*

Comment: This provision determines whether or not an entity can be considered a passive entity excluded from the definition of business entities subject to the tax. To be considered a passive entity, the entity must have a high percentage of income (measured by federal income

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tax standards) that is passive, as opposed to active, in nature. A significant omission in the laundry list of types of passive income includes income that is received by a partner or member by way of an allocation from a pass-through entity such as a limited partnership or limited liability company. If allocations of income from a tax partnership are not included, an artificial distinction is created between these types of income earned directly versus indirectly. That distinction does not make sense. We suggest that allocations of income from pass-through entities such as partnerships and limited liability companies be included if the underlying character of such income otherwise satisfies the standard above. By the same token, it is not clear why distributions from REITs and RICs, which are also passive in nature, should not be included in the list of types of passive income.

**6. Section 14(3)(a) [Definition of "passive entity – active trade or business"]. This subsection provides –**

*"For the purposes of paragraph (c) of subsection 1:*

*(a) Except as otherwise provided in this subsection, a business entity is 'conducting an active trade or business' if:*

*(1) The activities being carried on by the business entity include one or more active operations that form a part of the process of earning income or profit, and the business entity performs active management and operating functions; or..."*

Comment: A business entity should not be considered an active business if it has been formed solely as an accommodative vehicle and has no motive to conduct its activities for a profit or economic gain.

**7. Section 22(1)(f) [Situs rules]. This subsection provides –**

*"Gross revenue from any services not otherwise described in this section is situated in this State in the proportion that the purchaser's benefit in this State, with respect to what was purchased, bears to the purchaser's benefit everywhere with respect to what was purchased. For the purposes of this paragraph, the physical location at which the purchaser of a service ultimately uses or receives the benefit of the service that was purchased is paramount in determining the proportion of the benefit in this State to the benefit everywhere. If the records of a business entity do not allow the taxpayer to determine that location, the business entity may use an alternative method to situs revenue under this section if the alternative method is reasonable, is consistently and uniformly applied and is supported by the taxpayer's records as the taxpayer's records exist when the service is provided or within a reasonable period of time thereafter."*

Comment: Provide interpretive language to the effect that individuals are deemed to receive the benefit of financial services (accounting, tax returns preparation, investment advice, etc.) at their place of residence, except to the extent that the services relate to activities (active business, real estate, etc.) in Nevada.

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Comment: It would also be appropriate to look through trusts to the residence of the beneficiaries. A trustee's fees from a trust with no Nevada beneficiaries should be situated entirely outside of Nevada.

Comment: Maybe clarify that services provided to a trustee in his capacity as trustee are considered to be provided to the trust. For example, a trustee is required to file a tax return for the trust, but this obligation arises only because the trustee is acting in a fiduciary capacity for the beneficiaries. Fees for the preparation of the trust return should be situated to the residence of the beneficiaries. The trustee would also need to file its own tax return. Preparation of that return would be a service to the trustee rather than the trust.

Comment: For the purpose of situsing the benefit of financial services provided to entities other than trusts, the place of organization is likely to be the most significant factor, but some way to measure the benefit for entities operating both in and out of the state will be needed.

**8. Section 22(1)(g) [Situs rules] --**

*"Gross revenue not otherwise described in this section is situated to this State if the gross receipts are from business conducted in this State. For the purposes of this paragraph, the physical location of the purchaser is paramount in determining if business is done in this State. If the records of a business entity do not allow the business entity to determine the location of the purchaser, the gross revenue must not be considered to be from business conducted in this State.*

Comment: In the case of sales of publicly securities, these are done on an exchange in which the purchaser is anonymous and the presumption should be there is no Nevada situs unless the business entity has affirmative knowledge to the contrary.