

LCB File No. T053-99

ADOPTED TEMPORARY REGULATION
OF THE NEVADA TAX COMMISSION

(Effective June 11, 1999)

EXPLANATION – Matter in *italics* is new; matter in brackets ~~⊞~~ is material to be omitted.

AUTHORITY: NRS 360.090, NRS 372.025, NRS 372.050, NRS 372.055, NRS 372.085, NRS 372.725 AND NRS 372.735.

Section 1. NAC 372.460 is hereby amended to read as follows:

Sec. 2. 1. The sale of tangible personal property by a retailer includes the furnishing ~~[, pursuant to the guaranty provisions of the contract of sale, of replacement parts or materials. Sales of the parts and materials to the retailer are sales for resale to which the tax does not apply.]~~ of replacement parts or materials for the repair of the tangible personal property ~~[sold by the retailer]~~ pursuant to the provisions of a warranty or guaranty ~~[contract included with the sale of the tangible personal property]~~ **included in the contract of sale.** No sales or use tax applies to the retailer's purchase and use of replacement parts or materials for the repair of tangible personal property under the provisions of ~~[a]~~ **the** warranty or guaranty ~~[contract]~~. ~~[A]~~ **Where a lessor** ~~[who]~~ leases or rents tangible personal property to a retailer who will furnish the tangible personal property to a customer to fulfill the retailer's contractual obligations under ~~[a]~~ **the** warranty or guaranty, **the lessor** is not required to include the gross receipts from the lease or rental of the tangible personal property in the gross receipts subject to use tax. The lessor must keep clear documentation that a particular lease or rental was to a retailer, **or the retailer's customer**, for purposes of fulfilling warranty or guaranty obligations of the retailer.

INFORMATIONAL STATEMENT

The following statement is submitted for adopted amendments to Nevada Administrative Code (NAC) 372.

1. A description of how public comment was solicited, a summary of public response, and an explanation of how other interested persons may obtain a copy of the summary.

On January 23, 1998, a taxpayer wrote to the Department of Taxation petitioning to initiate rule-making procedures to amend NAC 372.460. The taxpayer posited that a car dealership's purchase of a vehicle to provide to customers as a loaner vehicle for the period during which the customer's vehicle is under repair pursuant to a new car warranty would be exempt from sales and use tax as a sale for resale under NAC 372.460. The taxpayer also contended that a car dealership's lease of a vehicle from a car rental business to provide as a loaner vehicle to a warranty customer should also be exempt from use tax. Thus, the taxpayer proposed to amend NAC 372.460 to include the lease transaction.

On February 4, 1998, the Executive Director of the Department of Taxation responded to the taxpayer's petition. The petition was denied in accordance with NRS 233B.100. The Executive Director informed that the taxpayer's previous claim for refund in which the same arguments were advanced had been denied because the taxpayer's claims lacked merit, and litigation commenced by the taxpayer was pending in district court on the issues. The Executive Director further informed that the taxpayer's assertion that loaner vehicles purchased or leased for temporary use of warranty customers was not within the language or intent of NAC 372.460. The taxpayer was advised of its right to appeal the denial of its petition to initiate rule-making proceedings to the Nevada Tax Commission.

On March 6, 1998, the taxpayer provided notice of appeal to the Nevada Tax Commission. At public hearing on May 26, 1998, noticed in accordance with the Open Meeting Law, Administrative Procedures Act and regulations governing practice before the Nevada Tax Commission, the Nevada Tax Commission decided to commence the regulatory process. Comments were received from the taxpayer's representative and the Department of Taxation's representative. Written notice of the decision of the Nevada Tax Commission was provided on June 24, 1998.

In accordance with NRS 233B.061, the Department of Taxation gave timely and proper public notice of workshop on the proposed amendment to NAC 372.460, which workshop was held on July 29, 1998, 9:30 a.m., at the Grant Sawyer Office Building, LCB Conference Room, Number 4412, 555 East Washington Avenue, Las Vegas, Nevada, 89101. Written comments were submitted at the workshop as follows: the January 23, February 4, March 6, and June 24, 1998, correspondence referenced above; correspondence dated March 30 and May 1, 1998, between the taxpayer's representative and the staff of the California State Board of Equalization; and a memorandum dated July 5, 1998, from the President of the Nevada Taxpayers Association to the Department of Taxation. These written comments are summarized in #3 below.

Written comments were submitted after the workshop as follows: letter dated August 5, 1998, with a one page enclosure from Enterprise Rent-A-Car to the Department of Taxation; August 20 and September 10, 1998, correspondence between the Nevada Office of the Attorney

General and the taxpayer's representative; letter dated November 17, 1998, from the taxpayer to the Nevada Department of Taxation. These written comments are also summarized in #3 below.

Notices of hearing for the adoption and amendment of the proposed temporary regulation were posted at the following locations: Department of Taxation, 1550 East College Parkway, Carson City, Nevada; Nevada State Library, 100 Stewart Street, Carson City, Nevada; The Legislative Building, Capitol Complex, Carson City, Nevada; each County Main Public Library; Department of Taxation, 4600 Kietzke Lane, Building O, Suite 263, Reno, Nevada; Department of Taxation, 555 East Washington Avenue, Las Vegas, Nevada.

A copy of the notice of hearing and the proposed regulation were placed on file at the State Library, 100 Stewart Street, Carson City, Nevada, for inspection by members of the public during business hours. Additional copies of the notice and the proposed regulation were also made available and placed on file at the Department of Taxation, 1550 East College Parkway, Carson City, Nevada; Department of Taxation, 4600 Kietzke Lane, Building O, Suite 263, Reno, Nevada; Department of Taxation, 555 East Washington Avenue, Suite 1300, Las Vegas, Nevada; Department of Taxation, 850 Elm Street, No. 2, Elko, Nevada; and in all counties in which an office of the Department of Taxation is not maintained, at the main public library, for inspection and copying by the members of the public during business hours.

Hearings were held on December 1, 1998, at the Grant Sawyer Office Building, 555 E. Washington Avenue, Room 4401, Las Vegas, Nevada and February 10, 1999 at the Office of the Military, Nevada National Guard, 2525 South Carson Street, Carson City, Nevada. It appears that due to the primarily procedural nature of the proposed temporary regulation, only affected or interested persons and businesses as set forth in #3 below responded to the proposed temporary regulation and testified at the hearing. A copy of the transcript of the hearing, for which a reasonable fee may be charged, may be obtained by calling the Nevada Department of Taxation at (702) 687-4896, or by writing to the Nevada Department of Taxation at 1550 East College Parkway, Suite 115, Carson City, Nevada, 89706.

2. The number of persons who:

(a) Attended the hearing: 33

(b) Testified at the hearing: 5

(c) Submitted to the Tax Commission written comments: Written comments were submitted by the taxpayer Cashman Cadillac, Inc. requesting the amendment, the Nevada Taxpayer's Association, Enterprise Rent-A-Car, and the Department of Taxation, as summarized in #3 below. No other written comments were submitted to, or received by, the Nevada Tax Commission.

3. A description of how comment was solicited from affected and interested persons, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary.

Comments were solicited from affected and interested businesses and persons by the notices set forth in #1 above, by direct mail to all county assessors, and by direct mail to the approximately 150 interested businesses and persons on the Department of Taxation's mailing list.

Comments from affected or interested businesses and persons were received as follows:

A. By letter dated January 23, 1998, Cashman Cadillac, Inc.'s representative wrote to the Department of Taxation petitioning to initiate rule making procedures to amend NAC 372.460. The taxpayer noted that under NAC 372.460 as it existed prior to amendment, sales tax is imposed on the price of a warranty when a new vehicle is purchased, and therefore, no subsequent sales tax is required when replacement parts or materials are purchased to fulfill the terms of a warranty. The taxpayer explained the underlying policy of NAC 372.460 to be the avoidance of double taxation.

Based on this, the taxpayer posited that a car dealership's purchase of a vehicle to provide to customers as a loaner vehicle for the period during which the customer's vehicle is under repair pursuant to a new car warranty would be exempt from sales and use tax as a sale for resale under NAC 372.460. The taxpayer contended that a car dealership's lease of a vehicle from a car rental business to provide as a loaner vehicle to a warranty customer should also be exempt from use tax. Thus, the taxpayer requested amendment to NAC 372.460 to clarify the language.

B. By letter dated February 4, 1998, the Executive Director of the Department of Taxation informed the taxpayer's representative the Department staff disagreed that loaner cars purchased by the taxpayer for the temporary use of the warranted customers, or cars provided to warranted customers through short term rentals from rental car agencies, fell within the language or intent of NAC 372.460. The Department's Executive Director explained there is a fundamental distinction between; parts purchased for use in fulfilling warranty obligations in which the customer receives title and possession of the part after the repair, and the purchase of loaner vehicles that are only temporarily provided to a warranty customer where the dealership retains title and, when not loaned out, possession of the vehicles, and eventually sells them in transactions unrelated to warranty services. The correspondence further explains that the rental of vehicles from a rental car company on a short-term basis to provide a vehicle to warranty customers is more attenuated since the car dealership is simply reimbursing the rental car company's use tax liability. Finally, it is explained that in both cases, the car dealership is simply providing a service to warranty customers, and not providing customers with tangible personal property already under the warranty, as in the case of parts.

C. By letter dated March 6, 1998, the taxpayer's representative reiterated its position described in A above.

D. In correspondence dated March 30, 1998, the taxpayer's representative requested the advice of the California State Board of Equalization regarding the application of California sales and use tax law to the rental car company lease transaction.

E. By letter dated May 1, 1998, staff of the California State Board of Equalization responded that leases of tangible personal property in California are continuing sales, and thus, the car dealership may lease loaner vehicles for warranty customers from a rental car agency extax.

F. By memorandum dated July 25, 1998, the President of the Nevada Taxpayers Association agreed with the taxpayer's proposed amendment of NAC 372.460, indicating the issue should be the honoring of the provisions of a warranty, not how a business chooses to honor the provisions. The memorandum indicates the existing regulation acknowledges the payment of sales tax on

items included in the warranty, and therefore items provided in conjunction with the warranty, including a loaner car, for which the customer is not charged, should not be subject to sales tax, which in effect would result in double taxation. The memorandum also notes that Department regulations have had to be changed to clarify the manner in which business is conducted today vs. 1955 when the majority of the provisions contained in NRS 372 were approved by referendum.

G. Public workshop was held on July 29, 1998. The members of businesses and the public appearing were supportive of the amendment, and the staff of the Department of Taxation and its counsel from the Office of the Attorney General explained that there was a lack of statutory law for the proposed amendment.

H. By letter dated August 5, 1998, Enterprise Rent-A-Car sent a cover letter and document to the Department of Taxation, providing information as a result of the public workshop held on July 29, 1998.

I. By letter dated August 30, 1998, from the Office of the Attorney General to the representative of Cashman Cadillac, alternative language for the amendment sought by Cashman Cadillac was set forth.

J. By letter dated September 10, 1998, to the Office of the Attorney General, the representative of Cashman Cadillac proposed minor revisions to the alternative language set forth.

K. On October 29, 1998 the Department of Taxation posed Notice of Public Hearing before the Nevada Tax Commission to be held on December 1, 1998.

L. By letter dated November 17, 1998, to the Department of Taxation, the representative for Cashman Cadillac indicated support to the proposed amendment and its adoption, proposing additional changes to the language.

M. Public hearing was held before the Nevada Tax Commission on December 1, 1998. A Deputy Executive Director of the Department of Taxation informed the Nevada Tax Commission that staff had concerns associated with the amendment and noted it was important to understand that Nevada is not a continuing sales state relative to leases like California which changed its law in 1965 to allow for continuing sales treatment of leases for sales and use tax purposes.

The Senior Deputy Attorney General for the Department of Taxation further presented the Department's position, indicating that he did not agree with the proposed amendment, and he redrafted the language for purposes of form. After discussing some of the language changes proposed, the Senior Deputy Attorney General informed he did not believe the current Nevada sales and use tax statutory scheme would allow for extension of the regulation as proposed, and that Nevada and California law is quite different. He explained the incidence of the use tax on leases and rentals in Nevada is on the lessor, passing it on contractually does not shift responsibility, and the Department has never pursued lessees for use taxes.

The representative of Cashman Cadillac spoke in support of the amendment to the regulation.

The President of the Nevada Taxpayers Association spoke in support of the amendment. She indicated understanding of the Department Staff's and Attorney General's office concern, but, indicated the law was put into effect in 1955 and, unlike California, Nevada is not able to easily change NRS Chapter 372 provisions. She explained business is not done the same way today as it was in 1955, these issues are not easily put on the ballot, and that the amendment is an administrative issue within the purview of the Commission.

A representative of the Nevada Franchise Automobile Dealers Association spoke in support of the amendment, and agreed with the comments of the President of the Nevada Taxpayer's Association.

A representative of Enterprise Rent-A-Car spoke in support of the amendment.

A public hearing was continued to the next Tax Commission meeting.

N. A second public hearing was held before the Nevada Tax Commission on February 10, 1999. At the hearing, an additional letter dated February 9, 1999, from the representative of Cashman Cadillac to the Senior Deputy Attorney General enclosing suggested language modifications to the proposed amendment, which Enterprise Rent-A-Car supported by letter dated February 9.

A Deputy Executive Director of the Department summarized the proceedings and positions set forth above.

The representative of Cashman Cadillac spoke in favor of the amendment. He described the warranty transaction under the existing regulation and indicated the purpose of avoiding double taxation. He also reviewed the language modifications.

A representative of the Nevada Franchise Automobile Dealers Association spoke in favor of the amendment.

The president of the Nevada Taxpayer's Association spoke in favor of the amendment.

The Senior Deputy Attorney General explained the lack of statutory authority by the amendment and no double taxation exists.

The Nevada Tax Commission adopted the amendment to the regulation by unanimous vote.

4. If the temporary regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the temporary regulation without change.

The proposed temporary regulation was modified prior to adoption, due to issues raised by the Department of Taxation and by affected or interested businesses and persons. The remaining portions of the proposed temporary regulation was not changed since no concerns were raised by the public, affected or interested businesses or persons, the Department of Taxation or Tax Commission members, and the Tax Commission believed no changes other than those made were necessary.

5. The estimated economic effect of the adopted temporary regulation on the business which it is to regulate and on the public. These must be stated separately, and each case must include: (a) Both adverse and beneficial effects; and (b) Both immediate and long-term effects.

(a) Adverse and beneficial effects.

The proposed temporary regulation presents no foreseeable or anticipated adverse economic effects to businesses or the public. There may be some beneficial economic effects to the businesses to which the temporary regulation speaks. The proposed temporary regulation does present an anticipated loss in state and local sales/use tax revenue, which cannot be quantified at this time.

(b) Immediate and long-term effects.

Same as #5(a) above.

6. The estimated cost to the agency for enforcement of the adopted temporary regulation.

The proposed temporary regulation presents no significant foreseeable or anticipated cost or decrease in costs for enforcement. However, it appears that there may be some minor additional administrative costs for the Department of Taxation, which cannot be quantified at this time.

7. A description of any regulations of other state or governmental agencies which the temporary regulation overlaps or duplicates and a statement explaining why the duplication or overlap is necessary. If the temporary regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.

The proposed temporary regulation is particular to the Department of Taxation practices and procedures and does not appear to overlap or duplicate regulations of other state or local governmental agencies.

8. If the temporary regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions.

There are no known federal regulations pertaining to state sales/use tax procedures, which are the subject of the proposed temporary regulation.

9. If the temporary regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.

The proposed temporary regulation does not provide a new fee or increase an existing fee.