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March 24, 2023

Yvonne M. Nevarez-Goodson  
Chief Deputy Executive Director  
Nevada Department of Taxation  
1550 College Parkway  
Carson City, Nevada 89701

RECEIVED  
MAR 30 2023  
State of Nevada  
Department of Taxation

Re: Proposed Amendment to NAC 372.938

Dear Ms. Nevarez-Goodson:

I am in receipt of your letter, dated January 22, 2023, responding to our letter, dated November 25, 2022, requesting that the Nevada Tax Commission (“NTC”) consider the amendment of NAC 372.938 proposed by NFIB. I am submitting copies of our request and your response with this letter.

As you note, following our submission of the request, Governor Lombardo issued Executive Order 2023-003. The Executive Order requires that the NTC “undertake a comprehensive review” of its regulations and report to the Governor on how those regulations “can be streamlined, clarified, reduced or otherwise improved.” NAC 372.938 is one of the regulations which must be reviewed and the proposed amendment proffered by NFIB would eliminate a tax trap while ensuring the State continues to receive the tax, penalties and interest it is entitled to. Consequently, I respectfully request that the regulation as well as the proposed amendment be included in the NTC’s report to the Governor’s office. In support of this request I offer the following summary of the problem.

In 2009, the NTC changed the sales and use tax treatment of leases through its adoption of LCB File No. R105-09. Prior to this rule-making proceeding, the sales and use tax treatment of leases was governed by NAC 372.070, 372.075, 372.080, 372.085, 372.086, and 372.088. LCB File No. R105-09 did not repeal these provisions, but after its adoption these provisions were renumbered as NAC 372.922, 372.924, 372.926, 372.928, 372.030 and 372.932 and their applicability limited to property purchased on or before June 15, 2005. In this letter I refer to these regulations as the “Original Regulations.”

Adoption of LCB File No. R105-09 added eight new regulations. Specifically, NAC 372.920, 372.934, 372.936, 372.938, 372.940, 372.942, 372.944, and 372.946. These regulations only apply to property purchased after June 15, 2005. In this letter I refer to these regulations as the “New Regulations.”

Both the Original Regulations and the New Regulations allow a taxpayer to elect to report tax measured by (i) the gross receipts from the lease or rental of the property (which is typically the measure of sales tax) or (ii) the cost of acquiring the property (which is typically the measure of use tax). However, the manner in which the regulations implement the election differ dramatically. Several provisions in the Original Regulations make the election taxpayer friendly, but those provisions have been altered in such a way that the New Regulations fail to be taxpayer friendly and, instead are a trap for the unwary.

First, under the Original Regulations, a taxpayer’s failure to timely notify the Department of its election results in a rebuttable presumption, while under the New Regulations it results in a “deemed election.” This eliminates the ability of a taxpayer to correct the tax treatment by presenting evidence to rebut a presumption.

Second, the rebuttable presumption found in the Original Regulations assumes the taxpayer elected to pay the tax measured by its cost of acquiring the property (the measure of use tax). While under the New Regulations, the taxpayer is “deemed” to have elected to pay the tax measured by the gross receipts from the lease or rental of the property (the sales tax measure). This changes the tax from a use tax measure to a sales tax measure and the resulting tax liability can be devastating for a small business.

Third, under the Original Regulations, a taxpayer who initially began reporting tax on the gross receipts from the lease or rental of the property (the sales tax measure) could, at any time, report the tax on the cost of acquiring the property (the use tax measure) and stop collecting tax on the gross receipts from the lease or rental of the property (the sales tax measure). The New Regulations eliminated this option.

The provisions I’ve mentioned above make the Original Regulations taxpayer friendly. Changing these provisions for the New Regulations was not required by the SSUTA or the Simplified Sales and Use Tax Administration Act. Furthermore, I cannot think of any policy reason these changes were necessary. Nonetheless, the changes were made and it’s created a tax trap.

As you know, taxpayers, particularly small businesses, are often less familiar with use tax and consequently a failure to timely make an election under the New Regulations should not be surprising. Taxpayers should be able to cure their error by paying the delinquent use tax, plus interest and penalties. But under the New Regulations taxpayers who failed to make an election timely are “deemed” to have elected to pay for tax measured by their gross receipts from the lease or rental of the property (the sales tax measure). The “deemed” election is one the taxpayer may not learn of for years and at that point the taxpayer is not in a position to go back to its customers to collect the sales tax. The resulting liability can crush a small business.

This result was avoided under the Original Regulations by (i) assuming the taxpayer elected to pay the tax measured by the cost of acquiring the property (the use tax measure), instead of the gross receipts from the lease or rental of the property (the sales tax measure), (ii) by creating a rebuttable presumption instead of a “deemed” election and (iii) by allowing a taxpayer to, at any time, report the tax measured by the cost of acquiring the property (the use tax measure) and stop collecting tax on the gross receipts from the lease or rental of the property (the sales tax measure).

The amendment to NAC 372.938 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. The State is made whole in this situation because the taxpayer making the election would be required to pay the delinquent tax as well as interest and penalties. For the foregoing reasons we support NFIB’s proposed amendment of NAC 372.938.

Please include this letter as well as our initial letter requesting the amendment and your response in the materials to be considered at the workshop on April 7. Thank you.

Sincerely,



Cindy Creighton, President

cc: Tony Wren, Chair, Nevada Tax Commission  
Shellie Hughes, Executive Director, Nevada Department of Taxation  
Sharon Glazner, Nevada Department of Taxation  
Tray Abney, Nevada State Director, NFIB