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April 18, 2013

OPINION NO. 2013-03

TAXATION; WAGES; EMPLOYEE LEASING COMPANIES (ELCs): The payroll paid by the ELCs to leased employees in accordance with Chapter 616B of the NRS constitutes wages paid by an employer subject to imposition of the Modified Business Tax (MBT) pursuant to NRS 363B.110. Even if employees are co-employed by ELCs and client companies, the sum of the wages paid by the ELCs are subject to the MBT because the ELCs are the employer paying the wages.

Christopher G. Nielsen, Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

Dear Mr. Nielsen:

By letter dated May 1, 2012, you have requested the opinion of this Office regarding whether the payroll of an Employee Leasing Company is subject to the Modified Business Tax and whether a co-employed status would allow for calculating the tax as if it were applicable to the client companies.

QUESTION ONE

Does the payroll of Employee Leasing Companies (ELCs) paid to leased employees in accordance with Chapter 616B of the NRS constitute wages paid by an employer subject to imposition of the Modified Business Tax (MBT) pursuant to NRS 363B.110?

ANALYSIS

The MBT was enacted in 2003. The MBT imposes an excise tax on employers based on the sum of wages paid by the employer. During the 2011 Legislative Session, the Legislature adopted the version of NRS 363B.110 that became effective on July 1, 2011 which states, in pertinent part:

> There is hereby imposed an excise tax on each *employer* at the rate of 1.17 percent of the amount by which the sum of all the *wages, as defined in NRS 612.190, paid by the employer* during a calendar quarter with respect to employment in connection with the business activities of the employer exceeds $62,500.

Act of June 16, 2011, ch. 476, § 4, 2011 Nev. Stat. 2891 (A.B. 561) (emphasis added). Pursuant to the current version of the statute, the first $62,500 in wages paid per quarter is not subject to the MBT (the exclusion).

ELCs are defined in NRS 616B.670(3) as follows:

> "Employee leasing company" means a company which, pursuant to a written or oral agreement:
> (a) Places any of the regular, full-time employees of a client company on its payroll and, for a fee, leases them to the client company on a regular basis without any limitation on the duration of their employment; or
> (b) Leases to a client company:
> (1) Five or more part-time or full-time employees; or
> (2) Ten percent or more of the total number of employees within a classification of risk established by the Commissioner.

For the purposes of imposing the MBT, the question is whether the tax is imposed on the sum of the wages paid by the ELCs or the amount of wages that would have otherwise been paid by the individual client companies.

The plain language of NRS 363B.110 imposes the MBT on "each *employer* at the rate of 1.17 percent of the amount by which the sum of all the *wages . . . paid by the employer* . . . exceeds $62,500." (emphasis added). Because the ELCs, and not the client companies, pay the wages of the employees, the tax is properly imposed on the sum of all wages paid by the ELCs.

In addition, the wages paid to the employees of an ELC are paid "with respect to employment in connection with the business activities of the employer . . ." because the ELC is in the business of leasing employees. NRS 363B.110(1). NRS 616B.691(1) also states that it is the ELC and not the client company that is the employer of the leased employees. Consequently, the ELCs are the employers paying the wages and only the first $62,500.00 in total wages paid by the ELCs are excluded from application of the MBT.

Even though the meaning is plain and statutory construction is not required, the legislative history for A.B. 561 lends further support to the conclusion that the MBT is imposed on the sum of the wages paid by the ELCs. A.B. 561 was amended before it was passed. As "introduced," A.B. 561 included Section 3 which stated:

> 1. The amount of the tax imposed by NRS 363B.110 on an employee leasing company for each calendar quarter must be calculated by:
> (a) Determining separately for each client company to whom the employee leasing company leases employees the amount of the tax based upon the sum of all the wages paid by the employee leasing company during that calendar quarter with respect to the employment of its employees for the purpose of leasing those employees to that client company; and
> (b) Determining separately the amount of the tax based upon the sum of all the wages paid by the employee leasing company during that calendar quarter with respect to the employment of its employees in connection with its business activities for any purpose other than the leasing of those employees to a client company.

As a result of amendments adopted on June 5, 2011, Section 3 was deleted from the Bill.

The Legislative minutes explain the issue and why Section 3 was removed from the bill. Helen Foley, representing the ELCs, requested that Section 3 not be eliminated. Hearing on A.B. 561 Before the Assembly Committee on Ways and Means, 2011 Leg., 76th Sess. 29 (May 25, 2011). Ms. Foley argued, "Section 3 allowed each individual business to be considered separately and then pay that amount of tax instead of being treated differently from any other business in Nevada." *Id.* Responding to questioning regarding Section 3, Russell Guindon, Principal Deputy Fiscal Analyst stated:

> We were directed that those provisions be removed under the understanding the Modified Business Tax (MBT) is tied

> to wages paid by an employer to the employees. The MBT is tied to *Nevada Revised Statutes (NRS) 612. The employer reporting those wages for those employees is the employee leasing company.* There is consistency in regard to the administration of the MBT. *For the Department of Taxation, the wages reported are for the employees of the employee leasing company, which is consistent with NRS 612. The provisions were removed to keep consistency with the MBT.*

Hearing on A.B. 561 Before the Senate Committee on Revenue, 2011 Leg., 76th Sess. 2 (June 6, 2011) (emphasis added). Shortly after Mr. Guindon's comments were made, the motion to pass carried. *Id.* at p. 3. According to the legislative history, the ELCs are the employers paying wages to all the employees on their payroll for purposes of the MBT.

CONCLUSION TO QUESTION ONE

The payroll paid by the ELCs to leased employees in accordance with Chapter 616B of the NRS constitutes wages paid by an employer subject to imposition of the MBT pursuant to NRS 363B.110.[1]

QUESTION TWO

Does the analysis regarding payment of the MBT change if employees are co-employed by ELCs and the client companies?

ANALYSIS

Whether the leased employees are co-employed by the ELC and the client company does not change the answer to Question One. As stated above, NRS 363B.110 imposes the MBT on the employer who pays the wages. Therefore, even if it could be determined that the leased employees are "co-employed," the ELC is the employer who pays the wages as set forth in the analysis section regarding Question One above.

[1] Only the first $62,500.00 of the total wages paid by the ELC is excluded from application of the MBT. NRS 363B.110.

CONCLUSION TO QUESTION TWO

Even if employees are co-employed by ELCs and client companies, the sum of the wages paid by the ELCs are subject to the MBT because the ELCs are the employer paying the wages.

Sincerely,

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Attorney General

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