

● ORIGINAL ●

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON,)

Appellant,)

vs.)

THE FIRST JUDICIAL DISTRICT COURT)
OF THE STATE OF NEVADA in and for)
Carson City, and THE HONORABLE)
JAMES T. RUSSELL, Judge thereof,)

Respondents.)

No. 55228

District Court No. 09-0C-00016-1B

FILED

FEB 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

CLARK COUNTY'S AMICUS CURIAE BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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29 MISCELLANEOUS

30 1965 Nev. State. Chapter 362, P. 966 §14, codified as NRS 233B.130 2

31 Minutes, Assembly Government Affairs Committee, June 6, 1989 2

I

IDENTITY OF AMICUS CURIAE

Clark County ("County") is a political subdivision of the state of Nevada which was a party to the administrative proceedings in this matter due to its interest in collection of the taxes at issue. County has requested leave to file this brief in a motion filed with this brief.

II

ARGUMENT

Summary

When the sales and use tax was enacted in Nevada there were no general administrative review procedures in Nevada law. Refunds were obtained by actions brought in the district courts. When the Administrative Procedure Act ("APA") was enacted in 1965 it did not limit the use of trial de novo where provided by statute. The 1989 amendments to the APA removed trial de novo as an option in reviewing final decisions of administrative bodies in contested cases and required all judicial review of or judicial action concerning a final decision in a contested case to be done as provided in the APA. Subsequent to these amendments, this Court ruled that administrative res judicata is the law in Nevada, thus precluding trial de novo where an administrative body has made a final decision in a contested case.

The 1997 amendments to Nevada tax law make it clear that decisions of the Nevada Tax Commission ("Commission") are final decisions for purposes of judicial review. Prior to 1999, a taxpayer could either administratively appeal or pay use taxes under protest and go directly to court to seek a refund. The 1999 amendments to Nevada tax law provide that no court action on a use tax appeal is available until after a final decision by the Commission, thus combining administrative review and refund claims into one coherent procedure. All review of use tax claims in court is now after final administrative review and must be done in the manner the APA provides.

A. **Facts**

Southern California Edison ("SCE") and the Department of Taxation ("Department")

1 were not the only parties to this case. Clark County and the City of Henderson were also
2 parties with legally protectible interests in the outcome of this case. See, Clark County's
3 Appendix, February 27, 2009 Decision, and NRS 360.245(6). SCE has never served its
4 complaint on all parties to the administrative proceedings as required by NRS 233B.130(2).

5 B. Chronological Review of the Applicable Law

6 The Sales and Use Tax Act was enacted in 1955. NRS 372.010 et seq. The
7 Administrative Procedure Act was not added to Nevada law until 1965. NRS 233B.010 et
8 seq. The original APA provided an alternative method for judicial review of a final decision
9 in a contested case, but did not preclude "trial de novo review where provided by statute."
10 1965 Nev. State. Chapter 362, p. 966 §14, codified as NRS 233B.130.

11 The APA's judicial review provisions were substantially revised in 1989 by
12 Assembly Bill 884. The State Bar of Nevada drafted the revisions and testified in support of
13 the bill. See, Minutes, Assembly Government Affairs Committee, June 6, 1989, pp. 6-8.
14 Mr. Campbell, Chairman of the State Bar's Administrative Law Committee, testified that
15 one
16 flaw with the previous APA was that:

17 each agency has its own judicial review provision but it is
18 incomplete and contains no provision for procedures before
19 the courts. He also pointed out it is not clear whether NRS
20 233 or the agency's law applies thereby creating confusion
21 among practitioners and the courts. ... some people file
motions for summary judgments while others request hearings
before the court. He said AB 884 explains the complete
procedure.

22 Id. at 7.

23 Mr. Campbell further testified that:

24 the Administrative Law Committee does not want the courts
25 to substitute their expertise for the expertise of the
26 administrative agency Since the court does not hear the
27 testimony of witnesses, the court is not in a position to judge
credibility. Therefore, in reviewing records of an
administrative agency, the court merely looks for evidence in
the record that supports the agency's decision.

28 Id. at 8.

1 233B.135. It amended NRS 233B.130 by removing the provision allowing trial de novo as
2 an option and instead mandating that the provisions of the APA “are the exclusive means of
3 judicial review of, or judicial action concerning a final decision in a contested case involving
4 an agency to which this chapter applies.” NRS 233B.130(6). (Emphasis added). An action
5 based on the same claims considered by the Commission is clearly an action concerning the
6 Commission’s final decision. NRS 372.680.

7 Once the APA was clarified, this court adopted “a general rule of administrative res
8 judicata,” noting only one statutory exception in NRS 612.533.¹ Britton v. City of North
9 Las Vegas, 106 Nev. 690, 692, 799 P.2d 568, 569 (Nev. 1990). The court applied the new
10 rule to sales and use tax refund actions brought under NRS 372.680 in Campbell v.
11 Department of Taxation, 108 Nev. 215, 827 P.2d 833 (Nev. 1992) although allowing that
12 case to proceed as a “judicial review pursuant to NRS 233B.135.” 108 Nev. at 219, 827
13 P.2d at 836.

14 At the time Campbell was decided, taxpayers had two ways to appeal their sales and
15 use taxes. They could administratively appeal, or pay under protest and seek a refund in
16 district court. 108 Nev. at 217, 827 P.2d at 834. Because the Department had failed to
17 properly inform taxpayers of both options, and because taxpayers “filed their claim in
18 district court within the time period provided in NRS 233B.130(2)(c)” the court allowed the
19 refund claim to proceed as though it had been properly filed as a petition for judicial review.
20 108 Nev. at 219, 827 P.2d at 836. The court, however, reaffirmed that a second evidentiary
21 hearing would not be allowed. Id.

22 The two routes of appeal in sales and use tax cases were consolidated into one in
23 1999 by Senate Bill 362. That bill required all appeals to the courts to be from “a final
24 decision ... by the Nevada Tax Commission.” NRS 372.680.² The law had already been
25 amended in 1997 to clearly provide that a “decision of the Nevada Tax Commission is a
26

27 ¹ Unlike NRS 612.533, NRS 372.680 contains no language indicating administrative res judicata does not apply to use
28 tax actions.

² See also, 1999 amendments in the same bill to NRS 372.685 which had previously allowed direct court intervention
without prior administrative action, but now requires a final decision by the Commission before review in court.

1 final decision for the purposes of judicial review.” NRS 360.245(5). These amendments
2 left no doubt that under the APA and principles of administrative res judicata, taxpayers
3 must seek judicial review of Tax Commission decisions and may not have a hearing de novo
4 in court. NRS 372.680 does not authorize a court to ignore the final decision of the Nevada
5 Tax Commission, required before any judicial intervention is authorized, and proceed with a
6 new trial of the facts and the law. Compare, NRS 612.533.

7 C. SCE’s arguments are invalid.

8 SCE wants to litigate this case as though nothing had changed since 1955, but much
9 has changed and cannot be ignored. The court stated the law succinctly in Nevada State
10 Purchasing Division v. George’s Equipment Company, 105 Nev. 798, 803, 783 P.2d 949,
11 952 (Nev. 1989), shortly after the APA amendments in the same year:

12 If a hearing held by an administrative body is considered a
13 contested case and the agency is not exempt from the
14 operation of the Administrative Procedure Act, judicial
review of an agency’s final decision is governed by NRS
233B.130.

15 This matter was a contested case. NRS 233B.032. The Department is not exempt from the
16 operation of the APA. NRS 233B.020(1). The final decision is governed by NRS
17 233B.130. NRS 233B.130(6). The statute very clearly sets forth the standards and
18 procedures for any “judicial action concerning” a matter finally decided by a covered
19 agency. Id. Other than extending the time when an action may be brought, nothing in NRS
20 372.680 purports to allow a judicial action in contravention of APA requirements and
21 certainly nothing in that statute nullifies administrative res judicata.

22 Judicial review is simply one type of action that can be brought in court. See, Kame
23 v. Employment Security Department, 105 Nev. 22, 24, 769 P.2d 66, 67 (Nev. 1989). “[A]n
24 aggrieved party may secure judicial review ... by commencing an action in the district
25 court.” See also, Department of Human Resources v. Fowler, 109 Nev. 782, 784, 858 P.2d
26 375, 376 (Nev. 1993) (Action brought pursuant to petition for judicial review). The Nevada
27 Rules of Civil Procedure do not apply to all civil suits. See, NRCP Rule 1 and Rule 81,
28 providing statutory procedure governs in event of conflict with court rules.

1 The principal cases relied on by SCE were decided before the substantial
2 amendments to both the APA and Nevada tax law cited above, or were not based on the
3 same statutes at issue here. Furthermore, they were decided before administrative res
4 judicata became the law in Nevada. For example, in State v. Obexer & Son, Inc., 99 Nev.
5 233, 660 P.2d 981 (Nev. 1983) the district court apparently employed a combination of
6 stipulated facts and a partial administrative record to enter summary judgment in favor of
7 one party. 99 Nev. at 236, 660 P.2d at 983. Although that may have been acceptable
8 practice prior to the 1989 APA amendments, no statute currently authorizes that kind of
9 hybrid judicial review. The proper means of review was not in dispute in Obexer, nor was
10 res judicata an issue. There is no suggestion in Obexer that it involved a contested case with
11 a full administrative hearing.

12 Saveway Super Service Stations, Inc. v. Cafferata, 104 Nev. 402, 760 P.2d 127 (Nev.
13 1988) also predated the substantial amendments to Nevada statutes and other changes to
14 Nevada law considered in this case. The statute in issue in Saveway, NRS 365.460, did not
15 suggest that administrative review was even available, let alone required prior to judicial
16 action. At the time, the APA permitted review de novo in the district court where allowed
17 by statute. NRS 365.460 allowed a claim against the state treasurer who the court noted was
18 not a party to the administrative proceedings, unlike here where the Department was a party
19 below. 104 Nev. at 404, 760 P.2d at 129, f.n. 4. There was also no consideration of the res
20 judicata effect of prior administrative proceedings, since that rule had not yet been
21 announced. Saveway sets no precedent on the issue now before the court.

22 The more recent reported decision in Sparks Nugget, Inc. v. State ex rel. Department
23 of Taxation, ___ Nev. ___, 179 P.3d 570 (Nev. 2008) was decided on stipulated facts and
24 cross-motions for summary judgment on the law. 179 P.3d at 573. There was no trial de
25 novo on the facts nor any issue of administrative res judicata or the proper standard of
26 review. As stated by the court:

27 Because the parties have stipulated to the operative facts in
28 this case, the only issue before us involves the interpretation
and application of Nevada constitutional and statutory
provisions.

1 Id. (Emphasis added).

2 SCE's interpretation of the law ignores both the exclusivity of the APA procedures
3 and the principles of administrative res judicata. The correct view, adopted by the district
4 court, is that NRS 372.680 consolidates judicial review with refund claims under the
5 standards of the APA, thus preserving the principles of administrative res judicata and
6 conserving precious court resources. SCE can hardly complain that it will not have a third
7 full blown hearing, since it has already had two full hearings in front of the Commission.

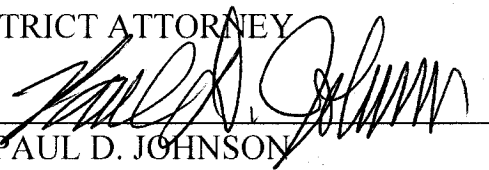
8 **III.**

9 **CONCLUSION**

10 SCE is not entitled to a hearing de novo after a final decision by the Commission in a
11 contested case. The APA forbids it; the principles of administrative res judicata also forbid
12 it. Nevada use tax laws do not supersede either the APA or the res judicata doctrine in this
13 matter. It would be a complete waste of judicial resources to conduct a new trial as SCE
14 requests. There is no authority for such a result. County would be limited to judicial review,
15 if it appealed a Commission decision. SCE has the same limitation. The petition should be
16 denied.

17 DATED this 23rd day of February 2010.

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DATED this 23rd day of February 2010.

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1 **CERTIFICATE OF MAILING**

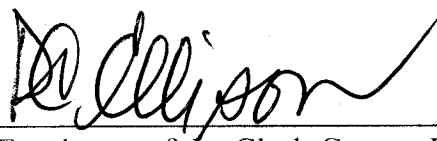
2 I hereby certify that on the 23rd day of February 2010, I deposited in the United
3 States Mail, postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope, a copy of
4 the above and foregoing **CLARK COUNTY'S AMICUS CURIAE BRIEF IN**
5 **OPPOSITION TO PETITION FOR WRIT OF MANDAMUS** addressed as follows:

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