McDONALD·CARANO·WILSON LLP

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

February 23, 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: Comments on Interpretation of SB 483, Section 11(c)

Dear Ms. Vasheko:

In anticipation of the Commerce Tax Workshop scheduled for February 23, 2016, we respectfully submit the following comments on behalf of NAIOP Southern Nevada, the leading organization for developers, owners and related professional in office, industrial and mixed-use real estate. This comment is in regards to an email dated February 17, 2016 from 'The Commerce Tax Team' to Russell Smithson of McDonald Carano Wilson, wherein The Commerce Tax Team provided its interpretation of Section 11(c) of SB 483. For ease of reference, Section 11(c) is reproduced below:

> 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;

In response to a question regarding whether common area maintenance or property operating costs incurred costs by landlord *on behalf of a tenant* could be considered reimbursements for the purpose of Section 11.1(c), The Commerce Tax Team indicated as follows:

> Common Area Maintenance (CAM) charges represent additional rent charged to the tenant of a property for providing services including but not limited to snow removal, repair, maintenance, parking lot striping, and utilities. The CAM charges represent the operating costs of the landlord's business that contribute to the gross rent of the property. The service offered by the landlord to the tenant is

> the occupancy of the property. The expenses are in respect of the service offered by the landlord.
>
> Section 11.1(c) would not apply in this situation since the landlord is in the business of renting buildings and providing common area maintenance to that building would be considered a service rendered with respect to the business in which it engages. Therefore the CAM charges would not be deductible for commerce tax purposes.

With respect, the foregoing interpretation of Section 11(c) does not reflect an appropriate assessment of the landlord-tenant relationship in the commercial context, and conflates the services which are in fact provided by landlord with those provided by other service providers.

In the context of a commercial lease, the service provided by a landlord to its tenant is the lawful possession of the leased premises. In exchange for this, the tenant pays a set amount of rent to landlord. In addition, the landlord may also charge a property management fee to compensate landlord (or its third party property manager) for its efforts in coordinating the provision of certain services or amenities at the leased premises. Thus, the services provided by a landlord in the context of a commercial lease can generally be boiled down to (i) possession of the premises in the condition required by the lease, and (ii) property management services, which may in fact be delegated to an outside management company.

While in occupancy of the leased premises, the tenant will have the need for additional services, which landlord is not able, in and of itself, to provide. These services may include, for example, electricity at the leased premises provided by Nevada Energy, phone and internet services provided by Cox Communications, and water services provided by the Southern Nevada Water District. Depending on the lease in question, the tenant may contract for and pay for such services directly. Alternatively, the landlord may contract for such services on the tenant's behalf, advance payment for the same on tenant's behalf to the service providers, and ultimately be reimbursed by tenant. In neither example, however, are the electricity, phone, internet and water used by tenant 'services rendered' by the landlord such that the general rule that client reimbursements may be deducted from gross revenue should not apply.

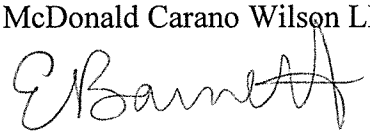
Further, consider that it is not uncommon for landlords with substantial commercial portfolios to subcontract out their property management to a third party property management company. Often, the tenant will then receive a monthly invoice form the property management company, and it is the property management company who receives tenant's payment, and ensures that the landlord, as well as NV Energy Cox Communications and the SNWD (to continue with the above example) are paid. Which party, in this instance, must claim these amounts as their gross receipts, the landlord or the property management company? In reality, it should be neither party, as neither party is in the business of providing the services in question, and neither party is in fact rendering such services to the tenant.

It would seem that, in interpreting Section 11.1(c) as it has, The Commerce Tax Team has concluded that, by merely advancing a payment for a good or service on behalf of a customer or client, a business entity is then, by definition, in the business of providing such good or service, such that a reimbursement for such amounts may not be deducted from gross revenue. Put another way, based on The Commerce Tax Team's email of February 17, 2016, it is difficult to imagine what kind of reimbursements - if not reimbursements for advances made by a landlord on behalf of a tenant for such tenant's electricity, internet, etc. – could possibly be considered "pass-through revenue" and deducted from gross revenue.

To conclude, on behalf of NAIOP Southern Nevada, we request a reconsideration of the above interpretation, and, if deemed necessary by the Department of Taxation a clarification in the regulations accompanying SB 483.

Thank you,

McDonald Carano Wilson LLP



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