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July 30, 2018

OPINION NO. 2018-06

STATUTORY INTERPRETATION:

TAXATION:

DISTRIBUTION OF SALES TAX

REVENUE:

For sales tax imposed upon an intrastate retail sale in Nevada, the portion identified as the "Local School Support Tax" may lawfully be distributed to the county in which the collecting business is located at the time of the sale, while the portion identified as the "Basic City-County Relief Tax" may lawfully be distributed to the county in which the taxable goods are physically delivered to the consumer pursuant to the contract of sale.

William D. Anderson
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, NV 89706

Dear Mr. Anderson:

On behalf of the Nevada Department of Taxation (Department), you have requested an opinion from the Office of the Attorney General on the proper interpretation of NRS 374.785 and NRS 377.055, specifically:

QUESTION

Is the Department compliant with NRS 374.785 and NRS 377.055 in its distribution of the Local School Support Tax (LSST) and the Basic City-County Relief Tax (BCCRT)?

SHORT ANSWER

The Department has reasonably interpreted NRS 374.785 and NRS 377.055 as requiring that the receipts attributable to the LSST be distributed to the county in which the collecting retailers are located, and that the receipts attributable to the BCCRT be distributed to the county in which goods have been delivered.

BACKGROUND

Sales tax rates in Nevada vary from county to county. Each county has a minimum sales tax rate of 6.850%, comprised of four components: sales tax (2.00%), the LSST (2.60%), the BCCRT (0.50%), and the supplemental city-county relief tax (1.75%). Thirteen of Nevada's counties have also adopted special or local acts imposing additional sales tax components at the county level.¹ For example, Lander County has adopted an infrastructure tax of 0.25% (see NRS 377B.100; NRS 377B.110), and its sales tax rate is thus 7.100% (the statewide minimum tax rate of 6.85% plus its option tax of 0.25%).

The sales tax is a tax on the privilege of selling tangible personal property at retail in Nevada (see NRS 372.105; NRS 374.110), and the tax must generally be collected and remitted by the retailer at the rate in effect in the county where the retailer has agreed to physically deliver tangible personal property to the consumer. See NRS 360B.360. For example, if a car dealer located in Churchill County delivers a car to a purchaser in Washoe County, the dealer must collect sales tax at Washoe County's rate; if the purchaser takes delivery of the car in Churchill County, the dealer must collect sales tax at Churchill County's rate.

Determining the applicable sales tax based on where goods are delivered is referred to as destination sourcing, and has a long history and widespread application. See Anthony D. Milewski Jr., *Streamlined Sales and Use Tax Agreement: Is Your Business Ready for Compliance?*, 2 Shidler J. L. Com. &

¹ Esmeralda, Eureka, Humboldt, and Mineral Counties have not adopted special or local acts imposing additional components, so their sales tax rates are thus the statewide minimum of 6.850%.

Tech. 7, ¶ 5 (2005) (explaining that determining whether a retail sale is taxable is “a process known as ‘sourcing’ the sale,” at which point “the source’s sales tax rate” is applied); *Dell Catalog Sales L.P. v. N.M. Taxation & Revenue Dep’t*, 199 P.3d 863, 869 (N.M. Ct. App. 2008) (“A good consumption tax should result in taxation in the jurisdiction in which consumption takes place. Taxing the sale or use of goods that cross [jurisdictional] lines at their destination implements this principle because goods typically are consumed at their destination.”) (quoting Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 18.02[1] (3d ed. 2002) (footnotes omitted)); see also, e.g., *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937) (noting, in approving use tax on construction machinery bought in another state but transported to and used in Washington, that “a tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate.”); *South Dakota v. Doherty*, 513 N.W.2d 390, 393 (S.D. 1994) (“In determining whether a taxable event occurred . . . for sales tax purposes, the question is: where was the sale consummated by delivery?”).

While the BCCRT and LSST are uniformly *collected and remitted* according to a destination sourcing rule, the Department *distributes* the revenue attributable to each using different methodologies—BCCRT receipts are distributed according to a destination sourcing rule, while LSST receipts are distributed according to an origin-based sourcing rule. See Juliana Frenkel, *Something’s Gotta Give: Origin-Based E-Commerce Sales Tax*, 12 Brook. J. Corp. Fin. & Com. L. 133, 137 (2017) (explaining that origin-based sales taxes “are charged based on the seller’s location and remitted to the seller’s local government”); Dale A. Sevin, *Capturing Tax Revenue on Internet Sales: Abandoning the Streamlined Agreement for Origin Sourcing*, 56 Ariz. L. Rev. 249, 266 (2014) (“For example, under an origin-based rule, a person who purchases a good from a seller in Lawrence, Kansas and has the good shipped to her residence in Topeka, Kansas will pay Lawrence’s applicable sales tax, and the seller will remit the tax to Lawrence’s taxing authority.”). In this regard, the LSST is distributed by the Department in reference to a sale’s point of origin, specifically the county where the retailer is located at the time of the sale. Using the prior example, if the car dealer located in Churchill County delivers a car to a purchaser in Washoe County, and the dealer collects sales tax at Washoe County’s rate, the BCCRT portion of that sales tax will be distributed by the Department to Washoe County. If the purchaser takes delivery of the car in Churchill County, the dealer must collect sales tax at Churchill County’s rate, and the BCCRT portion will be distributed to Churchill County. However, the LSST portion of the sales tax will be distributed to Churchill County, where the dealer is located, regardless of the county where the purchaser takes delivery.

The Governor's Finance Office, Division of Internal Audits (auditor), recently conducted an audit of the Department and raised the possibility that distributing the BCCRT and LSST according to different sourcing rules may violate the governing statutes. See State of Nev., Governor's Fin. Office, Div. of Internal Audits, *Audit Report: Dep't of Tax'n, County Distributions* (Rep. No. 18-07, June 14, 2018). The auditor noted that the language of the statutes governing the distribution of the receipts from each of these two sales tax components is virtually identical. The receipts attributable to the BCCRT are allocated between counties and distributed to any given county based upon the amount of BCCRT "collected in that county." NRS 377.055(1). Similarly, the receipts attributable to the LSST are allocated between school districts and distributed to any given school district within a county based upon the amount of LSST "collected in the county." NRS 374.785(1)(c). The auditor noted that this language can be reasonably interpreted as "denot[ing] the amount of money collected in the county where the business that made the sale is located, or the county where the taxpayer takes delivery." In light of this observation, as well as other statutory provisions that require that the two taxes be administered in "parallel" and "substantially identical" manners (see NRS 374.015(8); NRS 377.040), the auditor questioned whether the Department has been distributing the LSST and BCCRT in accordance with state law, and recommended that the Department collaborate with the Attorney General's Office to interpret the relevant statutes.

As recommended by the auditor, you have asked this office to interpret the relevant statutes with respect to the distribution of revenue attributable to collections of the LSST and BCCRT by Nevada-based businesses. Your objective is to determine whether the Department has been applying the laws correctly as they pertain to the allocation of tax revenue between different units of local government.

ANSWER TO QUESTION

Since their enactment approximately 50 years ago, the LSST and BCCRT have been allocated in the same manner they are now. See Act of April 10, 1967, ch. 322, § 169, 1967 Nev. Stat. 920; Act of April 24, 1969, ch. 599, § 6, 1969 Nev. Stat. 1136 (recodified by Assembly Bill 369 in 1981); *Hearing on A.B. 104 Before the Senate Committee on Taxation*, 1991 Leg., 66th Sess. 9 (June 15, 1991) (testimony of Legislative Counsel Bureau Deputy Fiscal Analyst Ted Zuend explaining that although "the language [of the statutes concerning the BCCRT and LSST] is very much the same," the LSST has "always been credited to the county where the retailer is located" while the BCCRT has "always been credited netting out the effects of cross-county transfers, when

they can be identified”). And nothing in Nevada’s Constitution, statutes, or case law appears to require that the LSST and BCCRT be distributed in an identical manner, nor is using one methodology for collecting taxes and a different one for distributing them prohibited. *See City of Las Vegas v. Mack*, 87 Nev. 105, 110 n.4, 481 P.2d 396, 399 n.4 (1971) (explaining how a tax was distributed equally among Nevada’s counties, even though some counties contributed many times the revenue they received in return, and another was collected at a uniform rate but distributed according to a nonuniform formula; the court noted that the “distribution of taxes on a basis different from their collection is not unusual in Nevada”); NRS 360.090 (giving Tax Commission broad authority to adopt regulations “for carrying on the business of the Nevada Tax Commission and of the Department”); NRS 360.200 (bestowing on the Department the wide discretion to “exercise general supervision and control over the entire revenue system of the state”).

The language in NRS 374.785 and NRS 377.055 is, of course, the starting point of interpreting their requirements. As the auditor notes, however, their language can be reasonably understood to authorize the use of more than one distribution methodology, thus permitting inquiry as to the Legislature’s intent. *Pub. Employees’ Benefits Program v. Las Vegas Metro. Police Dep’t*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008) (instructing that “when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act’s spirit,” and when a statute “is capable of being understood in two or more senses by reasonably informed persons, or when it does not address the issue at hand,” the courts may “look to reason and public policy to determine what the Legislature intended”). The “background and spirit in which the law was enacted,” as well as “the entire subject matter and policy” may assist in the interpretation of the legislative language. *Id.*

That distributions of revenue from the LSST and BCCRT are governed by similarly worded statutes does not necessarily require that they be distributed in identical manners. Examining the purposes of the BCCRT and LSST confirms that the Department’s current practices are within its discretion to “exercise general supervision and control over the entire revenue system of the state.” NRS 360.200.

The BCCRT is one of six types of taxes that the Legislature has consolidated for purposes of distribution. The revenue generated by the BCCRT, along with the revenue generated by the supplemental city-county relief tax, liquor tax, cigarette tax, real property transfer tax, and the basic motor vehicle privilege tax, is deposited into the Local Government Tax Distribution Account (sometimes referred to as the “Consolidation Tax” or “C-

Tax”). NRS 360.660; Act of July 17, 1997, ch. 660, §§ 1-38, 1997 Nev. Stat. 3278; *see also City of Fernley v. State, Dep’t of Tax.*, 132 Nev. 32, 37, 366 P.3d 699, 703 (2016).

In creating the C-Tax, the Legislature aimed to rectify the problems posed by distributing six different pools of revenue that “had no relationship to the service-level needs with the community.” *Hearing on S.B. 254 Before the Senate Committee on Government Affairs*, 1997 Leg., 69th Sess. 3 (April 14, 1997). The Legislature intended that, instead, the system of revenue distribution would be more responsive to growth and the resulting greater demand for services, and would “promote the formation of general-purpose governments.” *Id.* Given these concerns, it is logical that the revenue designated for use by a county and its municipalities would correlate with the economic activity in that county as measured by the consumption of goods there. While the presence of retailers within a county will, to some extent, provide a measure of economic activity, actual consumption, as generally indicative of more consumers, is arguably a better indicator of the corresponding level of demand for government services within the county. *See* John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 Ga. L. Rev. 343, 376 n.167 (2003) (“Because the sales tax is a consumption tax, the jurisdiction in which the consumption occurs should be the beneficiary of the tax.”); *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080, 2096 (2018) (noting that sales taxes are “essential to create and secure the active market [retailers] supply with goods and services.”); *cf. Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981) (in analyzing whether a severance tax violated the Commerce Clause, the Court noted that “[w]hen a tax is assessed in proportion to a taxpayer’s activities or presence in a [jurisdiction], the taxpayer is shouldering its fair share of supporting the [jurisdiction]’s provision of police and fire protection, the benefit of a trained work force, and the advantages of a civilized society.”) (internal quotation marks omitted)). Accordingly, the Department’s method of distributing the BCCRT is consistent with the Legislature’s purpose in enacting the C-Tax as a remedy for population growth and the resulting demand for increased governmental services.

Unlike tax revenue earmarked for the support of local governments generally, the LSST was enacted for a single, specific purpose—“to provide support for the public schools” and revenue therefrom is “earmarked for that purpose.” *Matthews v. State ex rel. Nev. Tax Comm’n*, 83 Nev. 266, 268, 428 P.2d 371, 372 (1967). And the revenue generated by the LSST “goes back to the county of origin to be used for the support of their schools. . . .” *Id.* at 270, 428 P.2d at 373 (Zenoff, J., concurring).

Although the LSST and BCCRT statutes contain similar directives to distribute tax receipts in reference to the location where they are collected (see NRS 374.785; NRS 377.055), the different purposes and different designs of the two taxes indicate that such “location” was contemplated from a distinct perspective for each tax. The Legislature, in adopting the LSST, described it as a “tax upon the privilege of selling tangible personal property at retail in *each county* to provide revenue for the school district comprising *such county*.” NRS 374.015(4) (emphases added). The BCCRT statutes do not include a comparable description. Consequently, the Legislature drew a singular connection between the imposition of the LSST, namely an imposition on the privilege of selling tangible personal property *in each county*, and the distribution of the resulting tax receipts to *such county*. Because it is the retailer who enjoys the privilege of selling tangible personal property, the imposition of the LSST (as opposed to the collection of the receipts) is reasonably characterized as having occurred within the county where the retailer is located, and NRS 374.015(4) is properly construed as an expression of the Legislature’s intent to distribute the revenue from the LSST to the county where the collecting retailers are located.

The BCCRT contrasts with the LSST because it supports local government operations as opposed to public education. A matter of statewide concern, public education is ultimately funded according to a complex formula designed “to ensure each Nevada child a reasonably equal educational opportunity.” NRS 387.121. Although the funding for any school district within Nevada is partially tied to the sales tax revenue generated within the county where that school district is located, there is not a strict geographic correlation between all sources and expenditures of revenue earmarked for public education. As noted above, the text of the relevant statutes supports the Department’s exercise of its discretion to distribute LSST revenue according to an origin-based sourcing rule. On the other hand, the BCCRT supports specific local government operations and is more rationally tied, on a geographic basis, to specific local government expenditures. Since the amount of consumption within the county is a reasonable benchmark for estimating the demand for government services within the county, the Department is within its discretion to distribute receipts from the BCCRT according to a destination sourcing rule.

The statutes identified by the auditor as possibly requiring “parallel” or “identical” distribution merely require, for taxpayers’ convenience, that the various components of the sales tax be *collected and remitted* according to the same basic rules governing computation and reporting. NRS 374.015(8) specifically notes that the LSST is imposed on “exactly the same transactions, requiring the same reports and making [the LSST] parallel in all respects to the sales and use taxes” in order to serve “the convenience of the public and of

retail merchants.”² Indeed, principles of consistency governing tax administration apply to the treatment of taxpayers generally (*see, e.g.*, NRS 360.291(1)(a) (stating that “each taxpayer has the right . . . [t]o be treated . . . with courtesy, fairness, uniformity, consistency and common sense.”); *cf. Mack*, 87 Nev. at 110 n.4, 481 P.2d at 399 n.4), but upholding its duty to individual taxpayers with regard to collection and remittance does not bear upon the Department’s separate duty to properly distribute tax receipts for the support of local governments. Ultimately, the Department is within its discretion to distribute tax receipts in the manner that best promotes the Legislature’s stated purposes and objectives in enacting a specific tax.

The statutes governing the two taxes have been amended numerous times in the several decades since their adoption, and the Legislature has been aware of the different ways the revenue from the two taxes has been distributed and has designed their distribution formulas based on that knowledge. *See, e.g., Hearing on A.B. 450 Before the Assembly Committee on Taxation*, 1995 Leg., 68th Sess. 2 (May 2, 1995) (testimony of bill sponsor, Assembly Speaker Lynn Hettrick, that the bill clarified that sales taxes in Nevada should be collected on a destination source basis and provided penalties for noncompliance, but the bill “in no way[] affects the distribution of school or any other taxes”); *Hearing on A.B. 450 Before the Assembly Committee on Taxation*, 1995 Leg. 68th Sess. 15 (May 25, 1995) (including discussion in which one legislator noted that the LSST “was reported where the sale occurred” and the BCCRT was “reported where the goods were delivered” and asked if the bill changed where the LSST was reported, to which Speaker Hettrick responded that the bill was carefully drafted to avoid such a change). The Legislature’s knowledge of and acquiescence to the continuation of the longstanding distribution procedures is indicative of its intent not to disturb those procedures. *See Attorney General v. Board of Regents*, 114 Nev. 388, 396, 956 P.2d 770, 776 (1998) (providing that the Legislature’s failure to amend a statute after an agency’s reasonable interpretation indicates the interpretation is consistent with the legislative intent). Changing the LSST or BCCRT

² NRS 377.040(2) contains a similar requirement that county ordinances enacting the BCCRT contain “[p]rovisions substantially identical to those of the [LSST], insofar as applicable.” Since the manner of distributing the BCCRT is governed by NRS 377.055, and not by county ordinance, the uniformity provisions of NRS 377.040(2) are not relevant to the analysis.

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distribution methodology for the sake of consistency would upset the predictability of the revenue streams on which the counties and school districts currently rely. Without any clear textual support in statute for such a change, the Department is within its discretion to continue using current methods of distribution based upon the Legislature's apparent intent to fund school districts and local government operations according to different distribution methodologies.

Sincerely,

ADAM PAUL LAXALT
Attorney General

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