

LCB File No. R058-02

PROPOSED REGULATION OF THE NEVADA TAX COMMISSION

Draft Regulations On Leasing

(Attorney General's Office will provide a Memorandum of Explanation to the NTC)

I. Addition of New Regulation to Chapter 372 of the NAC _____.

*Leasing of Tangible Personal Property to Entities exempt pursuant to NRS 372.3261 or 372.3251.*¹

1. If a lease transaction constitutes a sale as defined in NAC 372.070 and the tangible personal property is leased to an entity exempt from the imposition of sales and use tax pursuant to NRS 372.3261 or an entity described in NRS 372.325 then no use tax is due pursuant to NRS 372.170, NRS 372.240 or otherwise.

2. If a lease transaction does not constitute a sale as defined in NAC 372.070 and the tangible personal property is leased to an entity exempt from the imposition of sales and use tax pursuant to NRS 372.3261 or an entity described in NRS 372.325 then use tax is due pursuant to NRS 372.170 and, or NRS 372.240.

II. NAC 372.080 Collection of tax when tangible personal property is purchased for lease or rental within state.²

1. A person who purchases tangible personal property outside of this state for lease or rental within this state shall:

(a) Pay the use tax due in this state measured by the cost of the property to him; or

(b) Pay the use tax measured by his gross lease or rental charges for the lease or rental of the property within this state.

2. A person who purchases tangible personal property within this state for lease or rental within this state shall:

(a) Pay the sales tax to his vendor on the sales price of the property to him; or

(b) Give the seller a resale certificate for the property and elect to pay the tax measured by the gross lease or rental charges for the lease or rental of the property within this state.

3. If a person who sells and rents or leases tangible personal property within this state gives a resale certificate to the vendor from whom he purchases property, when the property is:

(a) Sold, the tax applies to the sales price.

(b) Committed to lease or rental transactions, the tax applies to his gross lease or rental charges.

4. If the purchaser:

(a) Pays the tax to his vendor on the sales price of the property to him, no further tax is due and tax must not be collected from the customer on the gross lease or rental charges.

(b) Elects to measure the use tax by his gross lease or rental charges, he may seek

¹ This regulation will also apply to the counterpart provisions found in Chapter 374 of the Nevada Revised Statutes.

² A taxpayer has requested the language in NAC 372.080(4)(b) be stricken in lieu of adding the proposed regulation under Section (I) above. The Department of Taxation and the Attorney General's Office do not believe the Nevada Tax Commission has the requisite legal authority to support the deletion of the existing language.

reimbursement for the tax from his customers measured by the lease or rental charges. ~~[The purchaser shall pay the tax in lieu of a customer if the customer is exempt from the tax or for any other reason is not required to pay the tax.]~~

5. The tax applies to the sales price of the property within this state following its use in rental or lease service, 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. A person who elects to pay the tax measured by his gross lease 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 use in this state if he gives a resale certificate to the vendor from whom he purchases the property.

7. A person who initially elects to pay the tax measured by his gross lease or rental charges and later wishes to pay the use tax, may pay that tax measured by the cost of the property to him. The department shall not grant a refund or credit for any taxes paid or due before he makes such an election.

8. 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 will be considered a part of the gross lease or rental charge and are subject to the tax. 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, interest, financing fees and carrying charges, collection call charges, repossession charges, and billing charges.

9. Optional charges, separately stated, 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.

(f) Fee or charge for maintaining, cleaning, or altering the property.

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

10. The department will determine whether a charge is mandatory or optional according to the terms of the agreement under which the charges are paid.

11. The fee for access to an airport and the charge for reimbursement of property taxes will not be considered part of the gross lease or rental charge if separately stated.

12. A gross lease or rental charge must represent a fair market value of the leased or rented property.

13. 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.

14. A lessor may discontinue charging use 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.

15. 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.

16. Except as otherwise provided in subsection 17, 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.

17. Any portion of the payments, penalties, fees, or other charges described in subsection 14 which represents sales or use taxes must be reported and remitted to the department.

III. Addition of New Regulation to Chapter 372 of the NAC _____.

Finance Leases.

1) A lease that meets the elements delineated in subsection (2) of this regulation as a finance lease is not subject to use tax.

2) A lease shall be considered a finance lease when the lessee's only rights to possession or use of the goods (tangible personal property) under the lease agreement is to lease the goods (tangible personal property) as a sub-lessor to another lessee (sub-lessee). In the event the sub-lessor has either the right or makes actual use of the goods (tangible personal property) in any other manner then the lease will not be a finance lease. The following additional factors are further evidence that the lease in question is a finance lease. The factors are:

1) The lessee-sublessor never had possession of the goods;

2) The lessee-sublessor was responsible for all fees assessments;

3) The lessee-sublessor assumes all risk of loss, and;

4) The lessee sublessor must keep the equipment insured.

The term possession does not include the maintenance, licensing, and registration of the goods.

IV. Addition of New Regulation to Chapter 372 of the NAC _____.

Election to Pay Use Tax on Rentals Charged.

1) NRS 372.170 and NRS 372.240 allow a lessor of tangible personal property the right to make an election to remit use tax on the rentals charged as compared to the acquisition cost of the item of tangible personal property.

2) The Nevada Tax Commission will adopt a form to allow lessors to report their election to pay use tax on the rentals charged as opposed the acquisition cost of the item of tangible personal property. A lessor must file the form on an annual basis reporting all tangible personal property which the lessor has elected to pay use tax on the rentals charged (Place Form Example in this spot)

3) In the event that a lessor does not file the form prescribed above then the failure to file the form creates a rebuttable presumption that the lessor did not intend to elect to remit

use tax on the rentals charged. The lessor can rebut the foregoing presumption by producing documentation and evidence that the lessor intended to pay the use tax on the rentals charged as opposed to the acquisition cost of the item of tangible personal property.