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Nikki E. Dobay
Senior Tax Counsel
(202) 484-5221
NDobay@cost.org

Patrick J. Reynolds
Senior Tax Counsel
(202) 484-5218
PReynolds@cost.org

August 2, 2018

Linda Chu Takayama
Director, Department of Taxation
Via Email to Taxpayer.Services@hawaii.gov

Re: Amended Announcement 2018-10 – Retroactive Application of Remote Seller General Excise Tax Imposition

Dear Director Takayama:

On behalf of the Council On State Taxation (COST), we are writing in response to an amended version of [Announcement 2018-10](#).¹ We commend the Department for eliminating the retroactive application of Hawaii’s remote seller collection law to periods prior to July 1, 2018. However, we urge the Department to follow the same approach taken by the South Dakota Department of Revenue (directive attached) and not initiate the imposition of the General Excise Tax (GET) on sales until after the sales threshold is met by a seller. This avoids any retroactive application of the tax on sellers that likely either did not factor the GET in their sales price or did not separately charge the GET to customers prior to reaching the threshold. The sales threshold provision in [Act 041/S.B. 2514](#) is substantially the same as South Dakota’s S.B. 106, which the U.S. Supreme Court addressed in [South Dakota v. Wayfair, Inc.](#) In *Wayfair*, the Court specifically recognized South Dakota’s prohibition against retroactive application of its remote seller collection law as one of its features “designed to prevent discrimination against or undue burdens upon interstate commerce.” We urge you to remove all retroactive application from the Department’s guidance.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 550 major corporations engaged in interstate and international business. COST’s objective is to preserve and

¹ On July 11, 2018, we submitted a letter in response to the original version of Announcement 2018-10. At that time, we were unaware of the Department’s amendments, which appear to have not been posted until July 12, 2018.

promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Consistent with our mission, COST is a strong advocate for fair and uniform sales and use tax laws.

Continued Retroactivity

Hawaii will be an outlier state if it requires a taxpayer to remit the GET on sales prior to the taxpayer knowing it will exceed Hawaii's threshold. Although it has only been a month since the *Wayfair* decision was issued, states are beginning to determine how to administer the Court's decision with respect to out-of-state sellers. For example, just last week the South Dakota Department of Revenue provided the following guidance for taxpayers:

The law applies to online retailers with 200 or more separate transactions in South Dakota, or with \$100,000 or more in gross sales into South Dakota in the previous calendar year or the current calendar year. Once a business reaches that mark, will the state tax all of that company's in-state transactions from the previous year?

Once a business meets either of the thresholds of SDCL 10-64-2 in the previous calendar year, the business is required to become licensed and remit South Dakota sales tax for the following year.

When a business meets either the thresholds of SDCL 10-64-2 during the current calendar year, the business is required to become licensed and remit South Dakota sales tax from that point forward.

Further, the Nevada Tax Commission has also issued a proposed regulation, in which it is not requiring collection of sales and use tax until after a taxpayer meets the threshold requirements. (See attached Proposed Regulation LCB File No. R189-181.) To our knowledge, Hawaii is the only state to include in its remote seller collection guidance a requirement that taxpayers remit the GET on pre-threshold sales. Thus, we urge the Department to follow the South Dakota Department of Revenue's lead and revise its guidance to require a GET taxpayer to begin collection only *after* it meets the collection threshold. This approach is a fair balance, prohibiting GET imposition without the taxpayer's knowledge of a tax obligation before the threshold is met, while subjecting a GET taxpayer to a continuing obligation for the tax for the subsequent year, even if the threshold is not met.

In addition, this type of retroactive collection raises Due Process concerns and is particularly egregious because double taxation of the same transaction is a distinct possibility. Purchasers in Hawaii are still liable for use tax collection on remote purchases, and if Act 041/S.B. 2514 is retroactively enforced, the remote sellers themselves would be equally liable. Further, the Department's own guidance in Tax Information Release 2001-4 is almost certain to create double taxation in many situations. In that release, the Department provides safe harbor guidelines, which include a seller providing a GET license number. If a taxpayer is not subject to the GET at the time of the sale and then later meets the threshold, it is very likely a purchaser would have paid use tax because the seller would not have a GET license number. Thus, making the seller pay the GET on that sale would result in double taxation where the purchaser was

unable to meet the safe harbor and required to pay use tax. Although there is precedent for the Department to provide a credit mechanism where double taxation results, it is unfair to make payment of double tax the rule as opposed to the exception. The more appropriate solution is to follow South Dakota's lead and require collection only after the threshold has been met.

Thus, we urge the Department to remove the remaining retroactive provisions from its announcement. Otherwise, it is likely that Hawaii will be exposed to constitutional challenges on this issue. Thank you for your consideration. If you have any questions or would like to discuss, please reach out to either of us.

Respectfully,



Nikki E. Dobay
Senior Tax Counsel



Patrick J. Reynolds
Senior Tax Counsel

cc: Gov. David Y. Ige
Sen. Ronald D. Kouchi
Speaker Scott K Saiki
COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

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Do I need a South Dakota sales tax license?

Any business with a physical presence in South Dakota is currently and will continue to be required to be licensed for sales tax collection.

*[South Dakota law](#) also requires any business without a physical presence in South Dakota to obtain a South Dakota sales tax license and pay applicable sales tax if the business meets one or both of the following criteria in the previous or current calendar year:

1. The business has gross sales into South Dakota exceeding \$100,000; or
2. The business has 200 or more separate transactions into South Dakota.

Gross sales or transactions include the sale of tangible personal property, any products transferred electronically, or services.

Note: These minimum thresholds do not apply to any business with a physical presence in South Dakota.

*While the U.S. Supreme Court ruled in South Dakota's favor, the South Dakota Department of Revenue is currently unable to enforce 2016's remote seller taxation law due to the State Circuit Court's injunction that is still in place. The U.S. Supreme Court's decision set aside the South Dakota Supreme Court's decision and the case will return to the South Dakota court system for further legal proceedings.

For more information on these thresholds, [click here](#).

How do I obtain a sales tax license?

The Department of Revenue offers a convenient, online application for a variety of taxes, including sales tax. To get started, [click here](#).

You can also register through the Streamlined Sales Tax Project. To get started, [click here](#).

How do I file and pay taxes?

You can file, pay, and amend your tax returns by using South Dakota's online tax filing system [EPath](#).

Will the state go back and try to recover taxes that weren't collected and paid on purchases made prior to the ruling?

No, the state cannot go back and retroactively collect sales tax from a remote seller. The state is legally precluded from enforcing retroactive tax collection on remote sellers per SDCL 10-64-6.

The law applies to online retailers with 200 or more separate transactions in South Dakota, or with \$100,000 or more in gross sales into South Dakota in the previous calendar year or the current calendar year. Once a business reaches that mark, will the state tax all of that company's in-state transactions from the previous year?

Once a business meets either of the thresholds of SDCL 10-64-2 in the previous calendar year, the business is required to become licensed and remit South Dakota sales tax for the following year.

When a business meets either the thresholds of SDCL 10-64-2 during the current calendar year, the business is required to become licensed and remit South Dakota sales tax from that point forward.

However, the Department is legally precluded from enforcing retroactive tax collection on remote sellers per SDCL 10-64-6.

What are the tax rates?

The South Dakota state sales tax rate is 4.5 percent. In addition, municipal sales tax may apply to your transactions. You can access the municipal tax rates for one or multiple addresses by using [TaxMatch](#).

Our rates are also available in our [Municipal Tax Bulletin](#).

Does South Dakota require me to file separate returns for state and municipal sales taxes?

No, South Dakota state and municipal taxes are reported on the same sales tax return.

What steps will DOR take to implement the tax changes now that the Supreme Court has ruled in South Dakota's favor?

Once the injunction is dissolved the Department will begin notifying identified unlicensed remote sellers that they potentially meet the licensing and filing requirements set in South Dakota statute. The Department will work with these businesses to assist them with licensing and filing as well as following up with businesses that do not comply.

Do I need to obtain a sales tax license in other states?

If you sell products or services in other states, you may be required to pay sales tax in that state. You can access more information on other states' laws and contact information by using [our state-by-state directory](#). If you are unable to contact other states, contact the South Dakota Department of Revenue for assistance.

You can connect with one of our business tax agents by clicking on the live chat button on the lower, right corner of this webpage. You can also contact the South Dakota Department of Revenue toll free at (800) 829.9188 or by email at bustax@state.sd.us.

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB FILE NO. R189-18I

**The following document is the initial draft regulation proposed
by the agency submitted on 07/17/2018**

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB File No. R___-18

July 9, 2018

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

AUTHORITY: §§1-2, NRS 360.090, 372.724, 372.725, 374.724 and 374.725.

A REGULATION relating to taxation; revising provisions relating to the imposition, collection and remittance of sales and use taxes by retailers located outside this State; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law ...

Section 1. Section 7 of LCB File No. R137-15 is hereby amended to read as follows:

1. For the purpose of determining whether the activities of a retailer located outside this State have a sufficient nexus with this State to satisfy the requirements of the United States Constitution, ~~the activities of~~ *except as otherwise provided in NRS 372.7243, 372.7247, 374.7243 or 374.7247 or section 5 or 6 of LCB File No. R137-15*, a retailer ~~are presumed to have a~~ *has* sufficient nexus with this State if the retailer is making a sale of tangible personal property, whether at retail or for storage, use or other consumption in this State, and the retailer:

(a) Is part of a controlled group of corporations that has a component member with physical presence in this State and the activities performed in this State by the component member are:

(1) Listed in paragraph (b) of subsection 1 of NRS 372.7243 or paragraph (b) of subsection 1 of NRS 374.7243; or

(2) Significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services ~~and: ~~or~~~~

(b) Enters into an agreement with a resident of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer, and the cumulative gross receipts from sales by the retailer to customers in this State who are referred to the retailer by all residents with such an agreement with the retailer is in excess of \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September and December ~~or~~ ; *or*

(c) Does not have a physical presence in this State, does not have sufficient nexus with this State pursuant to paragraph (a) or (b), and in the immediately preceding calendar year or the current calendar year:

(1) The gross revenue of the retailer from the retail sale of tangible personal property delivered in this State is greater than \$100,000; or

(2) The retailer made 200 or more retail sales of tangible personal property for delivery into this State; or

(d) Engages in any other activity that establishes sufficient nexus with this State to satisfy the requirements of the United States Constitution.

2. If a retailer is unable to determine which sales to customers in this State were the result of an agreement with a resident of this State as described in paragraph (b) of subsection 1, all gross receipts from sales by the retailer to customers in this State will be considered for purposes of establishing ~~the presumption~~ that the activities of a retailer have a sufficient nexus with this State.

3. If ~~{the activities of}~~ a retailer located outside this State ~~{are presumed to have}~~ *has* a sufficient nexus with this State ~~{}~~ *pursuant to subsection 1*, the retailer shall:

(a) Impose, collect ~~{or}~~ *and* remit the sales ~~{or}~~ *tax and collect and remit the* use tax ~~{pursuant to NRS 372.7243, 372.7247, 374.7243 or 374.7247;}~~ *in accordance with the provisions of chapters 360B, 372 and 374 of NRS;* and

(b) Register with the Department pursuant to NRS 360B.200 before, or at the time of, making ~~{the}~~ *a retail sale* ~~{}~~ *of tangible personal property for delivery in this State.*

4. As used in this section, “commission or other consideration based upon the sale of tangible personal property” includes, without limitation, an agreement to pay an amount of money based on the level of sales completed, cost per mille advertising, the payment of a flat fee in exchange for a referral, the payment of a fixed price in exchange for providing a referral link, or any other item of value given in exchange for a referral.

Sec. 2. This regulation, LCB File No. R___-18, is hereby amended by adding thereto the following transitory language which has the force and effect of law but which will not be codified in the Nevada Administrative Code:

1. The Department shall establish the date by which each retailer who satisfies the criteria set forth in paragraph (c) of subsection 1 of section 7 of R137-15, as amended by section 1 of this regulation, is required to:

(a) Begin to impose, collect and remit sales tax and collect and remit use tax in accordance with the provisions of chapters 360B, 372 and 374 of NRS; and

(b) Register with the Department pursuant to NRS 360B.200.

2. Notwithstanding the provisions of section 7 of R137-15, as amended by section 1 of this regulation, and except as otherwise provided in subsection 3, before the date established by the

Department pursuant to subsection 1, the Department shall not require a retailer who satisfies the criteria set forth in paragraph (c) of subsection 1 of section 7 of R137-15, as amended by section 1 of this regulation to:

(a) Impose, collect and remit sales tax and collect and remit use tax in accordance with the provisions of chapters 360B, 372 and 374 of NRS; or

(b) Register with the Department pursuant to NRS 360B.200.

3. The provisions of this section do not prohibit a retailer who satisfies the criteria set forth in paragraph (c) of subsection 1 of section 7 of R137-15, as amended by section 1 of this regulation, from voluntarily consenting to:

(a) Impose, collect and remit sales tax and collect and remit use tax in accordance with the provisions of chapters 360B, 372 and 374 of NRS; and

(b) Register with the Department pursuant to NRS 360B.200.