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State of Nevada
Department of Taxation

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August 3, 2015

Nevada Tax Commission
Ms. Deonne E. Contine, Executive Director
Grant Sawyer Office Building, Suite 1300
555 East Washington Avenue
Las Vegas, Nevada 89101

Re: Tax Commission Proposed Regulations – SB 376

Dear Ms. Contine:

On behalf of the Livery Operators Association (“LOA”), please accept the following comments regarding the proposed Tax Commission regulations pertaining to Senate Bill (“SB”) 376.

The LOA recommends inclusion of the definitions set forth in Nevada Revised Statute (“NRS”) and Nevada Administrative Code (“NAC”) Chapters 706, which define common motor carriers of passengers. *See Attached.*

Additionally, pursuant to 49 USC Sec. 14501, a state is prohibited from enacting or enforcing a law relating to the authority to provide intrastate charter bus transportation, save and except for the ability to exercise safety regulatory authority and impose minimum amounts of financial responsibility related to insurance requirements. The LOA submits that the excise tax as promulgated by SB 376 could be construed as a law relating to the authority to provide charter bus transportation and as such, it would be in direct conflict with the federal code enumerated herein. This interpretation is further supported by the US Supreme Court’s decision in *Natl. Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

Lastly, consistent with the comments entered into the record during the regulation workshop on July 24, 2015, the LOA seeks to confirm that the excise tax is a pass through tax charged to passengers following the trip. Furthermore, the LOA recommends for consideration the development of a tax formula for charter transportation operators to use in imposing the excise tax. In doing so, operators can ensure compliance with the law without the potential for error. Using the average of charter rates, and authorized surcharges and fees, a tax rate could be determined based on information maintained and calculated by the Nevada Transportation Authority (“NTA”) and thereafter reviewed and recalculated on an annual or semi-annual basis.

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On behalf of the LOA, we would like to thank the Department of Taxation for its valuable time and assistance with the proposed regulations. Please do not hesitate to contact me directly should you have questions or wish to further discuss the comments set forth herein.

Yours truly,

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Kimberly Maxson-Rushton, Esq.

cc: David Pope, Esq.

Enclosure

NRS 706.041 “Common motor carrier of passengers” defined. “Common motor carrier of passengers” means any person or operator, including a taxicab motor carrier, who is held out to the public as willing to transport by vehicle from place to place, either upon fixed route or on-call operations, passengers or passengers and light express for all who may choose to employ the person or operator.

NAC 706.015 “Airport transfer service” defined. (NRS 706.171) “Airport transfer service” means the transportation of passengers and their baggage in the same vehicle, except by taxicab, for a per capita charge between airports or between an airport and points and places in this State. The term does not include charter services by bus, charter services by limousine, scenic tours or special services.

NAC 706.034 “Charter service by bus” defined. (NRS 706.171)

1. “Charter service by bus” means the prearranged transportation of persons who have acquired the exclusive use of a bus for a particular itinerary under a single contract and at a fixed charge for the bus, which is consistent with the tariff filed by the carrier, for the duration of the charter.

2. Except as otherwise provided in paragraph (d) of subsection 3, the term includes services sold to a broker at an hourly rate only, for resale by the broker in combination with other services or facilities not related to transportation at per capita rates or at hourly rates, as necessary. As used in this subsection, “in combination with other services or facilities not related to transportation” means transportation purchased by a purchaser or broker and resold by the purchaser or broker for the purpose of transporting passengers, under a single contract, for a particular itinerary between a definite point of origin and a location where services or facilities other than, or unrelated to, transportation are provided by the purchaser or broker for its benefit or for the benefit of a third party, including, without limitation, malls, the place of employment of passengers or other similar locations or facilities.

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- (a) Scenic tours;
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1. “Charter service by limousine” means the exclusive use of a traditional limousine or livery limousine for the prearranged transportation of passengers and their baggage under a charter order at an hourly rate for a minimum of 1 hour.

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NAC 706.119 “Special services” defined. (NRS 706.171) “Special services” means the transportation of persons who have acquired the use of a vehicle for a special event, or for a specific purpose as approved by the Nevada Transportation Authority, between definite points of origin and destination, at a per capita rate. The term does not include charter services by bus, charter services by limousine, scenic tours or airport transfer services.

MEMORANDUM

TO: Ms. Deonne E. Contine, Executive Director
Mr. David Pope, Sr., Esq

FROM: Mrs. Kimberly Maxson-Rushton, Esq.
Livery Operators Association of Las Vegas

DATE: August 21, 2015

RE: Legal Implications and Effect of Excise (Passenger) Tax

The intent of this memorandum is to provide the Department of Taxation with further analysis relative to the intent of the Nevada State Assembly and Nevada Senate (collectively, the "Legislature") in passing the Senate Bill 376 ("Bill").

By way of background, the Bill was approved by the Legislature on May 20, 2015 and signed into law on June 9, 2015. The stated purpose of the Bill was to:

[R]evise provisions concerning an appeal of certain decisions of the Nevada Transportation Authority; revising provisions concerning an appeal of a final decision of the Taxicab Authority; revising provisions relating to the regulation of taxicabs; *transferring the authority to administer and collect certain excise taxes from the Nevada Transportation Authority and the Taxicab Authority to the Department of Taxation*; and providing other matters properly relating thereto. *Bill at page 1 (emphasis added).*

In the relevant part, the Bill imposed a three (3%) percent excise tax (the "Excise Tax") on three types of transportation users: (i) passengers who use "digital network or software application" services to obtain a transportation provider ("Digital Network Passenger"); (ii) passengers who use common motor carrier "connection" services to obtain a transportation provider ("Carrier Connection"); or (iii) passengers who use a taxicab "connection" service to obtain a transportation provider ("Taxicab Connection Passenger"). *Bill* §§35 – 37. For your convenience, please find below the statutory language of each Excise Tax category.

Digital Network Passenger

In addition to any other fee or assessment imposed pursuant to this chapter, an excise tax is hereby imposed on the use of a digital network or software

application service of a transportation network company to connect a passenger to a driver for the purpose of providing transportation services at the rate of 3 percent of the total fare charged for transportation services, which must include, without limitation, all fees, surcharges, technology fees, convenience charges for the use of a credit or debit card and any other amount that is part of the fare. The Department of Taxation shall charge and collect from each transportation network company the excise tax imposed by this subsection. *Bill* at §35, Nev. Rev. Stat. Ann. § AB 175, § 28 (1) (*emphasis added*).

Carrier Connection Passenger

Except as otherwise provided in subsection 2¹ and **in addition to any other fee or assessment imposed pursuant to this chapter**, an excise tax is hereby imposed on the connection, whether by dispatch or other means, made by a common motor carrier of a passenger to a person or operator willing to transport the passenger at the rate of 3 percent of the total fare charged for the transportation, which must include, without limitation, all fees, surcharges, technology fees, convenience charges for the use of a credit or debit card and any other amount that is part of the fare. The Department of Taxation shall charge and collect from each common motor carrier of passengers the excise tax imposed by this subsection. *Bill* at §36, Nev. Rev. Stat. Ann. § AB 175, § 51 (1) (*emphasis added*).

Taxicab Connection Passenger

Except as otherwise provided in subsection 2² and **in addition to any other fee or assessment imposed pursuant to this chapter**, an excise tax is hereby imposed on the connection, whether by dispatch or other means, made by a certificate holder of a passenger to a taxicab willing to transport the passenger at the rate of **3 percent of the total fare charged** for the transportation, which must include, without limitation, all fees, surcharges, technology fees, convenience charges for the use of a credit or debit card and any other amount that is part of the fare. The Department of Taxation shall charge and collect from each certificate holder the excise tax imposed by this subsection. *Bill* at §37, Nev. Rev. Stat. Ann. § AB 175, § 52 (1) (*emphasis added*).

Based on a plain language analysis of the Bill, the Excise Tax can only be read as a pass-through tax on the passenger. As indicated by the blue text in the Excise Tax explanations above, the Excise Tax is imposed on the “use” or “connection,” not the provision of transportation. This specific language was initially introduced by amendment on February 18, 2015 and survived numerous legislative debates.

The Nevada Supreme Court held that “the plain meaning of the words in a statute should be respected unless doing so violates the spirit of the act.” *City of Las Vegas v. Eighth Judicial*

¹ This refers to the exemption of “airport transfer service” passengers from taxation.

² Please see *supra* fn. 1.

Dist. Court ex rel Cnty. of Clark, 124 Nev. 540, 544 (2008). Per Merriam-Webster's Dictionary, the terms "use" and "connection" are defined as follows:

"Use"

"The act or practice of employing something" or "a method or manner of employing or applying something." See Merriam-Webster's Dictionary at <http://www.merriam-webster.com/dictionary/use>.

"To avail oneself of; apply to one's own purposes" or

"to expend or consume in use."

See Dictionary.com at <http://dictionary.reference.com/browse/use>.

"Connection"

"to place or establish in relationship" or "to join or fasten together usually by something intervening." See Merriam-Webster's Dictionary at <http://www.merriam-webster.com/dictionary/connection>.

"to establish communication between; put in communication" or

"to cause to be associated, as in a personal or business relationship." See Dictionary.com at <http://dictionary.reference.com/browse/connect>.

Therefore, given the plain and ordinary meanings of these terms, the Excise Tax is imposed on the party which employs or initiates contact, which is the passenger in the instant case, not the party which is employed or contacted, which is the transportation provider in the instant case.

The Nevada Supreme Court concluded that the "legislature's intent predominates" so as to prevent statutory language from "producing absurd or unreasonable results." *Anthony Lee R. v. State*, 113 Nev. 1406, 1414 (1997). Pursuant to this guidance, and in conjunction with the plain and ordinary meaning of the terms "use" and "connection," the Legislature's intent is that the Excise Tax is a pass-through tax. The red text in the Excise Tax explanations above state that the Excise Tax is imposed "in addition to any other fee or assessment." Therefore, if read literally, as the Nevada Department of Taxation ("Department") suggests its proposed regulations, hereinafter attached as the "Proposed Regulations," the Excise Tax would be subject to either: (i) multi-tier taxation for the same transaction or (ii) infinite assessment.

Based on the fact that the Excise Tax is imposed on "use" and "connection," the phrase "in addition" in the Bill creates an infinite cycle of tax for the use and connection to transportation services. Conversely, if the Proposed Regulations are ignored, and the Excise Tax is imposed on the consumer directly, it avoids the issue of circular taxation all together.

Due to the fact that a reasonable interpretation of the Bill can only lead to the conclusion that the Excise Tax is a pass-through tax to the consumer, section 7 of the Proposed Regulations ("Section 7") is unnecessary and could be construed in a such a manner as to contradict the Bill. Specifically, in the relevant part, Section 7 states:

The passenger transportation tax is a 3% excise tax imposed on the company providing the transportation service. It is not a tax on the consumer or the customer

The passenger transportation tax is a 3% excise tax imposed on the company providing the transportation service. It is not a tax on the consumer or the customer and the taxpayer is not required to collect it from the consumer. If the taxpayer decides to directly pass the charge onto its customers, a company must do the following:

- 1) If asked, explain to its customers that the charge is made in order to recoup money paid by the company for taxes imposed on it.
- 2) Keep records that clearly delineate the amount of the fare as separate from any charge the company may assess to recover the cost of complying with the tax; and
- 3) Not represent that the charge is a tax imposed directly on the customer.

To comply with 1 through 3 above, a taxpayer must recover the cost of the tax with the use of the following language in a separate line item on any receipt or invoice provided to a customer: "3% transportation recovery charge." In addition, taxpayers must use the same language to identify the recovery of the tax in its own records.

Pursuant to Section 7, the Department seemingly contemplates the possibility of a non-pass through version of the Excise Tax. Such a version does not exist, which negates the necessity for Section 7.

Section 7 also requires transportation providers to provide notice of the Excise Tax's legislatively mandated pass through status (the "Recovery Notice") to each consumer. The Recovery Notice is not discussed in the legislative history of the Bill and it entirely misrepresents the Legislature's intent behind the Excise Tax, as previously discussed. If the Legislature intended for the Excise Tax to be included in a passenger's total fare, the Bill would have enumerated the Excise Tax as part of the total fare, as the Legislature did with other items. Instead, as the Bill unambiguously states, the Excise Tax is (i) "in addition" to other "fees and assessments and (ii) calculated based on the provider's total fare, which by definition, cannot include the Excise Tax.

Last, it is my understanding that the Department has taken the position that the Excise Tax should be imposed on transportation providers because of the Bill's definition of a "taxpayer" as a "common motor carrier of passengers; taxicab; or transportation network company." *Bill* at §16, Nev. Rev. Stat. Ann. § SB 376, § 16. This position is unreasonable because it applies the term "taxpayer" out of context. The Bill states that the only instances in which the term "taxpayer" is referenced are as follows:

Section 22

Each person responsible for maintaining the records of a taxpayer shall:

- (a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;
- (b) Preserve those records for 4 years or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and
- (c) Make the records available for inspection by the Department upon demand at reasonable times during regular business hours. *Bill* at §22, Nev. Rev. Stat. Ann. § SB 376, § 22.

Section 23

To verify the accuracy of any return filed by a taxpayer or, if no return is filed, to determine the amount required to be paid, the Department, or any person authorized in writing by the Department, may examine the books, papers and records of any person who may be liable for the excise tax imposed by sections 28, 51 and 52 of Assembly Bill No. 175 of this session. *Bill* at §23, Nev. Rev. Stat. Ann. § SB 376, § 23.

The Bill states that transportation providers are only referred to as “taxpayers” because they are responsible for collection, remittance, and maintenance of records relating to the Excise Tax and not for the Excise Tax itself. Therefore, the Proposed Regulation’s imposition of the Excise Tax directly on transportation providers and the Recovery Notice requirement both violate the expressed and implied terms of the Bill, and should therefore should be stricken in entirety.

In conclusion, the Excise Tax was passed, and has always been intended to be, a pass through tax to transportation consumers. The direct imposition of the Excise Tax on transportation providers and the Recovery Notice requirement are therefore contradictory to the Bill’s expressed language and the Legislature’s intent behind the Bill.

Please feel free to contact me with any questions or concerns.

AUG 11 2015

State of Nevada
Department of Taxation

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