

LCB File No. R105-09

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

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

AUTHORITY: NRS 360.090, 360B.110, 360B.400 and 372.723.

A REGULATION relating to the implementation of the Streamlined Sales and Use Tax Agreement, particularly provisions relating to leasing.

Section 1. Chapter 372 of NAC is hereby amended by adding thereto the provisions set forth in sections 2 through ___ of this regulation.

Sec. 2. 1. *The provisions of NAC 372.070, 372.075, 372.080, 372.085, 372.086 and 372.088, apply to tangible personal property purchased before June 15, 2005, for lease or rental of the property in this state.*

2. For tangible personal property acquired on or after June 15, 2005, but prior to the effective date of these regulations, a person engaged in the leasing or rental of tangible personal property is in compliance if they have complied with the provisions of NAC 372.070, 372.075, 372.080, 372.085, 372.086 and 372.088 or the provisions of this regulation.

3. The provisions of NAC 372.070, 372.085 and sections 3 to 8, inclusive, of this regulation apply to tangible personal property purchased, on or after the effective date of this regulation, for lease or rental of the property in this state.

Sec. 3. *“Lease or rental” has the meaning ascribed to it in NRS 360B.450. Except as provided in section 4 of this regulation, such transactions are found to be in lieu of a transfer of title, exchange or barter for the purposes of NRS 372.060(2).*

Sec. 4. *Other than a lease or rental described in NAC 372.085, a lease or rental of tangible personal property for any reason other than for release or subrent, is a retail sale.*

Sec. 5. *The term retailer includes every person engaged in the lease or rental of tangible personal property for any reason other than for release or subrent.*

Sec. 6. 1. *The legal incidence of the sales tax on leases and rentals falls on the lessee.*

2. A retailer engaged in the lease or rental of tangible personal property may collect and remit the sales tax measured by:

a. The gross lease or rental charges for the lease or rental of tangible personal property; or

b. The cost of the tangible personal property to the retailer.

3. An election to pay the tax measured by the cost of the property to the retailer must be made by the first return due date following the acquisition of tangible personal property for lease or rental. If the retailer fails to make the election by the first return due date, the retailer is deemed to have elected to pay the tax measured by the gross lease or rental charges for the lease or rental of the tangible personal property. The election may not be changed following the first return due date following the acquisition of the property.

4. A retailer who elects to pay the tax measured by the gross receipts or rental charges pursuant to this section is not required to pay the sales tax for the purchase of parts or other equipment for the tangible personal property which is committed to lease or rental in the State if he gives a resale certificate to the vendor from whom he purchases the property.

5. When the property is sold following its use in rental or lease service and the purchaser receives delivery of the property within this state, the tax applies to the sales price of the property without any deduction or credit for the tax paid on the original cost of the property or the taxes paid on the gross lease or rental charges.

6. The gross lease or rental charges for property leased or rented between related or affiliated parties must be stated at fair market value. If the parties have significantly

understated the gross lease or rental charge, it is presumed that they have done so for purposes of tax avoidance and the department may, pursuant to NRS 360.300, restate the gross lease or rental charges at fair market value. The presumption of tax avoidance can be rebutted by the parties. As used in the paragraph “fair market value” means the price for which the property could be leased or rented in an open competitive market.

Sec. 7. 1. *The gross lease or rental charge includes mandatory charges, whether or not separately stated, for any service, activity or function made in conjunction with the lease or rental of tangible personal property.*

2. The term “mandatory charges” may include for example, without limitation:

a. A fee or charge for mileage.

b. A fee or charge for the return of the property, commonly referred to as a “drop-off charge”

c. A fee or charge for the reinstatement of a lease or rental agreement.

d. Reimbursement for fixed costs or expenses, including, without limitation, management fees, documentation fees, interest, financing fees and carrying charges, collection call charges, repossession charges, and billing charges.

3. Optional charges, separately stated on invoices, contracts or other documents, made in connection with the lease or rental of tangible personal property are not subject to the tax. The term “optional charge” may include for example, without limitation, a:

a. Fee or charge for the installation, erection, assembly or disassembly of the property.

b. Charge for a collision damage waiver or a similar instrument that acts as a waiver of the lessor’s right to collect from the lessee for any damage to the property.

c. Charge for the services of a person to operate or instruct another in the operation of the property.

d. Charge for fuel used to operate the property.

e. Fee or charge for the delivery, transportation or other handling of the property for original delivery of property or for return of property at end of lease.

f. Fee or charge for maintaining, cleaning or altering the property. If maintenance of the property is mandated by the lease agreement and lessee has options from whom to acquire the maintenance, such maintenance charge will be considered optional and not subject to the tax.

g. Fee or charge for insurance, such as, personal accident, extended protection or coverage for personal property.

h. Legal fees to negotiate lease terms

4. The following charges are not part of the gross lease or rental charge if separately stated on invoice, contracts or other documents:

a. A fee for access to an airport.

b. A charge for reimbursement of property taxes.

c. Charge for reimbursement of UCC filing fees

d. Late payment penalty

e. Any payment, penalty or other charges or fees collected by the lessor upon termination of a lease and return of the property as a result of a breach of contract or mutually agreed upon early termination of contract.

f. Disposition fee

5. Any charges assessed for damages for which the lessee is held responsible are exclusive of the original rental or lease contract, including those commonly referred to as a “charge-

back fee” or “damage reimbursement.” The Department will treat such charges as a taxable sale of tangible personal property from either the person making the repair for the lessor or from the lessor for the responsible party.

Sec. 8. 1. *A retailer may discontinue charging sales tax on the basis of gross lease charges when a lease agreement is terminated. Periodic billing statements for amounts which are past due at the time the agreement is terminated may continue after termination for collection purposes.*

2. Evidence that a lease agreement has been terminated includes:

a. Documentation showing that the leased property has been repossessed or returned to the lessor.

b. A formal notice of termination that has been personally served upon the lessee or served upon the lessee by certified mail, return receipt requested, or registered mail.

c. Proof that the property has been wrecked, damaged, stolen or otherwise rendered unusable.

d. A new agreement to lease the same equipment to the same or another lessee.

e. Any other evidence or documentation which is acceptable to the Department and shows that a lease agreement has been terminated.

Such evidence must be maintained pursuant to NRS 372.735.

3. *Except as otherwise provided in subsection 4, if a lease is terminated and the property is returned, any payments, penalties or other charges or fees collected by the lessor as a result of a breach of contract are not subject to taxation as gross lease charges.*

4. *Any portion of the payments, penalties, fees or other charges described in subsection 3 which represents sales or use taxes must be reported and remitted to the Department.*

Sec. 9. NAC 372.070 is hereby amended to read as follows:

1. If tangible personal property is sold, but the transaction is designated as a lease or rental for the purpose of retaining a security interest in the property, the transaction is a sale and the tax applies to the transaction in the same manner as a conditional sale described in NAC 372.050. A security interest in the property is created if the consideration paid by the lessee for the right of possession and use of the property is an obligation for the term of the lease *or plan for deferred payment that (1) requires the transfer of title upon completion of the required payments or (2) that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of \$100 or 1 percent of the total required payments.* ~~[and is not subject to termination by the lessee, and:~~

~~—(a) The original term of the lease is equal to or greater than the remaining economic life of the property;~~

~~—(b) The lessee is required to renew the lease for the remaining economic life of the property or purchase the property;~~

~~—(c) The lessee has an option to renew the lease for the remaining economic life of the property without the payment of any additional consideration or with the payment of nominal additional consideration if he complies with the terms of the lease; or~~

~~—(d) The lessee has an option to purchase the property without the payment of any additional consideration or with the payment of nominal additional consideration if he complies with the terms of the lease.~~

~~—For the purposes of this subsection, the economic life of the property will be determined with reference to the facts and circumstances at the time of the transaction.~~

~~—2. An agreement does not create a security interest merely because it provides that:~~

~~—(a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the property is substantially equal to or is greater than the fair market value of the property at the time the lease is entered into;~~

~~—(b) The lessee assumes the risk of loss of the property, or agrees to pay taxes, insurance, filing, recording or registration fees, or service or maintenance costs with respect to the property;~~

~~—(c) The lessee has an option to renew the lease or to become the owner of the property;~~

~~—(d) The lessee has an option to renew the lease for a fixed amount that is equal to or greater than the reasonably predictable fair market rent for the use of the property for the term of the renewal at the time the option is to be performed; or~~

~~—(e) The lessee has an option to become the owner of the property for a fixed price that is equal to or greater than the reasonably predictable fair market value of the property at the time the option is to be performed.~~

~~—3. Except as otherwise provided in subsection 4, additional consideration shall be deemed nominal if:~~

~~—(a) It is less than the lessee may reasonably expect to pay for the property if it were purchased at fair market value when the option is exercised.~~

~~—(b) The original sales price of the property is less than \$1,000 and the amount of the additional consideration is not more than \$150.~~

~~—(c) The original sales price of the property is \$1,000 or more and:~~

~~—(1) The lease is for not more than 4 years; and~~

~~—(2) The amount of the additional consideration is not more than \$150 or 10 percent of the original sales price, whichever is greater.~~

~~—(d) The original sales price of the property is \$1,000 or more and:~~

- ~~——(1) The lease is for more than 4 years; and~~
- ~~——(2) The amount of the additional consideration is less than 20 percent of the original sales price.~~
- ~~——4. Additional consideration shall not be deemed nominal if:~~
 - ~~——(a) When the option to renew the lease is granted to the lessee, the amount stated in the lease is the fair market value for the use of the property for the term of the renewal of the lease; or~~
 - ~~——(b) When the option to become the owner of the property is granted to the lessee, the price stated in the agreement is the fair market value of the property.]~~

Sec. 10. NAC 372.085 is hereby amended to read as follows:

1. The *initial* sale of tangible personal property to a *purchaser who sells the tangible personal property to a* person who is in the business of leasing tangible personal property to others ~~[and]~~ who *then* leases the property back to the *initial purchaser pursuant to the terms of this regulation, is a sale for resale.*

2. *The purchase of tangible personal property by a person in the business of leasing tangible personal property to others and who lease the property back to the seller pursuant to the terms of this regulation, is a sale for resale and the lease back to the seller is taxable pursuant to the provisions of NAC 372.070 or this regulation.* ~~[within 90 days after the date on which the property was sold is not a taxable sale if the lessor is registered with the Department to collect and elects to report the tax pursuant to NAC 372.070, and 372.080.]~~

- 3. To document properly such a transaction, the documentation must establish that:
 - a. The *initial* purchaser

i. gave a resale certificate to the vendor at the time of sale, ~~unless~~ *or if* the vendor was out of state and was not required to be registered in Nevada, *and did not self-assess and report the applicable use tax directly to the Department; or*

ii. *paid the tax to the vendor at the time of sale, or if the vendor was out of state and was not required to be registered in Nevada, self-assessed and reported the applicable use tax directly to the Department.*

b. The *initial* purchaser sold the property to a second purchaser who is in the business of leasing tangible personal property and accepted the second purchaser's resale certificate.

c. The second purchaser leased the property back to the ~~first~~ *initial* purchaser within ~~90~~ *180* days after the date on which the property was sold to the *initial* ~~second~~ purchaser. *This time period may be extended upon authorization by the Department.*

~~[d. The lessor was registered with the department to collect and report the tax pursuant to NAC 372.070 and 372.080 at the time of the transaction.]~~

4. A person who paid the sales or use tax on a sale of tangible personal property *and subsequently sells the tangible personal property to a person who is in the business of leasing tangible personal property and leases the property back to the seller pursuant to the terms of this regulation, is entitled to* ~~[that meets the requirements of subsection 1 may apply to the Department for]~~ a refund in the amount of the tax paid *to Nevada* ~~[if the transaction is properly documents].~~