

2015 NEVADA STATE TAX DEVELOPMENTS

As of October 2, 2015

I. BACKGROUND

Nevada state and local tax law is generally authorized and enacted by the Nevada Legislature and overseen by the Nevada Tax Commission, an eight member body appointed by the Governor. Various other state and local agencies administer other taxes and fees, including gaming license fees which are overseen by the Nevada Gaming Control Board and the Nevada Gaming Commission. The Legislature meets for a regular session biennially in odd-numbered years from February to June, and most recently concluded their biennial session in early June of 2015. The next general session of the Nevada Legislature will begin in February of 2017. This memorandum will provide a brief overview of some of the major developments in state tax law to date since April of 2014 (the last version of this memorandum), including an overview of recent and proposed changes to tax law.

II. INCOME/FRANCHISE TAXES

Nevada does not have either a corporate or individual income or franchise tax. However, in recent years several revenue based tax proposals have gained traction.

A. Commerce Tax

In November of 2014, Nevada voters soundly rejected a ballot question to impose a tax on gross revenue modeled on the Texas franchise tax. That proposal was backed by the teacher's union but almost universally rejected by elected officials of both parties.

In June of 2015, the Governor and Legislature approved a new "Commerce Tax" in Nevada that is based upon gross revenue, and modeled after the Ohio Commercial Activity Tax. The proceeds for the new tax are primarily allocated to a variety of education programs. The tax is imposed on businesses with gross revenue of over \$4,000,000 per year. There are 27 different tax rates which vary by industry classification. The tax is accrued on a fiscal year from June 30 to July 1, and is paid in mid-August. The first payment of the Commerce Tax is due on August 15, 2016.

Taxpayers are also entitled to receive a credit against the Modified Business Tax (based on payroll) of 50% of their Commerce Tax payment.

There are a variety of nuances to the Commerce Tax, including various exempt entities and deductions from gross revenue. For a detailed summary of the Commerce Tax please contact the author.

III. SALES AND USE TAX

A. Legislative Developments

1. Tax Rates

The sales tax rate was scheduled to decrease by .35% on June 30, 2015. That deduction was cancelled by the Legislature in 2015.

Because the sales and use tax rate is composed of a variety of state and local rates, it varies from county to county. The lowest rate is 6.85% in several rural counties, and the highest rate is 8.1% in Clark County. On January 1, 2016 the sales tax rate in Clark County will increase to 8.15% as the result of a County Commission decision to increase the tax rate to provide additional law enforcement funding.

2. Online Nexus

The Nevada Legislature passed a bill creating a presumption that out of state retailers have nexus in Nevada for sales tax purposes, including but not limited to controlled groups with a representative in Nevada and retailers with gross receipts of \$10,000 or more in four consecutive quarters through a commission agreement or referral relationship with a Nevada resident. The law is based on similar laws passed in New York and Colorado.

B. Judicial Developments

1. Use Tax Refunds on Coal

A long-standing issue concerning significant sales and use tax refunds claimed on coal by various utilities was finally concluded by the Nevada Supreme Court in late 2014. The Court refused to grant a refund, holding that even if a Commerce Clause violation existed, the taxpayer had not experienced any interstate discrimination. *Sierra Pacific Power Company v. Nevada Department of Taxation*, 130 Nev.Adv.Op. 93 (Dec. 4, 2014).

C. Administrative Developments

1. Technical Bulletins

The Nevada Department of Taxation was given authority by the Nevada Legislature in 2013 via Senate Bill 7 to issue technical bulletins along with published and unpublished attorney general opinions to advise taxpayers of tax issues. The technical bulletins do not need to follow the procedure for promulgation of regulations, but do need to be approved by the Nevada Tax Commission. The Department has issued technical bulletins on construction contractors, leases and subleases of personal property, auction companies and estate sellers, sales of propane gas, and resale of direct mail and several other topics. Technical bulletins can be found at: http://tax.nv.gov/Publications/Technical_Bulletin/

IV. PROPERTY TAXES

A. Legislative Developments

1. Property Tax Caps.

Nevada has an annual cap on increasing property taxes, which is generally 3% on residential property and 8% on non-residential property. As the State emerges from the recession, assessed values of property have increased while the cap has kept property taxes much lower. Consequently, many local governments who experienced severe financial hardships in the recession have seen those hardships prolonged. There were several efforts to address the tax caps by some legislators in 2015 but none were successful.

B. Judicial Developments

None of note.

C. Administrative Developments

None of note.

V. OTHER TAXES

A. Net Proceeds of Minerals

Nevada voters in November of 2014 were asked whether to remove the constitutional cap on the tax rate of mining proceeds. The question narrowly failed, and the constitutional cap remains in place.

B. Modified Business Tax

The Modified Business Tax (MBT) is based on payroll. The MBT was previously two tiered – 1.17% on most businesses and 2% on financial institutions. The Nevada Legislature adjusted the rate to 1.47% on most business, and added mining to financial

institutions as industries taxed at a 2.0% rate. The MBT is paid on wages over \$50,000 per quarter (formerly the MBT was paid on wages over \$85,000 per quarter). The changes were effective July 1, 2015.

C. Live Entertainment Tax

The Nevada Legislature removed most of the distinctions between gaming and non-gaming properties and changed the tax rate from 10% to 9%. The tax also no longer applies to most sales of food, beverage or merchandise. Non-profits remain exempt unless more than 7500 tickets are sold. The changes were effective October 1, 2015.

D. Business License Fee

The annual state business license fee on corporations was increased from \$200 to \$500. The state business license fee for other individuals and entities remains at \$200 per year. Filing fees for initial lists and annual lists were increased by \$25 for all entities. The new and increased fees were effective July 1, 2015.

E. Tobacco Tax

The cigarette tax was increased from \$.80 per pack to \$1.80 per pack. The Legislature also remove e-cigarettes from the definition of tobacco, effectively exempting e-cigarettes from the cigarette tax.

F. Gas Tax

The Legislature authorized a county to propose a county-wide ballot question in November 2016 to index fuel taxes for 20 years.

G. Transportation Network Companies

The Nevada Legislature authorized the operation of Transportation Network Companies (TNC) in Nevada. Contemporaneously, the Legislature imposed a 3% excise tax on TNC, taxi, and limo fares. TNC's will also be subject to an annual licensing fee.

H. School Construction

The Nevada Legislature authorized every county except for Clark County to propose a county-wide ballot question to increase certain taxes to fund school construction. To date, only Washoe County and Douglas County have formed committees to prepare ballot questions. The taxes that can be raised by the ballot question are limited to the sales tax, room tax, property tax, real property transfer tax, and government services tax (vehicle registration). Committees must have proposals prepared by spring of 2016.

I. Economic Development Abatements

The existing economic development abatement program for sales, property and modified business tax on new or expanding businesses was modified to require applicants to provide “primary jobs”, provide greater detail in abatement applications, provide a longer period of time for employment requirements to be met, and more closely tie wage level requirements to the statewide average hourly wage.

The Nevada Legislature also authorized partial sales tax abatements for businesses that own, operate, manufacture, service, maintain, test, repair, overhaul or assemble aircraft or aircraft components.

Finally, an existing tax abatement program for data centers was expanded and broadened to accommodate larger scale data centers and businesses that co-locate within a data center.

VI. OTHER NOTES OF INTEREST

A. 2016 Ballot Questions

In November of 2016, Nevada voters will be presented with statewide questions to legalize recreational marijuana and to require background checks on most transfers of firearms. Both are expected to increase voter turnout on both sides of the issues.

If sufficient signatures are gathered, the following questions will also appear on the November 2016 statewide ballot:

- Sales tax exemption on certain durable medical equipment and mobility enhancing equipment.
- Voter Identification requirement.
- Prohibition on state healthcare exchanges.
- Restrictions on the use of student information.

At least two groups have filed paperwork to circulate a referendum petition to repeal the Commerce Tax. Litigation has already commenced against at least one of the efforts. If the referendums survive legal challenges and gather sufficient signatures, they will be presented to the voters in November 2016. If voters approve the referendum, the Commerce Tax will be repealed. If voters disapprove the referendum, the Commerce Tax cannot be substantively modified in the future except by a vote of the people.

B. Tax Lien Priority

The Nevada Supreme Court held that a state tax lien was akin to a judgment lien and therefore was not protected against prior unrecorded conveyances, reinforcing the “first in time, first in right” rule of law. In this particular case, the Court rejected the Tax Department’s argument that a tax lien recorded in 2010 had priority over a deed of trust which attached in 2009 but was not recorded until 2011. *Department of Taxation v. Kawahara*, 131 Nev.Adv.Op. 42 (June 25, 2015).

C. Trends and Outlook for 2016

The November 2014 elections resulted in historic gains for Republicans, who took all statewide offices and majorities in both the Senate and Assembly, which had not occurred in Nevada in nearly 100 years.

The Republican Governor and Legislature proceeded to overhaul the tax system, but not in a way that might be expected. As noted above, the Governor and Legislature enacted a new tax, modified many others, and dramatically increased education funding. Aside from tax reform, they also passed significant tort reform, reformed prevailing wage laws, and made changes to the state retirement system.

The Republican wave in November 2014 was due in large part to dramatically low turnout by Democratic voters. With a presidential election in 2016, and the inclusion of background checks and recreational marijuana on the statewide ballot, Democratic turnout is expected to significantly increase. Consequently, the political landscape in Nevada will likely be different in 2016.

Ultimately, the impact on the tax system may depend on tax revenues. Significant changes were made in 2015 and the impact on revenues will not be realized for some time. The Commerce Tax, in particular, will not start coming into state coffers until August of 2016. If those revenues come in higher than projected, the Legislature will likely fight over how to address the surplus. If they come in lower than project, the Legislature will likely fight over how to address the budget gap.

VII. PROVIDER’S BRIEF BIOGRAPHY/RESUME

Mr. Hicks is a shareholder in Brownstein Hyatt Farber Schreck’s Reno and Las Vegas offices and is a member of the firm’s Government Relations and Tax groups.

Prior to joining the firm, Mr. Hicks served as Chief of Staff to the Governor of Nevada. Before his time as Chief of Staff, he served as General Counsel and Deputy Chief of Staff to the Governor of Nevada. He served in the Office of the Governor through

two regular sessions and three special sessions of the Nevada Legislature, including the 2009 regular session where the Governor and Legislature confronted one of the most severe economic downturns ever experienced in Nevada.

Before serving in the Governor's Office, Mr. Hicks served as a Senior Deputy Attorney General in the Nevada Attorney General's Office. While at the Attorney General's Office, Mr. Hicks represented the Nevada Department of Taxation, Nevada Tax Commission and the Nevada Secretary of State.

Mr. Hicks has argued cases in front of various Nevada District Courts, the Nevada Supreme Court, the United States District Court for the District of Nevada, the United States Bankruptcy Court for the District of Nevada, and the United States Court of Appeals for the Ninth Circuit.

Mr. Hicks was lead counsel on several published cases and numerous unpublished cases. Published cases include:

Malecon Tobacco v. Department of Taxation, 118 Nev. 837 (2002)

Meridian Gold v. Department of Taxation, 119 Nev. 630 (2003)

Department of Taxation v. DaimlerChrysler, 121 Nev. 541 (2005)

Herbst Gaming v. Heller, 122 Nev. 877 (2006)

Nevadans for the Protection of Property Rights v. Heller, 122 Nev. 894 (2006)

Nevadans for Nevada v. Beers, 122 Nev. 930 (2006)

The Education Initiative PAC v. Committee to Protect Nevada Jobs, 129 Nev. Adv. Op. 5 (Jan. 31, 2013)

Prior to his service with the Nevada Attorney General, Mr. Hicks was a law clerk to the Honorable Deborah A. Agosti of the Nevada Supreme Court and the Honorable Robert A. McQuaid, Jr. of the United States District Court for the District of Nevada.

In addition to his practice in government relations and Nevada tax law, Mr. Hicks also practices in all aspects of administrative law as well as campaign and election law. Mr. Hicks is a fourth-generation Nevadan.