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**FAX TRANSMITTAL SHEET**

Date: December 7, 2015

Please deliver transmittal to:

No. of Pages 7

NAME: Deonne E. Contine, Executive Director

FAX NO.: 775-684-2020

FROM: G. Barton Mowry, Esq.

RE: Comments for December 7, 2015 Public Workshop on Proposed  
Regulation R123-15 Relating to the Commerce Tax

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December 7, 2015

VIA FACSIMILE 775-684-2020

Deonne E. Contine  
Executive Director  
State of Nevada  
Department of Taxation  
1515 College Parkway, Suite 115  
Carson City, NV 89706

Re: Comments for December 7, 2015 Public Workshop on Proposed Regulation R123-15 Relating to the Commerce Tax

Dear Ms. Contine,

As noted in my letters to you dated July 6, 2015, and September 25, 2015, which have been made part of the record of the workshops relating to the Commerce Tax, I have been a licensed CPA in the State of Nevada for almost 40 years, a licensed attorney for over 35 years, and have an advanced law degree, an LL.M. in Taxation from New York University's Graduate School of Law. My law practice is concentrated in the estate planning area with emphasis on trusts, business entities, business succession, and the like.

With that as background, I respectfully submit the following comments and recommendations with respect to the Proposed Regulation of the Nevada Tax Commission, LCB File No. R123-15 (the "Proposed Regulation"):

**1. Definition of "Business Entity".** The Proposed Regulation defines "Business entity" by using a two-part disjunctive test. With respect to part "a", I support the recommendations of Robert E. Armstrong, Esq. of McDonald•Carano•Wilson in his letter to you dated November 25, 2015.

With respect to part "b", I have three comments that I believe are consistent with the statutory language of SB 483:

A. Limit Schedule E to Income in Part I from Rental Real Estate and Non-Mineral Royalties. The Proposed Regulation correctly excludes from the definition of "Business entity" persons

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who only have income from Parts II-IV of Schedule E (Form 1040) ("Schedule E") because income from Parts II-IV of Schedule E is not subject to the Commerce Tax. The exclusion related to Schedule E should go further. The Proposed Regulation should also exclude income from mineral royalties in Part I of Schedule E because income from mineral royalties is not subject to the Commerce Tax pursuant to Section 21.1(d) of SB 483. Additionally, the Proposed Regulation should exclude Part V of Schedule E because Part V is merely a summary of farming income and income derived from Parts I-IV of Schedule E. As the Proposed Regulation is currently written, a person that has any Schedule E income will be a "Business entity" because all Schedule E income is summarized in Part V. Given the intentional omissions of Parts II-IV of Schedule E in the Proposed Regulation, the drafters of the Proposed Regulation likely did not intend this result. I have attached a copy of Schedule E for your convenience.

B. Exclusion of Trusts that only Engage in Investment Activities. The Proposed Regulation should include clarifying language that a trust that only files Schedule B (Form 1040), Schedule D (Form 1040), and/or Schedule E (Form 1040)—except if the trust has income in Part I from rental real estate or non-mineral royalties—is not a "Business entity" for purposes of the Commerce Tax. This clarifying language would be consistent with the language in Section 1.2 of the Proposed Regulation defining the activities that indicate the conduct of a business.

C. Clarification that Express Exclusions Still Apply. The Proposed Regulation should include a clarification that, regardless of whether a person meets the definition of "Business entity" under "a" or "b", the person will not be a "Business entity" for purposes of the Commerce Tax if the person qualifies for any of the exemptions in Section 4.2 of SB 483.

2. Treatment of Entities Disregarded for Federal Income Tax Purposes. I agree with Mr. Armstrong's comments regarding this subject in his letter dated November 25, 2015. State law entity classification should control regardless of federal tax classification.

3. Filing Requirements of Businesses not Classified as "Business Entities". I agree with Mr. Armstrong's comments and support his proposed language regarding this issue. Requiring businesses that are not subject to the Commerce Tax to report their gross receipts from passive income will have a chilling effect on the desirability of having those passive businesses relocate or possibly remain in Nevada. Additionally, there inevitably will be ambiguous situations where it is unclear if a business will be a "Business entity" and thus required to file a return. For these reasons, the Nevada Department of Taxation (the "Department") should adopt the following regulation:

*A business is not a business entity under Section 4 of SB 483 if the*

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*business does not have any "Nevada gross revenue" as defined in Section 9 of SB 483.*

The Department should also develop a form for businesses that are not classified as "Business entities" under SB 483. Those businesses could simply check a box on the form to indicate to the Department that they are not "Business entities" subject to the Commerce Tax. This type of form could even contain a signed certification or declaration that such business or trust is not subject to the Commerce Tax. This would eliminate the chilling effect of requiring such business or trust to disclose the gross income that is not subject to the Commerce Tax because of exclusions and deductions.

**4. Engaging in Business in Nevada and Jurisdiction to Tax.** I agree with Mr. Armstrong's comments and support his proposed language regarding this issue. There should be a requirement for a business to have a physical presence in Nevada to justify imposition of the Commerce Tax.

**5. Persons Whose Activities are Confined to Owning, Maintenance and Management of Intangible Investments.** I agree with Mr. Armstrong's comments. I support his proposed language regarding this issue except that I would add clarifying language that ~~beneficial interests in trusts and all royalty interests are~~ intangible investments.

**6. "Passive Entity" Definition.** I agree with Mr. Armstrong's comments. I support his proposed language regarding this issue except that I would expand the passive-income test to say "income from a limited-liability company *or other flow-through entity such as a partnership or S corporation.*" This additional language (italicized) fits within the spirit and intent of SB 483 as a whole and Section 14 of SB 483 in particular. It is evident from the reference to "income from a limited-liability company" in Section 14.1(b)(1) of SB 483 that the intent of the Legislature is to include passive income that flows to a person from a flow-through entity in the passive-income test. This clarification that income from all flow-through entities counts as part of the passive-income test would be similar to the clarification in Section 5 of the Proposed Regulation that "investments in stocks should include an interest in other legal entities."

**7. Clarification that "Pass-Through Revenue" Means All Revenue Received from Entities in an Affiliated Group.** Under Section 11.1(f) of SB 483, "Pass-through revenue" includes revenue from another member of an affiliated group. However, pursuant to Section 11.2(a) of SB 483, an entity can only be a member of an affiliated group if that entity is a "Business entity" or, but for Section 4.2 of SB 483, would be a "Business entity" for purposes of the Commerce Tax. For example, if Entity A is a "Business entity" and owns 100% of Entity B, which is neither a "Business entity" nor would be a "Business entity" but for Section 4.2 of SB 483, then revenue received by Entity A

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from Entity B is not "Pass-through revenue" under the statute. Conversely, if Entity B was, for example, a "passive entity" under Section 4.2(l) of SB 483, the revenue received by Entity A from Entity B would be "Pass-through revenue" under the statute.

Pursuant to the "without limitation" language in Section 11.2(a) of SB 483, the Proposed Regulation should include the following provision that would have the dual benefit of having a neutral effect on revenue collection and decreasing unneeded confusion for taxpayers:

*"Affiliated Group" means a group of two or more entities regardless of whether one or more of such entities is a business entity or would be a business entity but for Section 4.2 of SB 483.*

Please contact me with any questions or if I can be of any further assistance.

Respectfully submitted,

  
G. Barton Mowry

GBM/km  
Enclosure

SCHEDULE E (Form 1040)

Supplemental Income and Loss

(From rental real estate, royalties, partnerships, S corporations, estates, trusts, REMICs, etc.)

OMB No. 1545-0074

2014

Attachment Sequence No. 13

Department of the Treasury Internal Revenue Service (99)

Attach to Form 1040, 1040NR, or Form 1041.

Information about Schedule E and its separate instructions is at www.irs.gov/schedulee.

Name(s) shown on return

Your social security number

Part I Income or Loss From Rental Real Estate and Royalties Note. If you are in the business of renting personal property, use Schedule C or C-EZ (see instructions). If you are an individual, report farm rental income or loss from Form 4835 on page 2, line 40.

A Did you make any payments in 2014 that would require you to file Form(s) 1099? (see instructions) Yes No

B If "Yes," did you or will you file required Forms 1099? Yes No

Table with columns: 1a Physical address of each property (street, city, state, ZIP code); 1b Type of Property (from list below); 2 For each rental real estate property listed above, report the number of fair rental and personal use days. Check the QJV box only if you meet the requirements to file as a qualified joint venture. See instructions. Columns include Fair Rental Days, Personal Use Days, and QJV.

Type of Property:

- 1 Single Family Residence 2 Multi-Family Residence 3 Vacation/Short-Term Rental 4 Commercial 5 Land 6 Royalties 7 Self-Rental 8 Other (describe)

Main table for reporting income and expenses. Rows include: 3 Rents received, 4 Royalties received, 5 Advertising, 6 Auto and travel, 7 Cleaning and maintenance, 8 Commissions, 9 Insurance, 10 Legal and other professional fees, 11 Management fees, 12 Mortgage interest paid to banks, etc. (see instructions), 13 Other interest, 14 Repairs, 15 Supplies, 16 Taxes, 17 Utilities, 18 Depreciation expense or depletion, 19 Other (list), 20 Total expenses, 21 Subtract line 20 from line 3 (rents) and/or 4 (royalties), 22 Deductible rental real estate loss after limitation, 23a-e Totals for various categories, 24 Income, 25 Losses, 26 Total rental real estate and royalty income or (loss).

Name(s) shown on return. Do not enter name and social security number if shown on other side.

Your social security number

Caution. The IRS compares amounts reported on your tax return with amounts shown on Schedule(s) K-1.

Part II Income or Loss From Partnerships and S Corporations Note. If you report a loss from an at-risk activity for which any amount is not at risk, you must check the box in column (e) on line 28 and attach Form 6198. See instructions.

27 Are you reporting any loss not allowed in a prior year due to the at-risk, excess farm loss, or basis limitations, a prior year unallowed loss from a passive activity (if that loss was not reported on Form 8582), or unreimbursed partnership expenses? If you answered "Yes," see instructions before completing this section. Yes No

Table with 5 columns: (a) Name, (b) Enter P for partnership; S for S corporation, (c) Check if foreign partnership, (d) Employer identification number, (e) Check if any amount is not at risk. Rows A, B, C, D.

Table with 5 columns: (f) Passive loss allowed, (g) Passive income from Schedule K-1, (h) Nonpassive loss from Schedule K-1, (i) Section 179 expense deduction from Form 4562, (j) Nonpassive income from Schedule K-1. Rows A, B, C, D, 29a Totals, 29b Totals, 30, 31, 32.

Part III Income or Loss From Estates and Trusts

Table with 2 columns: (a) Name, (b) Employer identification number. Rows A, B.

Table with 4 columns: (c) Passive deduction or loss allowed, (d) Passive income from Schedule K-1, (e) Deduction or loss from Schedule K-1, (f) Other income from Schedule K-1. Rows A, B, 34a Totals, 34b Totals, 35, 36, 37.

Part IV Income or Loss From Real Estate Mortgage Investment Conduits (REMICs)—Residual Holder

Table with 5 columns: (a) Name, (b) Employer identification number, (c) Excess inclusion from Schedules Q, line 2c, (d) Taxable income (net loss) from Schedules Q, line 1b, (e) Income from Schedules Q, line 3b. Row 39.

Part V Summary

Table with 2 columns: Description, Amount. Rows 40, 41, 42, 43.