

K&L GATES

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900,
SEATTLE, WA 98104-1158
T +1 206 623 7580 F +1 206 623 7022 klgates.com

Mr. George Hritz
Nevada Tax Commission
4600 Kietzke Lane, Bldg L Ste. 234
Reno, NV 89502

Michael Kelley
michael.kelley@klgates.com

T 206.370.8044
F 206.370.6071

October 12, 2015

Re: Nevada Commerce Tax
Comments on Proposed Siting Regulations Implementing to Senate Bill 483

Dear Mr. Hritz,

After review of the Nevada Tax Commission's ("Tax Commission") proposed siting regulations, K&L Gates LLP ("K&L Gates"), on behalf of Microsoft Corporation ("Microsoft"), submits the following comments:

The proposed siting regulation implements the siting rule for general services contained in SB 483, Section 22.1, which provides in pertinent part:

(f) Gross revenue from the sale of any services not otherwise described in this section is sited to 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....

Regulation should clarify that taxpayers with only one in-state physical location are entitled to situs receipts outside of the state provided they have nexus outside of the state

The Nevada Commerce Tax is a gross receipts tax that must be fairly apportioned. See *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995); *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) ("*Central Greyhound*"). State courts have struck down unapportioned gross receipts taxes imposed on services on numerous occasions. For example, the Pennsylvania Supreme Court has twice invalidated local unapportioned gross receipts taxes, stating that "gross receipts taxes imposed upon receipts from interstate commerce are prohibited unless the tax is apportioned to reflect the taxpayer's activities in the state," *Phila Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108, 129 (Pa. 2003); see also *Northwood Const. Co. v. Twp. Of Upper Moreland*, 856 A.2d 789 (Pa. 2004). Additionally, the U.S. Supreme Court has invalidated unapportioned gross receipts taxes on analogous facts. See *Central Greyhound*, 334 U.S. 653 (Court struck down a gross receipts tax imposed by New York on 100 percent of receipts from the sale of bus tickets because a

substantial portion of the activities conducted by the transportation service provider were performed out of state).

The proposed regulation does not include an apportionment mechanism that accurately reflects the business activities of all taxpayers. This will result in some taxpayers situsing 100 percent of their gross receipts to Nevada, regardless of where the physical activities that produce the benefit of those services occur. That result is in direct conflict with U.S. Constitutional law jurisprudence requiring that all gross receipts taxes must be fairly apportioned.

Regulation should provide an objective apportionment measure for internet advertising gross receipts

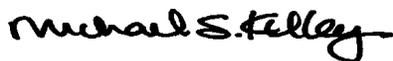
Section 42 of the proposed situsing regulations provides that internet advertising gross receipts, including receipts from pay-per-click advertisements, are sitused to Nevada “based upon the proportion of the...Internet provider’s subscribers located in Nevada over the total of the Internet provider’s subscribers located everywhere.” Unlike many of the other situsing rules, the provision for internet advertisers seem to look through the location of the purchaser (i.e., the advertiser) to the location of the ultimate viewers of the internet advertisements to discern the percentage sitused in Nevada.

This situsing rule presents a number of practical challenges. First, “internet advertising gross receipts” is not a defined term and the proposed situsing regulations provide very little guidance on which activities constitute internet advertising. Gross receipts from pay-per-click advertisements would be sitused to Nevada in accordance with this rule, but it is unclear whether the same rule applies to other forms of online or digital advertising, such as search and display advertising and banner advertising.

Finally, the proposed situsing regulations do not provide detail regarding how the Tax Commission will determine the proxy percentage for internet subscribers in Nevada as compared to internet subscribers everywhere (i.e., population, internet usage studies, PC usage, etc.).

We have attached the proposed situsing regulations for your reference. Please contact me at (206) 370-8044 or michael.kelley@klgates.com if you have any questions.

Best regards,



Michael Kelley