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March 28, 2013

OPINION NO. 2013-02

INSURANCE; TAXATION; DESK AUDIT PROGRAM (DAP); INSURANCE PREMIUM TAX (IPT). Legislature tasked Division of Insurance (DOI) with implementing a Desk Audit Program (DAP) to audit payment of the Insurance Premium Tax. A proceeding to recover a deficiency discovered through the DAP is commenced by the Commissioner of Insurance pursuant to NRS 679B.227. Accordingly, the limitation period in NRS 679.227 applies to the finding of a deficiency in the DAP. Further, DOI can initiate proceedings to recover a deficiency arising from the failure by TP to request a refund or credit carry-forward of an overpayment of taxes within one year of when the tax was due as long as the Commissioner complies with NRS 679B.227. TP will have the right to raise affirmative and equitable defenses in response to DOI's attempt to recover any deficiency

Mr. Christopher Nielsen, Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-2000

Dear Mr. Nielsen:

The Department of Taxation (Department), along with the Division of Insurance (Division), seeks a joint opinion regarding implementation of the Desk Audit Program

for insurance premium tax. Act of March 12, 2010, ch. 10, § 65, 2010 Nev. Stat. 53 (A.B. 6, § 65), passed during the 2010 Special Session of the Nevada Legislature, mandates that the Division implement the Desk Audit Program to audit insurance premium tax returns to ensure compliance with the provisions of NRS 680B.027 which requires an insurer to pay a tax "upon his or her direct premiums and net direct considerations written at the rate of 3.5 percent." The Desk Audit Program raises questions with respect to the joint responsibilities of the two agencies regarding application of the statute of limitations and other administrative matters related to the insurance premium tax.

QUESTION ONE

What statute of limitations should the Insurance Commissioner apply when seeking recovery of a deficiency in insurance premium tax owed under NRS 680B.027 discovered through the Desk Audit Program?

ANALYSIS

Under NRS 680B.027, "for the privilege of transacting business in [Nevada], each insurer shall pay to the Department of Taxation a tax upon his or her net direct premiums and net direct considerations written at the rate of 3.5 percent." In the absence of a waiver signed by the taxpayer, a failure to file timely returns, or the commission of fraud, NRS 360.355 gives the Department three years to notify a taxpayer the Department is not satisfied with the taxpayer's return or the amount of tax paid. In contrast, NRS 679B.227 gives the Insurance Commissioner seven years to begin proceedings to collect premium tax, in certain cases. Thus, whether the statute of limitations governing the Department (NRS 360.355) or the statute of limitations governing the Insurance Commissioner¹ (NRS 679B.227) controls the collection of a deficiency discovered through the Division's Desk Audit Program is a question of statutory interpretation.

Statutes are to be read based upon their plain meaning, and legislative history may only be relied upon in interpreting a statute when the statute is susceptible to two or more reasonable interpretations. *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); *State Div. of Ins. V. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). Also, statutes must be read in harmony with each other whenever possible; however, in the event of an irreconcilable conflict between a general statute and a specific statute, the specific statute provides the controlling authority for those cases within the scope of the specific statute. *Nev.*

¹ The Insurance Commissioner is the "chief officer of the Division." NRS 679B.020(1).

Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999); see also *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Finally, it is presumed that the Legislature is aware of the existing state of the law when it enacts new legislation. *Nevada-Douglas Consol. Copper Co. v. Berryhill*, 58 Nev. 261, 75 P.2d 992 (1938).

Under NRS 360.300, the Department holds authority to determine that tax is due upon review of a return or when a taxpayer fails to file a return. With limited exceptions, if the Department determines that a deficiency exists regarding the amount of tax paid, the Department must personally serve or mail a "notice of the determination of a deficiency . . . within 3 years after the last day of the calendar month following the period for which the amount is proposed to be determined or within 3 years after the return is filed, whichever period expires later." NRS 360.355.

Through NRS 679B.227, the Nevada Legislature specifically gave the insurance Commissioner authority to initiate proceedings for collection of insurance premium tax. In particular, NRS 679B.227 states:

The Commissioner has 7 years in which to begin proceedings to collect the premium tax and associated penalties and fines imposed pursuant to NRS 680B.027 . . . where the tax has been unreported or has been concealed by error or omission, and where the amount of the tax is known or through reasonable diligence should have been known.

NRS 679B.227.

During the 2010 Special Session, the Nevada Legislature enacted Assembly Bill 6. Section 65 of A.B. 6 provides:

Sec. 65: 1. The Division of Insurance of the Department of Business and Industry shall, not later than July 1, 2010, implement a desk audit program to audit insurance premium tax returns to ensure that insurers are complying with the provisions of NRS 680B.027.

2. The Commissioner of Insurance shall submit to the Fiscal Analysis Division of the Legislative Counsel Bureau, not later than June 1, 2010, a report detailing the implementation plan for the desk audit program required pursuant to subsection 1. The plan must include information

regarding the staff needed to implement the program, the insurers to be audited, and the manner in which the amount of unpaid taxes due to the state and the results of efforts to recover unpaid taxes and penalties will be reported to the Legislature. The Commissioner must submit with the plan any requests for work program revisions or allocations from the Interim Finance Committee's Contingency Fund that are required to implement the plan.

Act of March 12, 2010, ch. 20, § 65, 2010 Nev. Stat. 97.

Accordingly, based upon the plain language of the A.B. 6, § 65, the Division, and not the Department, is charged with implementing and conducting the Desk Audit Program. The Legislature specifically tasked the Division with implementing and conducting the Desk Audit Program, and NRS 679B.227 specifically grants the Insurance Commissioner authority to initiate proceedings to collect the premium tax and any related penalties within seven years. Accordingly, the limitation periods governing the Department and the Insurance Commissioner are independent of, and can be effectuated in harmony with, each other. However, to the extent any conflict exists between the two limitations periods, NRS 679B.227 controls because it specifically authorizes the Insurance Commissioner to initiate proceedings to collect the specific tax in question, while NRS 360.355 provides a general statute of limitations for the Department. *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 989 P.2d 870 (1999).

Similarly, the presumption that the Legislature knows the state of the law supports the conclusion that the Insurance Commissioner should apply the statute of limitations in NRS 679B.227 when the Division discovers a deficiency through the Desk Audit Program. It is presumed the Legislature knew when it enacted A.B. 6 § 65 that the Department's ability to collect a deficiency was limited to three years under NRS 360.200, while the Insurance Commissioner is given seven years to initiate proceedings to recover a deficiency under NRS 679B.227. Application of this presumption leads to the conclusion that, by selecting the Division to implement and conduct the Desk Audit Program, the Legislature intended for the Insurance Commissioner—as the chief officer of the Division—to apply NRS 679B.227 in recovering deficiencies the Division discovers through the Desk Audit Program.

Finally, the conclusion that the Insurance Commissioner should apply the seven-year statute of limitations in NRS 679B.227 is consistent with relevant legislative history. In 1993, the Nevada Legislature passed Assembly Bill 782 which resulted in an extensive reorganization of Nevada's executive branch. Act of July 9, 1993, ch. 466, 1993 Nev. Stat. 1479. Assembly Bill 782 included a provision amending

NRS 680B.027, changing the recipient of the insurance premium tax from the Insurance Commissioner to the Department. Act of July 9, 1993, ch. 466, 1993 Nev. Stat. 1479. Despite this change, in 1995 the Insurance Commissioner sought enactment of the seven-year limitations' period "to begin proceedings to collect the premium tax" Hearing on A.B. 475 Before the Senate Committee on Commerce and Labor, 1995 Leg., 68th Sess. 22 (June 27, 1995). The minutes from the Senate Committee on Commerce and Labor's June 27, 1995, hearing on A.B. 475 memorialize the following exchange between Senator Randolph Townsend and Insurance Commissioner Alice Molasky:

Senator Townsend questioned the provision in Section 12 on page 2 of the bill. He asked why the commissioner needs 7 years to begin proceedings to collect the premium tax and penalties imposed.

Ms. Molasky explained the requirement affects the statute of limitations. She stated the Division of Insurance examines insurers every 3 years. She stated by the time an insurer is examined it may have been 4 years since the problem occurred. She stated by the existing statute of limitations the division cannot enforce or collect the tax. She explained if the tax problem is not discovered for 7 years, this bill will allow the division to collect the tax.

Id.

That the Legislature created the seven-year statute of limitations in NRS 679B.227, after the Legislature amended NRS 680B.027 to require payment of the insurance premium tax to the Department, demonstrates that the Legislature intended for the Insurance Commissioner's authority under 679B.227 to operate independently of the Department's role as the payee of the insurance premium tax and the Department's three-year statute of limitations under NRS 360.355.

CONCLUSION TO QUESTION ONE

The Nevada Legislature mandated that the Division implement and conduct the Desk Audit Program to ensure payment of insurance premium taxes under NRS 680B.027. Because the Legislature tasked the Division with implementing the Desk Audit Program, and the Insurance Commissioner is the chief officer of the Division, any attempt to recover a deficiency discovered through the Desk Audit Program is a proceeding initiated by the Insurance Commissioner under

NRS 679B.227. Accordingly, the Commissioner should apply the limitation period in NRS 679B.227 when a deficiency is discovered through the Desk Audit Program.

QUESTION TWO

If a taxpayer is unable to provide documentation for which the taxpayer requested a carry-forward² for years prior to the issuance of an informal 2008 Attorney General Opinion which said that a taxpayer must request a refund or a credit carry-forward within one year of when the tax was due, can the Division initiate proceedings to collect the amount of the "variance"³ applied as a "carry-forward"?

ANALYSIS

As is noted above, a variance is the difference between the amount of tax paid and the amount the Division identifies is due through the Desk Audit Program. Prior to 2008, the Department did not object when a taxpayer took a credit carry-forward regardless of whether the taxpayer specifically requested the carry-forward. However, in March of 2008, the Attorney General issued an informal opinion stating NRS 680B.120(3) requires a taxpayer to request a refund or credit carry-forward of any overpayment of taxes within one year of when the tax was due. In some cases, during an audit conducted through the Desk Audit Program, the insurer is unable to provide documentation proving the taxpayer requested a carry-forward of the overpayment as a credit "against the premium tax payable by it under NRS 680B.027 in the next following calendar year." In that case, the Division disallows any credit the insurer took, which results in an amount due.

As is laid out above, an attempt to recover a deficiency in the tax owed under NRS 680B.027 that is discovered through the Desk Audit Program is a proceeding initiated by the Insurance Commissioner under NRS 697B.227. Accordingly, provided the Insurance Commissioner abides by the seven-year statute of limitations, deficiencies resulting from disallowance of a credit carry-forward may be pursued for collection. However, the Division should take into account that a the taxpayer will have the opportunity to request a hearing in order to present affirmative defenses to the Division's actions, and to seek judicial review of an order issued on the hearing, the refusal or failure to hold a hearing, or the refusal or failure to issue an order on the

² A "carry-forward" occurs when an overpayment of taxes is applied as a credit toward the amount the taxpayer owes in the next calendar year. See NRS 680B.120(3).

³ A "variance" is the difference between the amount of taxes paid, and the amount the Division identifies as due through the Desk Audit Program.

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hearing under NRS Chapter 233B. See NRS 679B.310; NRS 679B.370; see also NRCP 8(c) (identifying various affirmative defenses).⁴

CONCLUSION TO QUESTION TWO

Up until the issuance of an informal AGO in 2008, establishing that a taxpayer who overpays the amount of tax owed must—within one year—request either a refund or a carry-forward, the Department did not object to a taxpayer using credit for the overpayment as a carry-forward regardless of whether the taxpayer specifically requested the carry-forward. The Division—through its chief officer, the Insurance Commissioner—can initiate proceedings to recover the deficiency arising from the application of the carry-forward with a prior request for the carry-forward, including for years prior to the 2008 informal AGO, provided the Insurance Commissioner's actions are in compliance with NRS 679B.227. However, the Division and the Insurance Commissioner should be aware that taxpayers have the ability to raise affirmative and equitable defenses in response to the Division's attempt to recover any deficiencies.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

GINA C. SESSION
Chief Deputy Attorney General
Bureau of Government Affairs
Division of Business and Taxation

GCS/AKG

cc: Scott Kipper, Commissioner, Division of Insurance

⁴ Because it is the policy of the Attorney General not to speculate about what litigation strategies an opposing party might use, this opinion will not address what affirmative defenses the Division should expect when considering whether collection of the amount due is appropriate.