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August 18, 2015

VIA E-MAIL: Craig.Johnson@sstgb.org

Mr. Craig Johnson
Executive Director
Streamlined Sales Tax Governing Board, Inc.
Compliance Review and Interpretive Committee
100 Majestic Drive, Suite 400
Westby, WI 54667

IN THE MATTER OF: AMCS, LLC's Request for Sanctions against Nevada
Regarding
Delivery of Concrete in a Mixture Truck

Dear Mr. Johnson:

Please consider this correspondence as an additional explanation of the Nevada Department of Taxation's response to AMCS, LLC's request that Nevada be found not in compliance with the requirements of the Streamlined Sales and Use Tax Agreement as it relates to delivery of concrete in a mixture truck.

Facts and Procedural History

AMCS, LLC ("Requester") sent the Nevada Department of Taxation ("Department") requests for two advisory opinions regarding the delivery of concrete ("Opinions"). Each eleven page Request for Opinion included facts concerning the product and method of delivery along with an exemplar invoice. The Requester included numerous scenarios and requested answers to numerous questions. Based on the length of the request, lack of relevant facts, and the amount of information requested, the Department requested more information to comply with NAC 360.190. Additional information was provided by the Requester, and the Opinions, based on the information provided and Nevada Law were prepared and mailed to the Requester.

The Requester was not satisfied with the Opinion and immediately began a campaign to have the Opinion changed to conform to the Requestor's belief as to the taxability of the delivery of concrete. The attempts included correspondence with Mr. Craig Johnson, Executive Director of Streamline as well as several conference calls with the Director of the Department, the Chief Deputy Director and the Deputy Attorney General assigned to the Department. The Requester additionally appealed the Opinion

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to the Nevada Tax Commission ("Commission"). The matter was heard by the Commission on May 11, 2015 at a public meeting. The Requester's clients were represented by Paul Jones, Esq., licensed in the State of Utah, and the Department was represented by Deputy Attorney General Vivienne Rakowsky. The Commission voted 7-1 to uphold the Department's Opinion. The written Decision of the Commission is being prepared, and to date is not completed.

A conference call was held on May 26, 2015 with Mr. Johnson, the Requester, Deputy Executive Director, Paulina Oliver, and Deputy Attorney General Vivienne Rakowsky. The Department explained their position and the Requester explained his position. The matter remains unresolved. The Requester has now filed for an Interpretive Opinion pursuant to Rule 904. Please consider the analysis below as the Department's response.

Analysis

Concrete Manufacturing

The batching of ready mixed concrete is an exacting process. All of the processes must be performed so that the concrete has the required strength. Once it is batched, concrete cannot be transported without some processing during the transportation process. The agitation while the mixer is rotating must be performed or the concrete will not be usable after a short period of time. Whether the batch leaves the plant wet or dry, the mixing is part of the processing. Further processing, such as adding water or additives, which slows down or speeds up the process takes place at the destination. The required ASTM testing to make sure that the cement is to specifications is performed at the destination. Courts in other states find that the processing of concrete is not complete until the concrete has been poured and molded into its final form at the jobsite.

In fact, the original request for the Opinion at page 2 states "delivery trucks continue to mix the product during the transportation process to prevent the product from hardening in the truck and becoming worthless, additives are also added at times to prevent the ready mixed concrete from hardening as quickly as well as speeding up the hardening process." Thus, the Requester's argument that that no processing is performed during transportation or during delivery contradicts the facts in the request for Opinion.

Applicable Nevada Statutes and Regulations

Delivery charges are defined in NRS Chapter 3608.425 as:

NRS 3608.425 "Delivery charges" construed. "Delivery charges" means charges by a seller of personal property for the preparation and delivery of the property to a location designated by the purchaser of the property, including, but not limited to, charges for transportation, shipping, postage, handling, crating and packing, except that the term does not include any charges for transportation, shipping or postage which are stated separately pursuant to NRS 3608.290.

NRS 3608.290 states:

NRS 360B.290 Contents of document given to purchaser indicating sales price of tangible personal property. Any invoice, billing or other document given to a purchaser that indicates the sales price for which tangible personal property is sold:

1. May state separately any amount received by the seller for any transportation, shipping or postage charges for the delivery of the property to a location designated by the purchaser; and
2. Must state separately any amount received by the seller for:
 - (a) Any installation charges for the property;
 - (b) Any credit for any trade-in which is specifically exempted from the sales price of the property pursuant to chapter 372 or 374 of NRS;
 - (c) Any interest, financing and carrying charges from credit extended on the sale; and
 - (d) Any taxes legally imposed directly on the consumer.

A delivery charge is defined in NAC 372.101 as:

NAC 372.101 Delivery charges. (NRS 360.090, 360B.110, 372.025, 372.065, 372.725)

1. Delivery charges included in the sale of tangible personal property are subject to sales and use taxes, including, but not limited to, any charges for:
 - (a) Transportation, shipping or postage which are not stated separately on applicable invoices or other billing documents. Any charges for transportation, shipping or postage which are stated separately on applicable invoices or other billing documents shall be deemed not to be included in such a sale and are not subject to sales and use taxes.
 - (b) Handling, crating or packing, whether or not separately stated.
2. A delivery charge that is not connected with the sale of tangible personal property is a charge for a service and is not subject to sales and use taxes.
3. If a shipment of tangible personal property which is sold to a purchaser includes both taxable and exempt property, the seller of the property shall comply with the provisions of NRS 360B.255.

Thus, pursuant to NRS 3608.425 and NAC 372.101, delivery which includes preparation and transportation is a taxable event, and only delivery which is solely transportation may be tax exempt when separately stated. In the State of Nevada, any service that is part of a sale or necessary to complete a sale is also subject to tax. NRS 3608.480, NAC 372.101. In addition, transportation charges that are not separately stated on the invoice, bill of sale or other billing documents or that include charges for items **in addition to** transportation, shipping or postage are also subject to tax. With respect to the complaint that was filed and the case at hand, if the taxpayer can prove to the State of Nevada that the charges, although labeled "transportation charges" on the invoice, do not include charges for **anything** other than the movement of the ready mix from the plant to the jobsite, the State of Nevada would exclude those amounts from the sales price of the ready mix, as provided in Nevada's law and in the Streamlined Sales and Use Tax Agreement (SSUTA).

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Compliance with Streamline

Nevada is in full compliance with Streamline with respect to this issue. Streamline requires consistent definitions, but does not set a state's policy as to taxability. The Nevada Taxability Matrix is clear on this issue. Reference number 10010 states that charges by the seller for any services necessary to complete the sale other than delivery and installation are included in the sales price. Reference numbers 11000 and 11010 which govern delivery charges states that crating, packing, preparation for mailing or delivery and similar charges are included in the sales price, and transportation, shipping, postage and similar charges are excluded from the sales price if separately stated. The real issue at hand is not whether Nevada is in compliance with the requirements of the Streamlined Sales and Use Tax Agreement, but is a question of the facts surrounding the transactions and whether or not the charge labeled "transportation charges" on the invoice is solely for "transportation" or if the charge covers items in addition to transportation. Until such time as the taxpayer proves that the charge is solely for transportation of the product, Nevada would not allow it to be excluded from the sales price of the ready mix.

Finally, the Department has suggested to the Requester and Requester's counsel that they are willing to work with them and that the proper procedure to change a regulation is through the regulatory process contained in NRS 233B.

Sincerely:



Paulina T. Oliver

Deputy Executive Director

cc: Deonne Contine, Executive Director
Vivienne Rakowsky, Deputy Attorney General