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Reply to: Reno

October 1, 2019

Jim Devolld, Chairman  
Nevada Tax Commission  
115 E. College Parkway, Suite 115  
Carson City, NV 89706

Dear Chairman Devolld,

On behalf of the Retail Association of Nevada (“RAN”), our office hereby submits the following comments with respect to the proposed adoption of Regulation R002-17 (the “Proposed Regulation”). The Proposed Regulation pertains to the sales tax treatment of various delivery-related charges.

#### **Procedural Concerns**

The Proposed Regulation was first submitted to the Legislative Counsel Bureau (“LCB”), pursuant to NRS 233B.063 (1), in the early part of 2017. The Proposed Regulation went through the workshop process, but was also delayed because of pending cases before the Nevada Supreme Court. Ultimately, consideration, and potential adoption, of the Proposed Regulation was placed on the agenda for the Tax Commission meeting to be held on March 4, 2019.

However, NRS 233B.040 requires that an agency adopt regulations within 2 years from the date the regulation was first submitted to the LCB. After concerns were raised that the Tax Commission hearing would occur more than two years after the Proposed Regulation was first submitted to the LCB, consideration of the Proposed Regulation was pulled from the agenda for the meeting on March 4, 2019.

The Proposed Regulation has now been placed on the agenda for the Tax Commission’s meeting on October 7, 2019, which again violates the mandate of NRS 233B.040.

NRS 233B.040(4) sets forth two mandates. First, an agency “shall adopt a proposed regulation not later than 2 years after the date on which the proposed regulation is submitted to the [LCB] . . .” Notably, the title of the statute refers to this section as a “deadline for adoption of proposed regulation.” **Exhibit 1.** Second, if an agency misses the 2 year deadline, the agency head must appear before the Legislative Commission and provide an explanation. There is nothing in the statute that allows the 2 year period to be extended.

NRS 233B.040(4) was enacted in 2013 as a result of Assembly Bill 252. The original version of that bill included the following phrase: “If an agency does not adopt a proposed regulation within the time prescribed by this subsection, the regulation shall be deemed withdrawn unless, before the expiration of 2 years, the agency petitions the Legislative Commission for and receives an extension of time by which

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to adopt the proposed regulation.” See **Exhibit 2**. However, AB 252 was subsequently amended to remove the ability of the Legislative Commission to grant an extension to the 2-year rule. *Id.* Accordingly, the Legislature expressly rejected the concept of extensions to the 2-year rule and instead implemented a requirement that 2 years is a hard stop, and the process must be restarted if a regulation is not adopted in the appropriate time frame.

There is no question that the scheduled adoption of the Proposed Regulation is well-beyond the 2 year period set forth in NRS 233B.040(4). We respectfully request that the Commission refrain from adopting the Proposed Regulation and instead direct the Department to restart the process to adopt a regulation as required by NRS 233B.040(4).

### **Substantive Concerns**

Aside from the procedural concerns stated above, there remain several substantive concerns with the Proposed Regulation that further supports restarting the process and holding workshops to address concerns.

Under current law, delivery charges unconnected to a sale of tangible personal property are considered a service which is not subject to sales and use tax. NRS 360B.480(1)(c); NAC 372.101(2). Similarly, charges for delivery of tangible personal property are not subject to sales tax when those charges are stated separately on an invoice. NRS 360B.480(2)(a).

Also under current law, the term “delivery charges” includes both charges for the “preparation and delivery of the property to a location designated by the purchaser” and charges for “transportation, shipping, postage, handling, crating and packing.” NRS 360B.425. However, the current regulation is inconsistent when it states that charges for “handling, crating and packing” are subject to tax, regardless of whether such charges are separately stated on an invoice. NAC 372.101(1)(b). Instead of resolving this inconsistency the Proposed Regulation perpetuates it.

The Proposed Regulation provides that separately stated “transportation, shipping or postage” charges are non-taxable, but then makes such charges taxable if any “manufacturing, assembling or preparing of tangible personal property” occurs either during the transportation or shipping or during the time when the property is “off-loaded to a location designated by the purchaser.” Proposed Regulation Sec. 1(1)(a). Those same charges can become non-taxable again if they are segregated to differentiate between taxable “handling” charges and non-taxable “transportation or shipping” charges. *Id.* The sum effect of this section appears to be that separately stated “transportation or shipping” charges are non-taxable, and continue to be non-taxable, even if there is activity that is considered “manufacturing, assembling or preparing,” as long as there is also a separately stated charge for “handling.” It is unclear why there needs to be a separate charge for “handling” when there is “manufacturing, assembling or preparing.”

Section 1(1)(a) of the Proposed Regulation introduces the concept of “manufacturing, assembling, or preparing” that occurs during shipment or at the time of delivery, but is silent on the treatment of charges for that type of activity. Presumably, these charges would be taxable, but are these charges considered a type of “handling” charge? What happens if the retailer includes the charge for “manufacturing, assembling or preparing” in the sales price of the product? Do charges for “manufacturing, assembling, or preparing” need to be separately stated?

Notwithstanding the prior section, the Proposed Regulation then creates a new section providing that any separately stated “delivery charges, including, without limitation, charges for postage or the transportation or shipping of tangible personal property” incurred to ship the property to the “retailer’s place of business or any other location from which the... property will subsequently be delivered to a location designated by the purchaser” are taxable unless there is documentation that the purchaser designated the “retailer’s location” for the shipment. Proposed Regulation Sec. 1(2). The sum effect of this section appears to be that separately stated “delivery charges,” including “transportation or shipping” charges which were non-taxable under the prior section, are now taxable if they are shipped to the “retailer’s place of business” or “any other location” from where the goods will ultimately be sent to a location designated by the purchaser. However, these same charges are not taxable if the goods are designated by the purchaser for delivery to the “retailer’s location.” There is no definition of the “retailer’s place of business” (taxable) or the “retailer’s location” (non-taxable). This section also appears to make transportation or shipping charges taxable anytime goods are shipped to an intermediate location before being delivered to the final destination designated by the purchaser.

Finally, section 1(1)(a) draws a distinction between charges for transportation, shipping or postage, which if separately stated are not subject to sales tax, and charges for handling, crating or packing, which even if separately stated are subject to sales tax. This distinction is abandoned in section 2(a) which refers to “delivery charges, including, without limitation, charges for postage or transportation or shipping.” In section 1(2), transportation, shipping and postage are mentioned, but the type of charges which could be non-taxable under this subsection are not limited to these examples. This creates an internal inconsistency: under section 1(1)(a) charges for handling, crating or packing are taxable regardless of whether they are separately stated, but under section 1(2) a delivery charge, which includes charges for handling, crating or packing, may become non-taxable if the purchaser designates the retailer’s location as the destination.

At this point, the confusion and inconsistency of the Proposed Regulation is self-evident. We respectfully request that the Commission refrain from adopting the Proposed Regulation as currently drafted.

**Conclusion**

For all of the above stated procedural and substantive reasons, the Commission should refrain from adopting the Proposed Regulation on October 7, 2019 and instead direct the Department to restart the process to adopt a regulation pertaining to the sales tax treatment of delivery charges.

Sincerely,



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