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**Respond to Reno Office**

March 23, 2023

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

Re: Proposed Amendment to NAC 372.938

Dear Ms. Hughes:

I am writing, on behalf of Olcese Construction Co., Inc., in support of the proposed amendment to NAC 372.938 proffered by NFIB. The proposed amendment addresses what NFIB has identified as a “tax trap for the unwary.” NAC 372.938 and the proposed amendment are of particular concern to Olcese Construction because it has been snared by this trap.

Olcese Construction provides a waste removal and disposal service. In a typical transaction Olcese Construction delivers a large steel bin to a customer’s property using a roll-off truck. The customer places waste material in the bin. When the bin is full, Olcese Construction returns to retrieve the bin. The bin is hoisted onto the bed of the roll-off truck and the truck transports the waste materials to a land fill for disposal. The substance of this transaction – the real object of the customer – is the removal and disposal of waste materials.

When I first considered the tax treatment of this type of transaction, I concluded that Olcese Construction was providing a service. As a service provider, Olcese Construction would be responsible for paying sales tax, or remitting use tax, on the cost of acquiring tangible personal property used in providing its service and Olcese Construction would not be responsible for collecting sales tax on the amount it charged its clients for the service. To confirm that my analysis was correct, on April 25, 2019, I called the Department’s Call Center and asked whether the charge for placement of a bin on a customer’s property and the periodic pickup and disposal of waste placed in the bin was subject to sales tax. Their answer was “it’s not subject to sales tax because they’re not selling tangible personal property; they’re providing a service.” Incidentally, this is the same conclusion that has been reached by every jurisdiction to have considered the issue.<sup>1</sup>

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<sup>1</sup> Every court to have considered business activity similar to that of Olcese Construction has concluded the taxpayer was rendering a service and not in the business of selling at retail. *Waste Management of Colorado, Inc. v. City of*

Olcese Construction was not aware of its responsibility to accrue and remit use tax on its acquisition of the steel bins used in its waste removal and disposal service. Consequently, when an audit was commenced and Olcese Construction learned of its obligation, there was an expectation that it would be responsible for use tax on the acquisition cost of the bins, together with interest and appropriate penalties. However, NAC 372.938 prevents that result.

The Department considers Olcese Construction to be engaged in the rental of the steel bins used to hold and transport the waste materials. As such, Olcese Construction should have the option of paying tax measured by (i) its cost of acquiring the bins or (ii) the gross receipts from its rental of the bins. But, under NAC 372.938, its failure to timely file use tax returns following its acquisition of the bins is a “deemed election” to pay sales tax on the amounts it charged its customers for the waste removal and disposal service. This “deemed election” denies the taxpayer the ability to cure their mistake by filing a late return, it eliminates the discretion of the auditor and administrative law judge to base the deficiency on the use tax measure and, most importantly, it has resulted in a deficiency which is 17.6 times greater than if Olcese Construction had been allowed to make the election on a late filed return.

The proposed amendment proffered by NFIB eliminates the tax trap by eliminating the “deemed election” and allowing a taxpayer to make the election on a late filed return. If this had been in effect, it would have allowed Olcese Construction to make the election to report the tax measured by the cost of acquiring the steel bins on a late filed return. The state would have been made whole in this situation because Olcese Construction would have been required to pay interest and penalties.

For the foregoing reasons we support NFIB’s proposed amendment to NAC 372.938. Please include this letter in the materials to be considered at the workshop on April 7.

Sincerely,

*Paul D. Bancroft*

Paul D. Bancroft

cc: Sharon Glazner, Department of Taxation  
Tray Abney, Nevada State Director, NFIB

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*Commerce*, 250 P.3rd 722 (2010); *Sanitary Services Corporation v. Meehan*, 235 Conn. 393, 665 A2d 895 (1995); *In the Matter of U-Need-A-Roll Off Corp. v. New York State Tax Comm.*, 67 N.Y2d 690, 490 N.E.2d 840 499 N.Y.S. 2d 921 (1986); *Machinery Moving Inc. v. Porterfield*, 26 Ohio 2d 99, 269 N.E.2d 418 (1971). South Carolina reached the same conclusion in S. C. Private Letter Ruling #04-2 (January 12, 2004) and in California the same result is achieved under Sales and Use Tax Annotation 335.0015.

Cindy Creighton, President, Nevada Taxpayers Association

