TITLE 316 NEBRASKA ADMINISTRATIVE CODE, CHAPTER 34

NEBRASKA DEPARTMENT OF REVENUE

REGULATIONS AND PROCEDURES GOVERNING DECLARATORY ORDERS

Numerical Table of Contents

REG-34-001 SCOPE AND DEFINITIONS 2
REG-34-002 PETITION FOR DECLARATORY ORDER 4
REG-34-003 DISPOSITION OF THE PETITION 7
REG-34-004 INTERVENTION IN DECLARATORY ORDER PROCEEDING 8
REG-34-005 DECLARATORY ORDER PROCEEDINGS 9
REG-34-006 ISSUANCE OF DECLARATORY ORDER 10
REG-34-007 APPEAL 11

TITLE 316 NEBRASKA ADMINISTRATIVE CODE, CHAPTER 34

NEBRASKA DEPARTMENT OF REVENUE

REGULATIONS AND PROCEDURES GOVERNING DECLARATORY ORDERS

REG-34-001 SCOPE AND DEFINITIONS

001.01 Scope of this Chapter. This Chapter of these regulations is to be used only by persons seeking issuance of a declaratory order by the Department.

001.02 Definitions. As used in this Chapter:

001.02A Applicability means the relation of the law or action to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law or action applies at all, to whom it applies, when it applies, how it applies, or which law or action applies.

001.02B Authorized representative means a person who is authorized by the petitioner, or any party to represent the petitioner, or any party for purposes of the declaratory order proceeding consistent with the requirements of Chapter 33, Article 8 of these regulations.

001.02C Declaratory order proceeding means a proceeding initiated by a petitioner seeking issuance of a binding order by the Department as to the applicability of specified circumstances to a law or action that is within the primary jurisdiction of the Department.

001.02D Department means the Nebraska Department of Revenue.

001.02E Hearing Officer means the Tax Commissioner or individual or individuals designated by the Tax Commissioner to conduct a declaratory order proceeding pursuant to the Administrative Procedure Act.

001.02F Law or action means a statute, regulation, revenue ruling, or order of the Tax Commissioner.

001.02G Necessary party means a person who or an entity which has a specific interest in the applicability of the law or action, as distinguished from a general interest, such as may be the concern of the public at large. A necessary party is one which is, or would be affected, in a legally cognizable way if the Department issues a declaratory order regarding the uncertainty sought to be resolved.

001.02H Party means the petitioner, the Department, any necessary party, and any other person allowed to intervene in the declaratory order proceeding.

001.02I Person means bodies politic and corporate, county officials, societies, communities, nonprofit organizations, nonprofit corporations, the public generally, individuals, partnerships, limited liability companies, joint stock companies, associations, and other entities and organizations.

001.02J Petition means a written request for a declaratory order filed in accordance with section 003 of this Chapter.

001.02K Petitioner means a person who files a petition for a declaratory order proceeding before the Department that contains all the necessary information.

001.02L Tax Commissioner means the chief executive officer of the Department.

(Section 84-912.01, R.R.S. 2008)

REG-34-002 PETITION FOR DECLARATORY ORDER

002.01 Who May File. Any person may petition the Department to issue a declaratory order as to the applicability to specified circumstances of a law or action which is within the primary jurisdiction of the Department.

002.02 When Declaratory Orders Are Appropriate. A declaratory order may be requested on the applicability of a law or action enforced by the Department. A declaratory order may be requested only on the applicability of existing laws or actions. A declaratory order may be requested to obtain an analysis of proposed conduct, not to obtain an analysis of conduct that has already occurred.

002.03 When Declaratory Orders Are Inappropriate. The Department shall not issue a declaratory order where:

002.03A The petition requests a declaratory order on a matter that is outside the scope of the authority of the Department;

002.03B The petition requests review or appeal of a decision made by the Department in a contested case;

002.03C The petition requests a declaratory order on the effect of past conduct;

002.03D An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the Department involving the petitioner on substantially the same or similar facts or issues raised in the petition;

002.03E The petition seeks a declaratory order that a statute, rule, regulation, or revenue ruling is unconstitutional or invalid;

002.03F The issue raised in the petition has been settled by a change in circumstances or other means;

002.03G A declaratory order would substantially prejudice the rights of a necessary party who does not consent in writing to a declaratory order proceeding;

002.03H A declaratory order would not resolve the controversy or uncertainty; or

002.03I The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate.

002.04 The Department may refuse to issue a declaratory order where:

002.04A Refusal is necessary to assure adequate Department resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

002.04B The question presented is so complex that the Department has not had sufficient opportunity or resources to develop an appropriate declaratory order; or

002.04C The petitioner failed to submit any additional information requested by the Department or submitted such information after the date established by the Department.

002.05 Form and Contents of Petition. A petition for declaratory order shall be in writing and shall:

002.05A Contain a caption, which includes:

002.05A(1) The words: BEFORE THE DEPARTMENT OF REVENUE, STATE OF NEBRASKA;

002.05A(2) A heading specifying the subject matter and the name of the petitioner; and

002.05A(3) The words: PETITION FOR DECLARATORY ORDER.

002.05B Bear the signature of the petitioner, or an authorized representative of the petitioner;

002.05C Contain the name and address of the petitioner, and when his or her authorized representative is an attorney, the name, address, telephone number, and bar number of the attorney;

002.05D Include any documents that relate to the petition;

002.05E Contain the name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the law or action, or who may be affected by resolution of the issue sought to be resolved by the petitioner;

002.05F Cite the law or action upon which the petitioner seeks a declaratory order;

002.05G Contain a detailed statement of all of the material facts and specific

circumstances which apply to petitioner's request for a declaratory order;

002.05H State all legal or factual contentions asserted by the petitioner;

002.05I State a demand for the relief sought by the petitioner;

002.05J State the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested;

002.05K Include any documents pertinent to the petition that the petitioner wishes to be considered by the Department; and

002.05L State a request for hearing if one is desired.

002.06 The petitioner must also attach any written consents to the proceeding obtained from any necessary party.

002.07 When the Tax Commissioner approves and implements an electronic form or method for filing a petition, any petition for declaratory order may be filed electronically with the Department if it contains all the information required by this section. The petition may be filed using the Web site of the Department (www.revenue.ne.gov).

002.08 The petition shall be filed with the Tax Commissioner by mail, in person, or electronically during the Department's normal business hours.

002.09 The petition shall be deemed to be filed when it is actually received by the Department. The Department shall date stamp all petitions upon receipt.

002.10 At the same time the petition is filed with the Department, the petitioner must also serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties.

(Section 84-912.01, R.R.S. 2008)

REG-34-003 DISPOSITION OF THE PETITION

003.01 Generally. The Tax Commissioner may consider the petition or delegate the matter to a designated Hearing Officer to consider and recommend a decision to the Tax Commissioner. In considering the petition, the Tax Commissioner or Hearing Officer may do one or more of the following:

003.01A Require that additional information be submitted before the petition will be further considered;

003.01B Require the petitioner to provide notice to persons or entities who may be necessary parties that a request for a declaratory order has been filed with the Department;

003.01C Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral argument on the petition;

003.01D Consider the petition and any attachments without oral argument.

003.02 Within 30 days after the petition is filed, the Tax Commissioner shall, in writing:

003.02A Issue a declaratory order applying the law or action in question to the specified circumstances;

003.02B Agree to issue a declaratory order by a specified time applying the law or action in question to the specified circumstances;

003.02C Set the matter for proceedings as set forth in subsection 003.01 of this Chapter; or

003.02D Decline to issue a declaratory order, stating the reasons for the Tax Commissioner's decision.

003.03 The Tax Commissioner may decide at any time to not issue a declaratory order if issuing an order under the circumstances would be contrary to any provision of section 002.03 of this Chapter. The Tax Commissioner shall notify the petitioner and any party in writing when he or she decides not to issue a declaratory order.

(Section 84-912.01, R.R.S. 2008)

REG-34-004 INTERVENTION IN DECLARATORY ORDER PROCEEDING

004.01 Intervention by any person or entity in a declaratory order proceeding shall be allowed if:

004.01A A petition for intervention is submitted in writing to the Department. Copies must be mailed to all parties to the proceeding.

004.01B The contents of the petition are as specified in subsection 002.05 of this rule.

004.01C The Hearing Officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by the intervention.

004.02 The petition for intervention shall be submitted to the Department in writing. In addition to the requirements of section 002.05 of these regulations, the petition shall include:

004.02A A statement of facts sufficient to show the intervenor's interest; and

004.02B A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding;

004.03 The Department may invite any person to file a petition for intervention.

004.04 Except as provided in subsection 004.05 of these regulations, the Hearing Officer shall grant a petition for intervention if the requirements of subsections 004.01 and 004.02 of this section are satisfied.

004.05 The Hearing Officer shall deny a petition for intervention if the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

004.06 The Hearing Officer's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

(Section 84-912.02, R.R.S. 2008)

REG-34-005 DECLARATORY ORDER PROCEEDINGS

005.01 Oral Argument, When. Any party may submit a motion for oral argument to the Hearing Officer. If an opportunity for oral argument is granted, then argument shall be scheduled to be conducted no more than 45 days after the petition was filed. The petitioner and all other parties shall be served by the Department with notice of the date, time, and location for oral argument. The Department shall provide all parties with notice of the proceeding not less than seven days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

005.02 Oral Argument, Procedure. Oral argument will be made before the Hearing Officer. The Hearing Officer shall control the proceeding and shall:

> 005.02A Identify the proceeding, introduce himself or herself, and identify each party for the record;
>
> 005.02B Hear the oral arguments of the petitioner, Department, intervenors, and necessary parties; and
>
> 005.02C Close the proceedings.

005.03 The Hearing Officer may impose reasonable limits on the amount of time allocated for oral arguments.

005.04 The parties may file briefs in support of their positions. The Hearing Officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral arguments.

005.05 Oral arguments may be conducted either in person or by conference call.

(Section 84-912.01, R.R.S. 2008)

REG-34-006 ISSUANCE OF DECLARATORY ORDER

006.01 The Tax Commissioner shall issue his or her declaratory order within 60 days after the date the petition was filed.

006.02 The declaratory order shall be in writing and include the following:

006.02A The names of all parties to the proceeding;

006.02B The facts upon which the order is based;

006.02C The statute, rule, regulation, revenue ruling, or order at issue in the matter;

006.02D The Tax Commissioner's conclusions as to the applicability of the law or action to the facts;

006.02E The Tax Commissioner's conclusions as to the legal effect or result of applying the law or action to the facts; and

006.02F The reasons relied upon by the Tax Commissioner to support his or her conclusions.

006.03 A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

006.04 A declaratory order has the same status and binding effect as an order issued in a contested case.

006.05 If the Tax Commissioner has not issued a declaratory order within 60 days after the petition has been filed, the petition shall be deemed to have been denied.

(Section 84-912.01(5), (6), and (7), R.R.S. 1999)

REG-34-007 APPEAL

007.01 A declaratory order may be appealed in the manner provided for review of contested cases by the Administrative Procedure Act.

007.02 Parties desiring to appeal a final declaratory order of the Tax Commissioner must file a petition for review in the District Court of Lancaster County, Nebraska within 30 days after the service of the declaratory order of the Tax Commissioner. The period for appeal commences on the date of service of the notification of a determination by the Tax Commissioner to the parties or their authorized representatives. Service of the petition and summons must be made in accordance with Nebraska law.

(Sections 84-912.01(6), and 84-917, R.R.S. 2008)