McDONALD·CARANO·WILSON LLP

Erin R. Barnett **Reply to Las Vegas**

March 17, 2016

Via email: vashekon@tax.state.nv.us

Nadia Vasheko
Commerce Tax Manager
State of Nevada Department of Taxation
Grant Sawyer Office Building
555 E. Washington Ave., Suite 1300
Las Vegas, NV 89101

Re: Proposed Regulation regarding SB 483, Section 11.1(c)

Dear Ms. Vasheko:

This letter is submitted on behalf of the Board of Directors of the NAIOP Southern Nevada Chapter. NAIOP Southern Nevada is the leading member organization for Southern Nevada commercial real estate developers, owners and related professionals who develop and own office, industrial, and mixed-use projects. This letter is a follow up to my previous letter to you dated February 23, 2016. As you will recall, that letter detailed the NAIOP Southern Nevada Board's desire to clarify that payments received by a commercial landlord from its tenant, pursuant to the contractual terms of their lease, may properly be considered "reimbursements" under SB 483 Section 11.1(c), and thereby included in "pass through revenues" under this Section 11. Inclusion in a landlord's "pass thorough revenues" would permit such payments to be deducted from the landlord's gross revenue pursuant to SB 483 Section 21.1(l). For ease of reference, SB Section 11.1(c) provides as follows:

> Sec. 11.1. "Pass-through revenue" means:
>
> (c) Reimbursement for advances made by a business entity on behalf of a customer or client, other than with respect to services rendered or with respect to purchases of goods by the business entity in carrying out the business in which it engages;

It is the position of the NAIOP Southern Nevada Board, on behalf of its members, that, where a commercial lease specifies that the tenant is responsible to pay a certain cost or charge assessed by a third party vendor or service provider (such as, for example, utility bills for the tenant's leased premises), but, for ease of operation, the landlord advances such costs on the tenant's behalf and is reimbursed by the tenant pursuant to the terms of their lease, the amount of

such reimbursed costs is a "reimbursement" under SB 483 Section 11.1(c). As a result, such reimbursements should be deductible from the landlord's gross income.

With that in mind, the NAIOP Southern Nevada Chapter Board proposes the following additional regulations to further clarify SB 483 Section 11.1(c), to be added as a new Section 21 of the Regulations (following Section 20, which provides guidance regarding SB 483 Section 11.1(a)):

> Sec. 21. For the purpose of determining whether revenue received by a business entity is pass-through revenue pursuant to paragraph (c) of subsection 1 of section 11 of Senate Bill No. 483, chapter 487, Statues of Nevada 2015, at page 2881:
>
> (a) where a contract exists between a business entity and its customer or client which provides that the customer or client shall be responsible for any charge, cost, invoice or fee, and the amount of that charge, cost, invoice or fee is advanced by the business entity to a third party (i) on behalf of its customer or client, and (ii) with respect to a service or good that is provided by a third party and is distinct from the service or good being provided by the business entity to the customer or client, the subsequent reimbursement of the business entity by its customer or client for the amount of such charge, cost, invoice or fee shall constitute pass-through revenue; and
>
> (b) Neither the mere advancement of funds by a business entity on behalf of its customer or client, nor the arrangement or coordination by a business entity of goods or services to be provided to its customer or client shall, without more, be sufficient to render the business entity in question as being in the business of engaging in the services for which the advancement has been made.

Phrased in commercial leasing terms, the proposed Section 21(a) is intended to clarify that, where a lease provides, pursuant to the contractual agreement of the landlord and the tenant, that the financial responsibility with respect to a particular charge, cost, invoice or fee ultimately rests with the tenant, and not with the landlord, the reimbursement by the tenant of the landlord for amounts advanced by the landlord to a third party to cover such charge, cost, invoice or fee on behalf of the tenant, will, in fact, constitute pass-through revenue of the landlord for the purpose of Section 21.1(1) of SB 483.

It is important to note that the foregoing proposed regulation would not have the effect of allowing a landlord to simply deduct its operating expenses from its gross revenue. The proposed regulation would only apply where the subject lease provides that a particular charge, cost, invoice or fee is the responsibility of the tenant, such amounts may be advanced by the landlord to a third party on the tenant's behalf, and the landlord is ultimately entitled to reimbursement from the tenant for such advances. In such case, these amounts would be deductible from the landlord's gross revenue pursuant to Section 21.1(l) of SB 483. Further, the

deduction would only apply if the landlord advanced funds on a tenant's behalf *to a third party*. Amounts which a landlord charges its tenant for, for example, property management services, which are retained by the landlord and not paid to a third party, would not be deductible and would be included in the landlord's gross revenue.

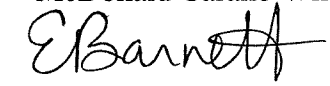
Further, the proposed regulation is intended to capture only true reimbursements from another business entity, client or customer (each, as the tenant under the lease) to a business entity that is the landlord; it is not intended to capture the cost of items which may simply be included in the amount charged by the landlord to its tenant for services provided by the landlord. With respect to gross or modified gross leases, for example, where the landlord remains financially responsible for the bulk of the cost of operating the leased premises, and such costs are included in the rent charged to tenant, the landlord would not be able to claim the deduction.

Finally, the proposed Section 21(b) is intended to clarify that, although a landlord may arrange for, and even advance payment for, certain services to be provided to a tenant (such as electricity, internet and phone service, water, etc.), such acts do not, without more, equate to the landlord being in the business of providing such services, so as to except landlords (or other business entities, as applicable) from the general rule set forth in Section 11.1(c) of SB 483 that a reimbursement of an advance made by a business entity on behalf of its client or customer constitutes pass-through revenue. As noted in my previous letter, a landlord is not engaged in the business of generating and selling electricity merely because it advances (and is reimbursed for) the amount due to the power company for the tenant's leased premises. That the power company will ultimately receive the amount advanced and be subject to the assessment of commerce tax on the same (subject to provisions of SB 483) illustrates that, in this example, it is the power company that rendered the service, and not the landlord. Put another way, the power bill payments made by a tenant should not be subject to the assessment of commerce tax both in the hands of a landlord and in the hands of the power company, merely because the landlord has acted as a conduit for payment.

We appreciate the Nevada Department of Taxation's consideration of our comments and suggestions. Thank you for your attention to this matter.

Thank you,

McDonald Carano Wilson LLP



Erin Barnett

ERB/

cc: Deonne Contine, Executive Director of the Department of Taxation (via email: contine@tax.state.nv.us)

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