



# Some Food for Thought on Nevada Sales and Use Tax

BY ANDREA NICHOLS, ESQ.

**It seems to me that it is rather popular to complain about taxes. Some lawyers even make a living helping clients avoid paying taxes. But without taxes, many of the things we take for granted would not be possible, like schools, police and fire protection, roads, sewers, and services for children, the aged, persons with disabilities, etc.**

In order to provide the state services that most of us expect, Nevada relies heavily on sales and use taxes. According to its Annual Report for Fiscal Year 2020, sales and use taxes made up 68.4 percent of the Nevada Department of Taxation's tax revenues.<sup>1</sup> One of the problems with the state's reliance on sales tax was illustrated by the COVID-19 pandemic. During the shutdown, sales tax revenue went down just when revenue was needed for things like unemployment benefits.

A system that relies heavily on sales and use taxes may be called regressive because the system tends to exacerbate income inequality.<sup>2</sup> To illustrate this point, consider the sales tax imposed on prepared foods, found in Article 10 Sec. 3A of the Nevada Constitution and NRS 372.284.

It happens; sometimes you need a quick meal. Maybe you just picked up your children from soccer practice. It will take at least an hour to get home and prepare a meal. They are hungry now, need showers, and have homework. You head to the drive-through and buy \$25 worth of fast food. In Clark County, you would pay another 8.375 percent in sales tax on this purchase, or \$2.09. If your income is \$100 per week, this sales tax equates to 2.09 percent of your weekly income. But, if you make \$1,000 per week, the sales tax is a mere 0.209 percent of your weekly income. In 2018, the Institute on Taxation & Economic Policy rated Nevada number five on its list of the 10 most regressive state and local taxing systems.<sup>3</sup>

On the other hand, Nevada tends to rank among the best states for taxes on business.<sup>4</sup> Looking again at the Nevada Department of Taxation's Annual Report for Fiscal Year 2020, it shows:

- Modified Business Tax accounts for 8.9 percent of total revenue;
- Insurance Premium Tax accounts for 6 percent;
- Other Taxes: 4.3 percent;
- Commerce Tax: 2.8 percent;
- Cigarette and Tobacco Taxes: 2.6 percent;
- Real Property Transfer Tax: 2 percent;
- Net Proceeds of Minerals Tax: 1.7 percent;
- Centrally Assessed Property Tax: 1.6 percent;
- and Marijuana Taxes and Fees: 1.5 percent.

Where does all that state tax revenue go? Well, a little more than half, 51.1 percent, goes to local governments, and 41.8 percent goes to the State General Fund.<sup>5</sup> The largest expenditures from the State General Fund are for government, health and human services, and education.<sup>6</sup>

That sales tax, which Nevada relies on, is imposed on retailers for the privilege of selling tangible personal property at retail. NRS 372.105. Tangible personal property means personal property that may be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses. NRS 372.085. The sales tax is imposed on gross receipts from retail sales and is typically collected by the retailer from the consumer. NRS 372.110. Sales tax is considered a debt to the state, and a retailer is liable for the sales tax regardless of whether the retailer collects it from the consumer. NRS 372.200.

Not everyone is required to pay sales tax though. There are exemptions. NRS 372.260-372.350; see also Nevada Constitution Article 10, Section 6. For example, proceeds of mines are exempted, since mining companies pay net proceeds of minerals tax. NRS 372.270; See also Nevada Constitution Article 10, Section 5. Sales to the U.S., and to the state and its political subdivisions are exempted. NRS 372.325. Sales to religious, charitable, and educational organizations are exempted. NRS 372.348. There is also an exemption for food for human consumption, but, as noted above, it does not apply to prepared foods for immediate consumption.

The exemption for food for human consumption is the subject of a few notable Nevada tax cases. In *Collins Discount Liquors & Vending v. State*, 106 Nev. 766 (1990) the Nevada Supreme Court held that soft drinks sold from vending machines were prepared foods for immediate consumption and consequently were subject to sales tax. But, in *State Dept. of Taxation v. McKesson Corp.*, 111 Nev. 810 (1995), the Nevada Supreme Court found that water sold from a vending machine, in quantities of at least one gallon, was intended for home consumption rather than immediate consumption, and was therefore exempt from sales tax. In *Sparks Nugget, Inc. v. State ex. rel. Dept. of Taxation*, 124 Nev. 159 (2008), the Nevada Supreme Court found that complimentary meals a casino provided to its employees and patrons were exempt from sales tax because no taxable event occurred when the meals were provided.

In the *Sparks Nugget* case, the court also found that the casino's purchase of the food was exempt from use tax as food for human consumption. Use tax is imposed on the use or consumption of property in this state with respect to property acquired out of state in a transaction that would have been taxable if it occurred within this state. NRS 372.185. That's a mouthful. As the Nevada Supreme Court explained in *State v. Kelly-Ryan, Inc.* 110 Nev. 276, 280 (1994), "[T]he use tax complements the sales tax so that all tangible personal property sold or utilized in Nevada is subject to taxation. Use taxation is also a way for Nevada to tax transactions outside the state that would otherwise escape sales taxation."

In that case, a construction contractor was required to pay Nevada use tax on modular housing that it purchased from an out-of-state vendor for use in Nevada.

Maybe you saw some baking pans that you liked in a catalogue. You ordered them from a vendor in another state that didn't have a physical location in Nevada. The vendor shipped the pans to you in Nevada but didn't collect sales tax. You would owe use tax on the purchase of your baking pans for use in Nevada.

This scenario used to be more of an issue because under the cases of *National Bellas Hess, Inc., v. Dept. of Revenue of State of Ill.*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota by and Through Heitkamp*, 504 U.S. 298 (1992), a state

had no power to impose liability on an out-of-state mail-order firm to collect use taxes, if the out-of-state firm did not have a physical presence in the state. However, *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018) overruled these cases and upheld a taxing statute requiring internet sellers to collect and remit sales tax.

Sales tax is imposed on retail sales but not on sales for resale. A party making a sale has the burden of proving that a sale of tangible personal property is not a sale at retail unless the person who makes the sale obtains a resale certificate from the purchaser. NRS 372.155. *Jim L. Shataki Distributing Co., Inc. v. State Dept. of Taxation*, 108 Nev. 901 (1992), another

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tax case involving food, illustrates this point. In that case, a food wholesaler argued that the sale of water softening rock salt should not be taxed because its customers used the salt for preparation of prime rib. Although the food wholesaler did not obtain resale certificates from its customers, it claimed that it had rebutted the presumption of taxability because the salt was incorporated into the food, which was then resold to a restaurant's customers. The Nevada Supreme Court found that letters from two of the food wholesaler's customers was insufficient to rebut the presumption of taxability, given the amount of rock salt sold during the audit test period.

It is hoped that this article gives you something to chew on, that the reader will not find it too taxing, and that it is easily digestible.

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## ENDNOTES:

1. [https://tax.nv.gov/Publications/Annual\\_Report/](https://tax.nv.gov/Publications/Annual_Report/)
2. <https://itep.sfo2.digitaloceanspaces.com/whopays-ITEP-2018.pdf>
3. *Id.*
4. <https://taxfoundation.org/state/nevada/>
5. [https://tax.nv.gov/Publications/Annual\\_Report/](https://tax.nv.gov/Publications/Annual_Report/)
6. <http://openbudget.nv.gov/OpenGov/ViewActualSummary.aep>

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