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Jeff Rodefer
Commissioner and Chairman
Nevada Tax Commission
1550 College Parkway
Carson City, Nevada 89701

Shellie Hughes
Executive Director
Department of Taxation
1550 College Parkway
Carson City, Nevada 89701

Re: Proposed Amendment to NAC 372.938

Dear Mr. Rodefer and Ms. Hughes:

I am writing to request an amendment to NAC 372.938. As more fully explained below, the regulation can be a trap for the unwary; it can force a small business into bankruptcy. The amendment we are offering will not change the tax treatment, but it will eliminate the trap. I have enclosed copies of the current regulation, as well as one marked to show the amendment we would like made.

Subsection 2 of NAC 372.938 provides a taxpayer the choice of reporting tax measured by the gross receipts from the lease or rental of the property (which is typically the measure of sales tax) or the cost of acquiring the property (which is typically the measure for reporting use tax). If the taxpayer desires to pay the tax based on the use tax measure (i.e., the cost of acquiring the property), subsection 3 requires the taxpayer to make that election by the date their next tax return is due. However, there is no direction on how to make the election. It is unclear whether there is a form for this election similar to the one mentioned in NAC 372.924 (1) or whether the election is made by reporting the use tax on the property acquired.

More importantly, taxpayers, particularly small businesses, are often less familiar with use tax. Consequently, a failure to report timely should not be surprising. A taxpayer who fails to report the use tax on the first return following the purchase of the property should be allowed to remedy their error by later filing the return and paying the tax. The State would be made whole in this situation because in addition to the tax it receives interest and penalties.

Nonetheless, subsection 3 does not allow a taxpayer to correct their error. Instead, the failure to make the election by the due date of the first return following the purchase of the property is a "deemed" election to pay sales tax on the gross receipts from the lease or rental of the property. This might be appropriate for taxpayers in those industries where sales tax is typically collected on rental charges but can be devastating for taxpayers in those industries where tax is typically paid on the acquisition cost of the property.

A taxpayer is unlikely to realize the "deemed" election occurred until years later. At that point, the current regulation does not allow the taxpayer to pay use tax, penalties and interest. Instead, they must pay sales tax on the rental charges. But, if the taxpayer is in an industry where tax is typically paid on the acquisition cost of the property, they would not have been collecting sales tax from their customers. And, upon discovery of the "deemed" election, the taxpayer would not be in a position to go back and collect sales tax. The taxpayer would need to pay the tax out of their profits from the business and this is likely to force them out of business.

According to the NYU-Stern database the average net profit for small businesses (other than those in the financial sector) is 8.19% of gross receipts. On the other hand, the sales and use tax rate in Washoe County is 8.265% and in Clark County is 8.375%. In addition, the taxpayer would be expected to pay penalties and interest. In other words, the potential tax, penalties and interest due based on the "deemed" election would far exceed the amount of money made by the business. It could result in financial ruin for the company.

For the foregoing reasons we respectfully request that our proposal to amend NAC 372.938 be placed on the next available agenda of the Tax Commission.

Thank you,

A handwritten signature in cursive script that reads "Randi Thompson".

Randi Thompson
State Director, NFIB

cc: Nevada Taxpayers Association

NAC 372.938 Collection and payment of sales tax on lease or rental of tangible personal property; sale of property following its use in lease or rental service. (NRS 360.090, 360B.110, 372.385, 372.725)

1. The legal incidence of the sales tax on a lease or rental of tangible personal property falls upon the person who leases or rents the property from the retailer.

2. A retailer engaged in the lease or rental of tangible personal property shall collect and remit the sales tax measured by:

(a) The gross lease or rental charges for the lease or rental of that property; or

(b) The cost of that property to the retailer.

3. A retailer engaged in the lease or rental of tangible personal property who desires to pay the tax measured by the cost of the property to the retailer must make that election not later than the date upon which the first tax return is due following the purchase of that property for lease or rental. If the retailer fails to make that election by that date, the retailer shall be deemed to have elected to pay the tax measured by the gross lease or rental charges for the lease or rental of the property. An election pursuant to this subsection may not be changed after the date upon which the first tax return is due following the purchase of the property for lease or rental.

4. A retailer who elects to pay the tax measured by the gross lease or rental charges pursuant to this section is not required to pay the sales tax for the purchase of parts or other equipment for the tangible personal property which is committed to lease or rental use in this State if the retailer gives a resale certificate to the vendor from whom the retailer purchases the property.

5. If the property is sold following its use in lease or rental service to a purchaser who receives delivery of the property within this State, the tax applies to the sales price of the property without any deduction or credit for the tax paid on the original cost of the property or the taxes paid on the gross lease or rental charges.

(Added to NAC by Tax Comm'n by R105-09, eff. 11-25-2009)

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(a) The gross lease or rental charges for the lease or rental of that property; or

(b) The cost of that property to the retailer.

3. A retailer engaged in the lease or rental of tangible personal property who desires to pay the tax measured by the cost of the property to the retailer must **report and pay the tax on the purchase and not give a resale certificate to his or her supplier.** ~~make that election not later than the date upon which the first tax return is due following the purchase of that property for lease or rental. If the retailer fails to make that election by that date, the retailer shall be deemed to have elected to~~ **A retailer engaged in the lease or rental of tangible personal property who desires to pay the tax measured by the gross lease or rental charges for the lease or rental of the property may provide his or her supplier a resale certificate and must report and pay the tax measured by the gross lease or rental charges. Once tax is reported and paid, either on the acquisition cost of the property or on the gross lease or rental charges for the lease or rental of the property, the manner of reporting tax on the property acquired** ~~An election pursuant to this subsection may not be changed after the date upon which the first tax return is due following the purchase of the property for lease or rental.~~

4. A retailer who elects to pay the tax measured by the gross lease or rental charges pursuant to this section is not required to pay the sales tax for the purchase of parts or other equipment for the tangible personal property which is committed to lease or rental use in this State if the retailer gives a resale certificate to the vendor from whom the retailer purchases the property.

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