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IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON,

Petitioner,

v.

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

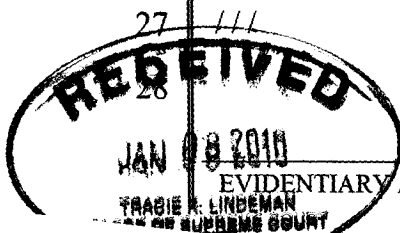
Respondents.

Case No. 09-0C-00016-1B

Docket No. _____

**EVIDENTIARY APPENDIX IN SUPPORT OF PETITIONER SOUTHERN
CALIFORNIA EDISON'S ORIGINAL PETITION FOR WRIT OF MANDAMUS**

Petitioner Southern California Edison ("Edison") submits this evidentiary appendix in
support of its Petition for Writ of Mandamus. Attached hereto are true and correct copies of:



EVIDENTIARY APPENDIX IN SUPPORT OF EDISON'S ORIGINAL PETITION FOR WRIT OF MANDAMUS

10-00714

FILED

JAN 08 2010

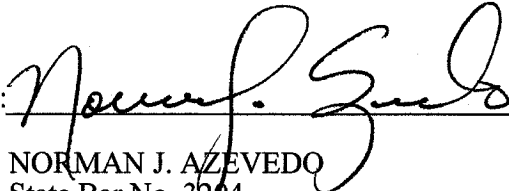
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

No.	Document Title	Bates Range Nos.
1.	District Court's Order To Proceed as a Petition for Judicial Review, dated November 19, 2009	001-006
2.	Amended Complaint (excluding exhibits thereto) that Edison originally filed against the Department on March 27, 2009 as corrected in a May 22, 2009 filing in the District Court	007-025
3.	District Court's Order Denying Defendant's Motion to Dismiss, dated June 30, 2009	026-028
4.	Department of Taxation's ("Department") Motion to Dismiss (excluding exhibits thereto), dated April 20, 2009	029-043
5.	Edison's Opposition to Motion to Dismiss (excluding exhibits thereto), dated May 8, 2009	044-062
6.	Department's Reply to Opposition to Motion to Dismiss, dated May 15, 2009	063-076
7.	Transcript of the June 16, 2009 hearing on the Department's Motion to Dismiss	077-120
8.	Department's Brief of the Nevada Department of Taxation to the Commission (excluding exhibits thereto), dated November 21, 2003	121-137
9.	Edison's Motion for an Order that Its Refund Action Under NRS 372.680 is a Trial de Novo (excluding exhibits thereto), dated August 28, 2009	138-158
10.	Department's Brief Regarding Nature of the Proceedings Before This Court (excluding exhibits thereto), dated August 28, 2009	159-169
11.	Edison's Opposition to Department's Request to Treat Edison's Tax Refund Action as a Petition for Judicial Review of the Tax Commission's Decision (excluding exhibits thereto), dated September 11, 2009	170-182
12.	Department's Opposition to Plaintiff's Motion for an Order That Plaintiff's Refund Action Under NRS 372.680 is a Trial de Novo, dated September 11, 2009	183-195
13.	Transcript of October 8, 2009; District Court hearing on Edison's Motion for an Order that Its Refund Action Under NRS 372.680 is a Trial de Novo	196-255

No.	Document Title	Bates Range Nos.
14.	Edison's Request to Stay Proceedings Pending Resolution of a Petition to the Nevada Supreme Court for a Writ of Mandamus, dated November 30, 2009	256-265
15.	Department's Non Opposition to Plaintiff's Request to Stay Proceedings Pending Writ of Mandamus, dated December 18, 2009	266-267
16.	District Court's Order Granting Plaintiff's Motion to Stay Proceedings Pending Resolution of a Writ Petition, dated December 23, 2009	268
17.	Complaint for Recovery of a Refund of Use Taxes Pursuant to NRS 372.680 (excluding exhibits thereto) that Sierra Pacific Power Company and Nevada Power Company filed against the Department on December 3, 2009	269-278
18.	Complaint for Refund Pursuant to NRS 368A.290(1)(b) and NRS 368A.300(3)(b), Declaratory Relief, Injunctive Relief and Damages (excluding exhibits thereto) filed by K-Kel, Inc. <i>et al.</i> against the Department <i>et al.</i> (Case No. A554970), dated January 9, 2008	279-299
19.	Answer of the Department <i>et al.</i> , to Complaint filed by K-Kel, Inc. <i>et al.</i> (Case No. A554970), dated March 3, 2008	300-310
20.	Docket in <i>K-Kel, Inc. v. Dep't of Tax'n</i> , Case No. A554970 (Nev. 8th Judicial Dist.), as of January 7, 2010	311-314
21.	Findings of Fact, Conclusions of Law and Judgment in <i>Lohse v. Nevada ex rel Dep't of Tax'n</i> , Case No. CV-05-00376 (Nev. 2nd Judicial Dist.), dated January 18, 2007	315-320
22.	Nevada Supreme Court's Order of Affirmance in <i>Lohse v. Nevada ex rel Dep't of Tax'n</i> , dated July 24, 2008	321-328
23.	Order in <i>Dep't of Tax'n v. Newmont Gold Co.</i> (Nev. 1st Judicial Dist.), dated September 3, 1996	329-330
24.	Affidavit of Norman J. Azevedo in support of Edison's Opposition to Motion to Dismiss, dated May 8, 2009	331-333
25.	Materials compiled by the Legislative Counsel Bureau Research Library pertaining to 1999 Senate Bill 362, available on-line at http://www.leg.state.nv.us/lcb/research/library/1999/SB362,1999.pdf	334-443

No.	Document Title	Bates Range Nos.
26.	Letter (redacted to protect confidential information) dated May 29, 2009 from Department Administrative Law Judge Dena C. James to John S. Bartlett, Esq. and Blake Doerr, Deputy Attorney General	444-445

Dated: January 8th, 2010

By: 
 NORMAN J. AZEVEDO
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Attorney for Petitioner

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CERTIFICATE OF MAILING

I hereby certify that on the 8th day of January, 2010, I caused a hand-delivered copy of
the foregoing to be delivered to the following:

The Honorable James T. Russell
First Judicial District Court
885 E. Musser Street
Carson City, NV 89701

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Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701



Johanna Maher

Nevada Office of the Attorney General
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1 CATHERINE CORTEZ MASTO
2 Nevada Attorney General
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5 100 N. Carson St.
6 Carson City, Nevada 89710-4717
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8 Attorneys for Defendant
9 Nevada Dept. of Taxation

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

Southern California Edison,

Plaintiff,

vs.

STATE OF NEVADA ex rel. Department of
Taxation,

Defendants.

Case No. 09 OC 00016 1B

Department No. 1

ORDER TO PROCEED AS PETITION FOR JUDICIAL REVIEW

This matter was originally before the Court as a motion to dismiss filed by Defendants. As part of the Court's order denying the motion dismiss, the Court directed the parties to meet and confer as to the nature of the proceedings before this Court. After meeting, the parties were unable to agree as to the nature of the proceedings and stipulated to a briefing schedule to brief the issues to the Court. Plaintiff filed a motion that this action be conducted as a trial de novo pursuant to NRS 372.680. The Defendants filed its brief arguing that the action is subject to NRS Chapter 233B and should proceed as a petition for judicial review. Each party filed an answering brief. On October 8, 2009 a hearing was held to determine the proper nature of the proceedings before this Court.

The Court has read and considered the points and authorities and other materials

1 submitted by Plaintiff and Defendants and considered the arguments of counsel at the
2 hearing. Based on the foregoing, and good cause appearing the Court hereby rules as
3 follows:

- 4 1. The proceedings in this case are controlled by NRS 233B.130(6) which states that:
5 "The provisions of this chapter are the exclusive means of judicial review of, or
6 judicial action concerning, a final decision in a contested case involving an agency
7 to which this chapter applies."
8 2. NRS Chapter 233B applies to all administrative agencies within the state unless
9 exempt. The Department of Taxation ("Department") and the Nevada Tax
10 Commission ("Commission") are not exempt from the provisions of NRS Chapter
11 233B. NRS 233B.039. All decisions by the Commission are therefore subject to
12 NRS 233B.130(6).
13 3. The judicial review standards imposed by NRS Chapter 233B apply unless there is
14 a specified exception. NRS 372.680 which states in pertinent part: "Within 90 days
15 after a final decision upon a claim filed pursuant to this chapter is rendered by the
16 Nevada Tax Commission, the claimant may bring an action against the
17 Department..." does not contain specific language authorizing the Court to conduct
18 a trial de novo.
19 4. NRS 372.680 is, to some extent, only a venue statute, informing a claimant that has
20 received a denial from the Commission of its claim for refund of sales or use tax
21 where it may file its action to seek a recovery of taxes it has overpaid.
22 5. Local governments that were parties to the proceedings below filed a petition for
23 judicial review of an earlier decision by the Commission in this matter. The Nevada
24 Supreme Court voided the earlier decision. Uniform standards and uniform
25 application of the law demands that both the local government agencies and the
26 taxpayers be treated the same and supports treating the current action as a petition
27 for judicial review.
28 6. The Legislature made the following changes to NRS Chapter 233B and NRS

372.680 indicating that decisions by the Nevada Tax Commission on refund claims are subject to NRS 233B:

1989

The legislature removes language authorizing original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6) "The provisions of this chapter are the exclusive means of judicial review of, or **judicial action concerning, a final decision** in a contested case involving an agency to which this chapter applies." (emphasis added)

1997

The legislature adds the language in NRS 360.245(5) that states "A decision of the Nevada Tax Commission is a **final decision** for the purposes of judicial review." (emphasis added)

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after a **final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax Commission**, the claimant may bring an action against the Department on the grounds set forth in the claim..." (emphasis added). "Thus, [the legislation] contemplates a change from past practice where refund claims upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes."

Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis added)

7. Two cases relied upon by Plaintiff, *State v. Obexer & Sons*, 99 Nev. 233, 660 P.2d 981 (1983) and *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402, 760 P.2d 127 (1989) were both decided before any of the legislative changes noted

1 above. Specifically, the change in 1999 was meant to change the past practice
2 where a taxpayer seeking a refund could go directly to district court after a denial by
3 the Department without a contested case going before the Nevada Tax
4 Commission. See Memorandum dated May 7, 1999 to Assemblyman Bernie
5 Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr.
6 Deputy Attorney General.

- 7 8. The legislative change made to NRS 372.680 in 1999 ensured that there would be
8 the opportunity for an evidentiary hearing, findings of facts and conclusions of law
9 and the opportunity for review by the Commission prior to a decision becoming final.
10 With the change, the legislature limited the scope of NRS 372.680 and brought it
11 within the umbrella of NRS Chapter 233B.
12 9. Plaintiff participated in an evidentiary hearing before the Commission. Plaintiff is
13 not entitled to a second evidentiary hearing in district court, but is entitled to judicial
14 review of the Commission's February 27, 2009 decision. *Campbell v. State of*
15 *Nevada*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992).

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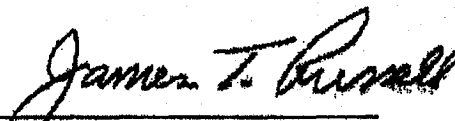
Nevada Office of the Attorney General
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Therefore, this matter will proceed as a Petition for Judicial Review pursuant to NRS Chapter 233B.


IT IS SO ORDERED.

Dated this 19th ^{November} day of ~~October~~, 2009.


JAMES T. RUSSELL
District Judge

Submitted by:

CATHERINE CORTEZ MASTO
Attorney General

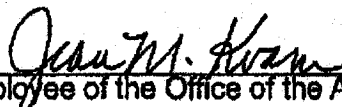
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General,
and that on this 24th day of November 2009, I served a copy of the foregoing, by mailing a
true copy to the following:

Norman J. Azevedo, Esq.
405 N. Nevada St.
Carson City, Nevada 89703


Employee of the Office of the Attorney General

1 Norman J. Azevedo, Esq.
2 State Bar No. 3204
3 510 West Fourth Street
4 Carson City, Nevada 89703
5 (775) 883.7000
6 Attorney for Southern California Edison

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7
8 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
9 IN AND FOR CARSON CITY

10 SOUTHERN CALIFORNIA EDISON,

Case No. 09-0C-00016-1B

11 Plaintiff,

Dept. No.: 1

12 v.

AMENDED COMPLAINT
(Corrected Version)

13 THE STATE OF NEVADA, *ex rel.*
14 DEPARTMENT OF TAXATION

(NRS 372.680; NRS 374.685; NRS 30.030)

15 Defendant.

16 Comes now Plaintiff Southern California Edison, by and through its counsel
17 Norman J. Azevedo, Esq., and hereby complains against Defendant, State of Nevada, *ex*
18 *rel.* Department of Taxation, and alleges as follows:

19 NATURE OF THE ACTION

20 1. This is an action to recover use taxes pursuant to Sections 372.680(1) and
21 374.685(1) of the Nevada Revised Statutes ("NRS") following a final decision by the
22 Nevada Tax Commission ("Commission") disallowing Plaintiff's claims for refund of use
23 tax Plaintiff paid to the Defendant for tax periods March 1998 through and including
24 September 2003.

25 2. NRS 372.680(1) and 374.685(1) each provide: "Within 90 days after a final
26 decision upon a claim filed pursuant to this chapter is rendered by the Nevada tax
27 commission, the claimant may bring an action against the department on the grounds set
28 forth in the claim in a court of competent jurisdiction in Carson City . . . for the recovery
of the whole or any part of the amount with respect to which the claim has been

AMENDED COMPLAINT

1 disallowed."

2 3. Defendant illegally imposed use tax on the use and consumption of out-of-
3 state coal at a coal-fired power plant in Nevada. All of the coal used and consumed at the
4 power plant was purchased, extracted and shipped from a coal mine located entirely
5 within the State of Arizona. Under NRS 372.185(2) and 374.190(2), Nevada's use tax
6 does not apply to the use or consumption of property acquired outside of Nevada in a
7 transaction that would not have been a taxable sale if it had occurred within Nevada.
8 Sales by mines located within Nevada of the minerals they extract, including coal, are
9 expressly exempt from sales tax and therefore not taxable sales. Since the equivalent in-
10 state transaction would not have been a taxable sale, Defendant's imposition of tax on the
11 use and consumption in Nevada of coal that was purchased, extracted and shipped from a
12 mine located in Arizona is illegal.

13 4. Defendant's imposition of use tax on Plaintiff's use and consumption of coal
14 in Nevada discriminates against interstate commerce in violation of the Commerce Clause
15 of the United States Constitution (U.S. Const. Art. I, §8, cl. 3) by taxing minerals acquired
16 from in-state mines more favorably than minerals acquired from out-of-state mines for use
17 in Nevada. Indeed, Defendant's application of the sales and use tax statutes is facially
18 unconstitutional because, as explained above, minerals acquired from in-state mines enjoy
19 a complete exemption from Nevada's sales tax while minerals acquired from out-of-state
20 mines for use or consumption in Nevada are subject to Nevada's use tax.

21 5. If the Court were to determine that Defendant's imposition of use tax in this
22 case is neither illegal nor unconstitutional, Plaintiff alternatively claims that it is entitled
23 to a refund of use tax in respect of each of the following reasons:

- 24 a. Plaintiff is entitled to a credit against the use tax for sales tax paid to
25 Arizona;
26 b. The taxable sales price should exclude taxes imposed by various taxing
27 jurisdictions; and
28 c. The taxable sales price should exclude the amounts paid for transportation

1 of the coal pursuant to NRS 372.065 and Nevada Administrative Code
2 ("NAC") 372.101.

3 6. Pursuant to NRS 30.030, Plaintiff also seeks a declaration from the Court
4 that, notwithstanding Defendant's assertions to the contrary, Plaintiff has exhausted its
5 administrative remedies with respect to the claims for refund that it filed for the periods
6 January 2001 through and including September 2003 and that such claims are properly
7 before this Court.

8 7. Finally, pursuant to NRS 30.030, Plaintiff seeks a declaration that the
9 decision of the Court in this litigation with respect to any factual or legal disputes shall
10 apply, subject to any appellate review thereof, to the claims for refund that Plaintiff filed
11 for the periods January 2001 through and including September 2003 (if the Court finds
12 such claims are not properly before this Court), and to the claims for refund for the
13 periods October 2003 through and including December 2005.

14 **PARTIES**

15 8. Plaintiff Southern California Edison Company ("Edison") is a California
16 corporation having its principal place of business in Los Angeles County, California.
17 Edison is not a Debtor in bankruptcy.

18 9. Defendant State of Nevada *ex rel.* Department of Taxation (the
19 "Department") is an agency of the executive branch of the State of Nevada that is charged
20 with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada
21 Revised Statutes, including chapters 372 and 374 of the Nevada Revised Statutes
22 governing sales and use taxes and local school support taxes, respectively.

23 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

24 **I. The Mohave Generating Station**

25 10. At all times relevant to this Complaint, Edison owned a majority interest in
26 the Mohave Generating Station ("Mohave Project"), a coal-fired power plant located in
27 Clark County, Nevada. The Mohave Project generated electricity by burning coal. It had
28 two generating units and supplied enough electricity to power approximately 1.5 million

1 homes. The Mohave Project provided energy to customers in Nevada, Arizona and
2 Southern California.

3 11. The Mohave Project began operations in 1970. Edison co-owned the
4 Mohave Project with three other parties (collectively, the "Mohave Co-owners"): Nevada
5 Power Company, the Department of Water and Power of the City of Los Angeles and Salt
6 River Project Agricultural Improvement and Power District. Edison owned the majority
7 interest (a 56% undivided interest) in the Mohave Project.

8 12. Edison operated the Mohave Project pursuant to the Mohave Project
9 Operating Agreement effective May 1, 1969 and dated July 6, 1970 (the "Operating
10 Agreement"). The Mohave Project ceased operations on December 31, 2005.

11 II. Out-of-State Purchase and Delivery of Coal

12 13. At all times relevant to this Complaint, all of the coal used and consumed at
13 the Mohave Project was supplied by Peabody Western Coal Company ("Peabody")
14 pursuant to the Amended Mohave Project Coal Supply Agreement dated May 26, 1976
15 between Peabody (as seller) and the Mohave Co-owners (as buyers) (the "Amended Coal
16 Supply Agreement").

17 14. All of the coal sold by Peabody for use at the Mohave Project was extracted
18 from the Black Mesa Mine in northeastern Arizona.

19 15. The Black Mesa Mine is located on land owned by the Navajo Nation and
20 Hopi Tribe. At all times relevant to this Complaint, Peabody operated the Black Mesa
21 Mine through lease agreements with the Navajo Nation and the Hopi Tribe.

22 16. Pursuant to agreements between Peabody and Black Mesa Pipeline, Inc.
23 ("BMP"), BMP constructed and operated a 273-mile pipeline to transport and deliver the
24 coal from the Black Mesa Mine to the Mohave Project (the "Pipeline"). The coal was
25 crushed and suspended in water for transportation through the Pipeline, and was separated
26 from the water upon delivery to the Mohave Project.

27 17. The Amended Coal Supply Agreement required Edison to pay Peabody, on
28 a monthly basis, for the price of the coal it purchased. Peabody invoiced Edison for this

1 charge and Edison sent payment for the coal to Peabody. BMP invoiced Edison directly
2 for the charges for transporting and delivering the coal to the Mohave Project and Edison
3 sent payment for such transportation charges directly to BMP.

4 18. Since 1970, Edison has paid Nevada use tax to the Department in respect of
5 the coal used and consumed at the Mohave Project.

6 **III. Exhaustion of Administrative Remedies**

7 **A. The Department Denies Edison's Claims for Refund for the Periods**

8 **March 1998 Through and Including September 2003**

9 19. Edison determined that several grounds existed for challenging Nevada's
10 imposition of use tax in respect of the out-of-state coal used and consumed at the Mohave
11 Project.

12 20. Between April 26, 2001 and February 25, 2003, Edison timely filed claims
13 for refund of the use tax it paid to the Department for the periods March 1998 through and
14 including December 2000 ("Claims Set 1"). For these periods, Edison paid
15 \$23,896,668.08 in use tax to the Department in respect of the coal used and consumed at
16 the Mohave Project.

17 21. By letter dated December 17, 2002 (Ex. A hereto), the Department denied
18 the claims for refund filed for the periods March 1998 through and including September
19 1999. By letter dated December 30, 2002 (Ex. B hereto), the Department denied the
20 claims for refund filed for the periods October 1999 through and including December
21 1999.

22 22. In the December 17 and December 30, 2002 denial letters, the Department
23 advised Edison that, if Edison desired to appeal the Department's decision, it had to file a
24 petition for redetermination within 45 days pursuant to NRS 360.360. On January 31,
25 2003, Edison filed a timely petition for redetermination for the periods covered by these
26 denial letters—March 1998 through December 1999.

27 23. By letter dated May 16, 2003 (Ex. C hereto), the Department denied the
28 claims for refund for the periods January 2000 through and including December 2000.

1 The Department's letter states that it will "consider this denial in the same status as your
2 previous requests and these periods will be added to the issue(s) under petition."

3 Accordingly, the Department deemed Edison to have appealed its denial of the periods
4 from January 2000 through and including December 2000 by considering them as part of
5 the petition for redetermination previously filed by Edison.

6 24. In a letter dated July 2, 2003, the Department acknowledged that it should
7 have instructed Edison to appeal the denial of its claims for refund to the Commission
8 pursuant to NRS 360.245(1) rather than filing a petition for redetermination with the
9 Department. The Department stated that it had rectified its mistake by redirecting
10 Edison's claims for refund to the Commission for a hearing.

11 25. On February 26, 2004, Edison timely filed claims for refund of use tax with
12 the Department for the use tax it paid in respect of the coal used and consumed at the
13 Mohave Plant for the periods January 2001 through and including September 2003
14 ("Claims Set 2"). The total refund claimed for these periods is \$24,331,667.62.

15 26. In a letter to Edison dated April 5, 2004 (Ex. D hereto), the Department
16 denied Claims Set 2. The letter states: "You have petitioned the Department's denial(s)
17 for refund for prior periods on this same issue. We will consider this denial in the same
18 status as your previous requests and these periods will be added to the issue(s) under
19 petition." Accordingly, the Department deemed Edison to have appealed its denial of
20 Claims Set 2 by considering Claims Set 2 as part of the petition for redetermination
21 previously filed by Edison (and redirected by the Department to the Commission as
22 explained above). The Department sent a copy of its April 5, 2004 letter to Greg Zunino
23 who, at the time, was the Senior Deputy Attorney General representing the Department in
24 connection with Edison's claims for refund pending before the Commission.

25 **B. In 2005 The Commission Grants Edison's Claims For Refund**

26 27. The Commission held a series of hearings on Claims Set 1 and Claims Set 2
27 beginning on November 1, 2004 and continuing on February 7, 2005, April 5, 2005 and
28

1 May 9, 2005.¹

2 28. At the May 9, 2005 hearing, the Commission voted to grant Edison's claims
3 for refund. The Commission's written decision dated November 29, 2006 (Ex. B hereto)
4 granting Edison's claims for refund expressly stated that the Commission's decision
5 included Claims Set 1 and Claims Set 2.

6 **C. The Open Meeting Law Case**

7 29. At Edison's request, the Commission closed each of the aforementioned
8 hearings. Edison made the request because the Commission's determination of the refund
9 claims required consideration of Edison's and the other Mohave Co-owners' proprietary
10 and confidential information. The Commission closed the hearings at the request of the
11 taxpayer in accordance with former NRS 360.247 and with the advice and consent of its
12 counsel, the Attorney General's Office of the State of Nevada ("Attorney General").² The
13 Commission had a thirty-year practice of closing hearings at the request of taxpayers.

14 30. Notwithstanding the fact that it served as legal counsel to the Commission
15 (the decision-maker in respect of Edison's claims) and approved the closure of the
16 hearings, the Attorney General filed a complaint on July 7, 2005 against the Commission
17 in the First Judicial Court, Carson City, seeking to void the Commission's grant of
18 Edison's claims for refund on the ground that the Commission had violated Nevada's
19 Open Meeting Law (NRS 241.010 et seq.) when it granted Edison's claims for refund in
20 closed session at the May 9, 2005 hearing ("Open Meeting Law Case").

21 31. The Commission hired independent counsel to represent it in the Open
22 Meeting Law Case. Edison was the real party in interest in the case.

23
24 ¹ On December 8, 2003, the Commission held an initial hearing on Edison's claims for refund and
25 referred the claims to a hearing officer. The hearing officer issued a written decision on July 14,
26 2004. Significantly, while the hearing officer found that the Department's imposition of the use
27 tax on Edison's use and consumption of coal at the Mohave Plant discriminated against interstate
28 commerce in violation of the Commerce Clause, he refused to grant a refund of the
unconstitutional tax to Edison.

² Former NRS 360.247 provided, in pertinent part: "Except as otherwise provided in this section,
any appeal to the Nevada tax commission which is taken by a taxpayer concerning his liability for
tax must be heard during a session of the commission which is open to the public. A hearing on
such an appeal may be closed to the public if the taxpayer requests that it be closed."

1 32. Following a bench trial on August 26, 2006, the district court dismissed the
2 Attorney General's complaint and entered judgment for the Commission and Edison.

3 33. The Attorney General appealed to the Supreme Court of Nevada. In an
4 opinion filed on April 24, 2008, the Supreme Court reversed the district court and found
5 that the Commission had violated the Open Meeting Law when it granted Edison's claims
6 for refund in a closed hearing.

7 34. Edison is thus the only taxpayer whose grant of a claim for refund by the
8 Commission has ever been voided pursuant to the Open Meeting Law, notwithstanding
9 that the Commission had been closing hearings at taxpayers' requests as provided by
10 statute and with the consent of its counsel for the past thirty years (during which time the
11 Attorney General acted as counsel to both the Commission and the Department at those
12 hearings).

13 **D. On Remand, the Commission Denies Edison's Claims for Refund**

14 35. Since the Commission's prior decision in favor of Edison was voided by the
15 Supreme Court's decision, Edison's claims for refund were returned to the Commission
16 for redetermination in open session.

17 36. The Commission held open hearings on the claims for refund on September
18 9, 2008 and December 1, 2008.

19 37. There were no changes in the facts or the law between the hearings held
20 before the Commission in 2004 and 2005 and those that were held in 2008.

21 38. At the December 1, 2008 hearing, and notwithstanding the absence of any
22 change in the applicable facts and law, the Commission voted to deny Edison's refund
23 claims.

24 39. On March 3, 2009, the Commission served its final written decision denying
25 Edison's claims for refund (Ex. F hereto).

26 40. The Commission's written decision fails to set forth any analysis of facts or
27 law in support of its conclusions. The decision reaches the *ipse dixit* conclusion that what
28 Edison purchased from Peabody "was a processed and/or manufactured product," and not

1 simply coal, in complete disregard of the uncontroverted evidence that Edison purchased
2 coal from a coal mine, that Edison separately purchased water in order to transport the
3 coal through the Pipeline, and that at the Mohave Project the coal was burned as fuel and
4 the water was used for cooling purposes. In other words, Edison purchased and used two
5 separate and distinct products. Significantly, the Commission's written decision
6 following the December 1, 2008 vote, by concluding that Edison purchased a combined
7 coal/water product, completely and inexplicably contradicted a finding in the
8 Commission's November 29, 2006 written decision that expressly reached the opposite
9 conclusion, namely that "we find that Edison is purchasing a raw mineral — in this case
10 coal. . . ."

11 41. Having exhausted its administrative remedies, Edison now brings this suit
12 against the Department in district court pursuant to NRS 372.680(1) and NRS 374.685(1),
13 almost eight years after filing its initial claim for refund.

14 **E. Claims for Refund for October 2003 Through December 2005**

15 42. On June 7, 2005, while the Open Meeting Law Case was pending, Edison
16 timely filed claims seeking a refund of use tax it paid on the coal with the Department for
17 the periods October 2003 through and including March 2005 in the total amount of
18 \$14,745,838.13. Edison stopped paying use tax on coal delivered to the Mohave Project
19 after March 2005 in view of the Commission's vote in Edison's favor at the May 9, 2005
20 hearing.

21 43. Following the Supreme Court's decision in the Open Meeting Law Case,
22 and pursuant to the amnesty program set forth in the Emergency Regulation of the
23 Commission (LCB File No. E002-08) and a stipulation entered into between Edison and
24 the Department dated September 30, 2008, Edison paid \$9,927,822.47 in use tax for coal
25 purchased from Peabody for use at the Mohave Project for the periods March 2005
26 through and including December 2005 (the "Amnesty Payment"). Concurrently with
27 entering into the stipulation and making the Amnesty Payment, Edison timely filed claims
28 for refund of the use tax it paid on the coal for periods March 2005 through and including

1 December 2005, i.e., the Amnesty Payment. Pursuant to the stipulation, if Edison prevails
2 on its claims for refund of the Amnesty Payment, the State of Nevada is not required to
3 refund interest with respect to the Amnesty Payment only. (The claims for refund filed by
4 Edison for the periods from October 2003 through and including December 2005 are
5 referred to herein as "Claims Set 3".)

6 44. According to a letter from the Department dated February 27, 2009 (Ex. G
7 hereto), the Department is holding Claims Set 3 "in abeyance until there is a final
8 resolution in the courts" of Claims Set 1.

9 **F. The Defendant's Refusal to Acknowledge that Both it and the Commission**
10 **Denied the January 2001 through September 2003 Claims for Refund**

11 45. Despite the fact that (1) the Department denied Edison's Claims Set 2 by
12 letter dated April 5, 2004 and unequivocally added these periods to the periods covered by
13 claims previously denied by the Department and placed before the Commission, i.e.,
14 Claims Set 1, and (2), the Commission's written decision in respect of the May 9, 2005
15 hearing expressly granted Edison's Claims Set 1 and Claims Set 2, the Department now
16 takes the position that Claims Set 2 has not yet been the subject of a final Commission
17 action and thus is not properly before the Court.

18 46. The Executive Director of the Department of Taxation sent a letter dated
19 February 27, 2009 (Ex. G hereto) to the undersigned counsel for Edison to provide the
20 Department's "understanding" of "the status of the various claims for refund of use tax"
21 that Edison has "on file with the Department."

22 47. The February 27, 2009 letter states, in relevant part, "[c]laims from March
23 1998 until December 2000 were the subject of the December 1, 2008 decision of the
24 Nevada Tax Commission. SCE [Edison] has filed on or about January 15, 2009 a
25 Complaint that includes these claims in the First Judicial District Court." The letter also
26 reaffirms that the Department "intend[s] to hold the claims for the periods of October
27 2003 through December 2005 [Claims Set 3] in abeyance until there is a final resolution
28 in the courts."

1 48. The Executive Director acknowledges that Edison included Claims Set 2 in
2 its original Complaint in this case, but fails to acknowledge that Claims Set 2 was
3 necessarily denied by the Department and the Commission.

4 49. In response to the Executive Director's letter, Edison sent a letter to the
5 Executive Director and the Attorney General on March 13, 2009 (Ex. H hereto) proposing
6 that the parties enter into a stipulation to organize the litigation before the Court, and
7 reminding them that the Department had denied Claims Set 2 and considered Claims Set 2
8 as having been appealed to the Commission.

9 50. By letter from its counsel dated March 17, 2009 (Ex. I hereto), the
10 Department declined to enter into a stipulation and expressly asserted that "[t]he
11 Commission to date has not rendered a final decision on [Claims Set 2]," despite the
12 Department's letter dated April 5, 2004 denying Claims Set 2 and "add[ing]" them to the
13 other periods before the Commission, just as the Department had done with the claims for
14 the periods January 2000 through and including December 2000, over which there is no
15 ripeness dispute.

16 51. Edison believes that Claims Set 2 was properly before the Commission at
17 the time of the December 1, 2008 vote and that the Commission's March 3, 2009 denial of
18 Edison's claims for refund necessarily included Claims Set 2 in addition to Claims Set 1,
19 even though the written decision prepared by the Department's Executive Director on
20 behalf of the Commission does not expressly mention Claims Set 2. Edison relied on the
21 Department's denial of Claims Set 2 on April 5, 2004 and addition of Claims Set 2 to
22 Edison's other claims for refund that were pending before the Commission, *i.e.*, Claims
23 Set 1. The Commission expressly granted Claims Set 1 and Claims Set 2 at the May 9,
24 2005 hearing (as memorialized in its written decision dated November 29, 2006). The
25 Supreme Court's decision in the Open Meeting Law Case voided the Commission's vote
26 at the May 9, 2005 hearing and placed both sets of claims, *i.e.*, Claims Set 1 and Claims
27 Set 2, back in front of the Commission.

1 **FIRST CLAIM FOR RELIEF**

2 **(Statutory Exemption from Use Tax)**

3 52. Plaintiff re-alleges and incorporates by reference herein the allegations set
4 forth in paragraphs 1 through 51, inclusive.

5 53. Edison's use and consumption of coal purchased from Peabody is exempt
6 from use tax under NRS 372.185(2) and 374.190(2). Under those statutes, use tax does
7 not apply to property acquired outside of Nevada in a transaction that would not have
8 been a taxable sale if it had occurred within this state. Under NRS 372.270 and 374.275 a
9 purchase of coal or any other mineral from a mine located in Nevada is not a taxable sale.
10 Since an acquisition of coal from an in-state mine would not be a taxable sale under
11 Nevada law, Edison's use and consumption of coal purchased from Peabody's mine in
12 Arizona is not subject to use tax.

13 54. Edison is entitled to recover a refund of \$48,228,335.70 in use taxes it paid
14 to the Department for the periods March 1998 through and including September 2003,
15 together with interest at the appropriate statutory rate.

16 **SECOND CLAIM FOR RELIEF**

17 **(The Department's Imposition of Use Tax is in Violation of the Commerce Clause of**
18 **the United States Constitution)**

19 55. Edison re-alleges and incorporates by reference herein the allegations set
20 forth in paragraphs 1 through 51, inclusive.

21 56. The application of Nevada's use tax to Edison's use and consumption of the
22 coal acquired from Peabody discriminates against interstate commerce in violation of the
23 Commerce Clause of the United States Constitution (U.S. Const. Art. I, §8, cl. 3) because,
24 as explained in paragraph 53 above, Nevada taxes the sales of minerals, including coal,
25 extracted from mines in Nevada more favorably than it does the use or consumption of
26 minerals, including coal, extracted and purchased from out-of-state mines for use in
27 Nevada.

28 57. Edison is entitled to recover a refund of \$48,228,335.70 in use taxes it paid

1 to the Department for the periods March 1998 through and including September 2003,
2 together with interest at the appropriate statutory rate.

3 **THIRD CLAIM FOR RELIEF**

4 **(Edison is Entitled to a Credit Against the Use Tax for Sales Tax Paid to Arizona)**

5 58. Edison re-alleges and incorporates by reference herein the allegations set
6 forth in paragraphs 1 through 51, inclusive.

7 59. Edison reimbursed Peabody for the Arizona Transaction Privilege Tax
8 imposed on Edison's purchase of coal from Peabody and that Peabody paid to the State of
9 Arizona. The Arizona Transaction Privilege Tax is Arizona's sales tax. In self-assessing
10 Nevada use tax, Edison included the amount reimbursed to Peabody for the Arizona
11 Transaction Privilege Tax in the sales price subject to use tax.

12 60. Edison is entitled to a credit against the Nevada use tax for the Arizona
13 Transaction Privilege Tax it reimbursed to Peabody because NAC 372.055 provides such
14 a credit for "sales tax legitimately paid for the same purchase . . . to a state or local
15 government outside of Nevada."

16 61. Edison will establish at trial the amounts it reimbursed to Peabody for
17 Arizona's Transactions Privilege Tax and will thereby establish the amount of the refund
18 to which it is entitled for use taxes it paid to the Department for the periods March 1998
19 through and including September 2003, together with interest at the appropriate statutory
20 rate.

21 **FOURTH CLAIM FOR RELIEF**

22 **(Edison is Entitled to Exclude From the Measure of Use Tax Taxes Paid to the**
23 **Federal Government)**

24 62. Edison re-alleges and incorporates by reference herein the allegations set
25 forth in paragraphs 1 through 51, inclusive.

26 63. Edison reimbursed Peabody for taxes imposed by the United States under
27 the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits
28 Revenue Act of 1977 (collectively, the "Federal Taxes") on the purchase of coal from

1 Peabody and that Peabody paid to the United States. In paying the Nevada use tax,
2 Edison included the Federal Taxes in the sales price subject to use tax.

3 64. Edison is entitled to exclude from the sales price the Federal Taxes that
4 Edison reimbursed to Peabody because the Federal Taxes are not includable in the sales
5 price subject to Nevada use tax under NRS 372.065.

6 65. Edison will establish at trial the amount of Federal Taxes it reimbursed to
7 Peabody and will thereby establish the amount of the refund to which it is entitled for use
8 taxes it paid to the Department for the periods March 1998 through and including
9 September 2003, together with interest at the appropriate statutory rate.

10 **FIFTH CLAIM FOR RELIEF**

11 **(Edison is Entitled to Exclude From the Measure of Use Tax Taxes Paid to the**
12 **Navajo Nation and Hopi Tribe)**

13 66. Edison re-alleges and incorporates by reference herein the allegations set
14 forth in paragraphs 1 through 51, inclusive.

15 67. Edison reimbursed Peabody for the Navajo Nation Business Activity Tax
16 and Possessory Interest Tax imposed on the coal purchased from Peabody for use at the
17 Mohave Project and that Peabody paid to the Navajo Nation. In paying the Nevada use
18 tax, Edison included the amount reimbursed to Peabody for the Navajo Nation's Business
19 Activity Tax and Possessory Interest Tax in the sales price subject to use tax.

20 68. Edison is entitled to exclude from the sales price the amounts paid to
21 Peabody for the Navajo Nation's Business Activity Tax and Possessory Interest Tax
22 because such taxes are not includable in the sales price subject to Nevada use tax under
23 NRS 372.065.

24 69. Edison will establish at trial the amount of the Navajo Nation's Business
25 Activity Tax and Possessory Interest Tax it reimbursed to Peabody and will thereby
26 establish the amount of the refund to which it is entitled for use taxes it paid to the
27 Department for the periods March 1998 through and including September 2003, together
28 with interest at the appropriate statutory rate.

1 **SIXTH CLAIM FOR RELIEF**

2 **(Edison is Entitled to Exclude From the Measure of Use Tax Taxes Paid to the State**
3 **of Arizona)**

4 70. Edison re-alleges and incorporates by reference herein the allegations set
5 forth in paragraphs 1 through 51, inclusive.

6 71. Edison reimbursed Peabody for Arizona's Ad Valorem Tax imposed on the
7 coal purchased from Peabody for use at the Mohave Project and that Peabody paid to the
8 State of Arizona. In paying the Nevada use tax, Edison included the amount reimbursed
9 to Peabody for the Arizona Ad Valorem Tax in the sales price subject to use tax.

10 72. Edison reimbursed Peabody for the Arizona Transaction Privilege Tax
11 imposed on the coal purchased from Peabody for use at the Mohave Project and that
12 Peabody paid to the State of Arizona. In paying the Nevada use tax, Edison included the
13 amount reimbursed to Peabody for the Arizona Transaction Privilege Tax in the sales
14 price subject to use tax.

15 73. Edison is entitled to exclude from the sales price the amounts paid to
16 Peabody for Arizona's Ad Valorem Tax because such amounts are not includable in the
17 sales price subject to Nevada use tax under NRS 372.065.

18 74. Edison is entitled to exclude from the sales price the amounts paid to
19 Peabody for the Arizona Transaction Privilege Tax because such amounts are not
20 includable in the sales price subject to Nevada use tax under NRS 372.065.

21 75. Edison will establish at trial the amount of Arizona's Ad Valorem Tax and
22 Arizona Transaction Privilege Tax it reimbursed to Peabody and will thereby establish the
23 amount of the refund to which it is entitled for use taxes it paid to the Department for the
24 periods March 1998 through and including September 2003, together with interest at the
25 appropriate statutory rate.

26 ///

27 ///

28 ///

1 **SEVENTH CLAIM FOR RELIEF**

2 **(Edison is Entitled to Exclude From the Measure of Use Tax the Transportation**
3 **Costs it Incurred in Transporting the Coal to the Mohave Project)**

4 76. Edison re-alleges and incorporates by reference herein the allegations set
5 forth in paragraphs 1 through 51, inclusive.

6 77. Edison paid use tax on amounts it paid for transportation costs to BMP.

7 78. Edison is entitled to exclude from the sales price the amounts it paid for the
8 transportation costs pursuant to NRS 372.065 and NAC 372.101.

9 79. Edison will establish at trial the amount of the transportation costs it paid to
10 BMP and will thereby establish the amount of the refund to which it is entitled for use
11 taxes it paid to the Department for the periods March 1998 through and including
12 September 2003, together with interest at the appropriate statutory rate.

13 **EIGHTH CLAIM FOR RELIEF**

14 **(Declaratory Judgment That Claims Set Two Is Properly Before This Court)**

15 80. Edison re-alleges and incorporates by reference herein the allegations set
16 forth in paragraphs 1 through 51, inclusive.

17 81. Edison timely filed claims for refund of use tax in respect of the coal used
18 and consumed at the Mohave Plant for the periods January 2001 through and including
19 September 2003, and the Department denied these claims by letter dated April 5, 2004.

20 82. In addition, in its April 5, 2004 letter, the Department indicated that the
21 periods from January 2001 through and including September 2003 would be considered as
22 part of the petition for redetermination previously filed by Edison (and redirected by the
23 Department to the Commission as explained above). This letter used exactly the same
24 language to describe the status of Claims Set 2 as was used to describe the status of claims
25 for the periods January 2000 through and including December 2000 in the Department's
26 letter of May 16, 2003. The Department does not dispute that the claims covered by the
27 May 16, 2003 letter have been denied by the Commission and are properly before the
28 Court.

1 83. Although the Commission's written decision dated November 29, 2006
2 granting Edison's claims for refund specifically includes the claims for refund for the
3 periods January 2001 through and including September 2003, the written decision issued
4 by the Executive Director of the Department on behalf of the Commission on March 3,
5 2009 fails to address the claims for refund for these periods.

6 84. The Department asserts that the claims for refund for the periods January
7 2001 through and including September 2003 have not been denied by the Commission.
8 Edison disputes the Department's assertion.

9 85. Edison hereby requests a declaration from this Court that, notwithstanding
10 Defendant's assertions to the contrary, Edison has exhausted its administrative remedies
11 with respect to the claims for refund that it filed for the periods January 2001 through and
12 including September 2003 and that such claims were necessarily encompassed within the
13 Commission's December 1, 2008 vote and are properly before this Court.

14 **NINTH CLAIM FOR RELIEF**

15 **(Declaratory Judgment That the Court's Findings of Fact and Conclusions of Law**
16 **Will Apply Equally to Claims For Refund Where Edison Has Not Yet Exhausted Its**
17 **Administrative Remedies)**

18 86. Edison re-alleges and incorporates by reference herein the allegations set
19 forth in paragraphs 1 through 85, inclusive.

20 87. Edison paid the tax and timely filed claims for refund with the Department
21 for the periods October 2003 through and including December 2005 (Claims Set 3).

22 88. The Department stated that it intended to hold the claims for refund for these
23 periods "in abeyance until there is a final resolution in the courts" with respect to the
24 periods prior to October 2003.

25 89. Edison believes that that after there has been a final, non-appealable
26 judgment in this litigation either granting or denying Edison's claims for refund for
27 periods prior to October 2003, the Department must necessarily apply the Court's findings
28 and conclusions to the refund claims held in abeyance, absent a determination that the

1 later claims include any material, distinguishing factors (which Edison believes is not the
2 case). Edison is informed and believes, and on that basis alleges, that the Department
3 disputes this contention and contends that a final judgment in this case will not bind the
4 Department as to its determination of the claims held in abeyance. Absent declaratory
5 relief from this Court, even if Edison prevails on its statutory, constitutional or other
6 arguments, the Department may consider itself free to compel Edison to re-litigate the
7 same issues before the Commission and ultimately file another action before the District
8 Court.


9 90. Following a final non-appealable judgment in this case, both Edison and the
10 Department should be bound by this Court's conclusions of law and findings of fact.
11 Accordingly, because all of the legal and factual grounds asserted by Edison apply equally
12 to Claims Sets 1, 2 and 3, this Court should include a declaration to that effect in its final
13 judgment in this action to avoid duplicative, future litigation.

14 WHEREFORE, Edison requests that judgment be entered in its favor as follows:

- 15 1. That the Court order Defendant State of Nevada to issue Edison a refund of
16 use tax previously paid in the total amount of \$48,228,335.70 together with
17 interest at the appropriate statutory rate;
 - 18 2. For a declaration that Edison has exhausted its administrative remedies with
19 respect to the claims for refund that it filed for the periods January 2001
20 through and including September 2003 and that such claims are properly
21 before the Court.
 - 22 3. For a declaration that the findings of fact and conclusions of law applicable to
23 this Court's determination of those claims where the Court finds Edison has
24 exhausted its administrative remedies shall also apply to those claims where
25 such remedies have not yet been exhausted.
 - 26 4. For costs of suit; and
- 27
28

5. For such additional relief as the Court deems appropriate under the circumstances.

Dated: May 22nd, 2009


NORMAN J. AZEVEDO, ESQ.
State Bar No. 3204
510 W. Fourth Street
Carson City, NV 89703
(775) 883.7900
Attorney for Plaintiff

1 Case No.: 09 RP 00016 1B

2 Dept. No.: I

REC'D & FILED
2009 JUN 30 PM 3:55

ALAN C. COOPER

BY C. COOPER CLERK

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6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY

8
9 SOUTHERN CALIFORNIA EDISON,

10 Plaintiff,

11 v.

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

12 STATE OF NEVADA, EX REL.
13 DEPARTMENT OF TAXATION,

14 Defendants.
15 _____/

16 On June 16, 2009 before the Honorable James T. Russell, Defendant's April 20, 2009
17 Motion to Dismiss pursuant to NRCP 12(b)(5) ("Motion") came on regularly for hearing. The
18 parties were represented by the respective counsel of record: Norman J. Azevedo and Charles C.
19 Read for Plaintiff Southern California Edison and Catherine Cortez Masto, Attorney General of
20 the State of Nevada, by Gina C. Session, Chief Deputy Attorney General, for Defendant Nevada
21 Department of Taxation. The Court has read and considered the points and authorities and other
22 materials submitted in support of, and in opposition to the Motion, and has considered the
23 arguments of counsel at the hearing on the Motion. Based on the foregoing, and good cause
24 appearing, the Court hereby rules as follows:

25 1. On February 27, 2009 the Nevada Tax Commission's ("Commission") issued a
26 final decision denying Plaintiff's claims for refund of use taxes. Plaintiff filed its Amended
27 Complaint against Defendant on March 27, 2009 pursuant to NRS 372.680. NRS 372.680
28 provides, in relevant part:

///

1 "1. Within 90 days after a final decision upon a claim filed pursuant to this chapter
2 is rendered by the Nevada Tax Commission, the claimant may bring an action
3 against the Department on grounds set forth in the claim . . . for the recovery of the
4 whole or any part of the amount with respect to which the claim has been disallowed.

5 2. Failure to bring an action within the time specified constitutes a waiver of any
6 demand against the State on account of alleged overpayments."

7 Defendant's argument is that Plaintiff should have filed a Petition for Judicial Review
8 pursuant to NRS 233B.130, and the failure to do so should result in the dismissal of its Amended
9 Complaint.

10 The Defendants argument would have this Court ignore and give no meaning to NRS
11 372.680. This violates the requirement that the Court must consider the statutes in pari materia,
12 such that legal effect is given to each statute. Whether the Plaintiff filed its Amended Complaint
13 under NRS 372.680 or NRS 233B.130, it was timely filed; and as such, this Court will not
14 dismiss the Amended Complaint. See, *Campbell v. State, Dept of Taxation*, 108 Nev. 215, 219,
15 827 P.2d 833 (1992).

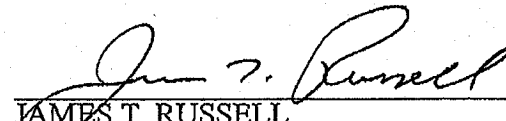
16 2. This Court reserves the right to treat the Amended Complaint as a Petition for Judicial
17 Review as to the February 27, 2009 final decision of the Nevada Tax Commission. See, NRS
18 360.245(5), and *Campbell*, supra at 219.

19 3. The Court directs the parties to meet and confer to resolve issues relating to the nature
20 of the proceedings in this Court pursuant to NRS 372.680 and NRS 233B.135. To the extent the
21 parties are unable to resolve such issues that arise, the parties by cross-motions shall request the
22 Court to resolve such issues.

23 4. Defendant may request that the Court certify its denial of Defendant's Motion as a
24 final judgment pursuant to NRCP 54(b), which this Court based on the unresolved issue of the
25 standard of review to be applied, is not inclined to grant. Any such request for certification shall
26 be by motion, pursuant to FJDCR 15.

27 IT IS SO ORDERED.

28 Dated this 30th day of June, 2009


JAMES T. RUSSELL
District Judge

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CERTIFICATE OF MAILING

I hereby further certify that on the 30th day of June, 2009, I placed a copy of the foregoing in the United States Mail postage prepaid, addressed as follows:

Norman Azevedo, Esq.
510 West Fourth Street
Carson City NV 89703

Gina Sessions, Esq.
100 N. Carson Street
Carson City NV 89701



Christine Erven
Judicial Assistant

1 Case No. 09 OC 00016 1B
2 Department No. 1
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APR 21 2009

FILED
APR 21 2009

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY
8

9 Southern California Edison)

10 Plaintiff,)

11 vs.)

12 STATE OF NEVADA ex rel. Department of)
13 Taxation)

14 Defendants)
15)
16)
17)
18)
19)

MOTION TO DISMISS

20
21 Defendant State of Nevada ex rel. Department of Taxation (Department), by and
22 through its attorney, Catherine Cortez Masto, Attorney General, by Gina C. Session, Chief
23 Deputy Attorney General, hereby submits its Motion to Dismiss in this matter. This motion is
24 filed pursuant to NRCP Rule 12(b)(5), and also based upon the following memorandum of
25 points and authorities, and the other papers and pleadings on file with the court in this matter.

26 ///

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FACTS

Southern California Edison (Edison) filed an Amended Complaint on March 27, 2009 to recover use taxes paid to the Department of Taxation (Department) on the use and consumption of out-of-state coal at a coal-fired power plant in Nevada. See Amended Complaint, paragraphs 1-3. By filing an Amended Complaint as opposed to a Petition for Judicial Review, Edison has initiated a civil law suit with the Department as Defendant. In the Amended Complaint, Edison admits in its factual allegations that a series of hearings were held by the Nevada Tax Commission (Commission) on November 1, 2004, February 7, 2005, April 5, 2005 and May 9, 2005. See Amended Complaint, paragraph 27. Edison also admits that the Commission issued a decision dated November 29, 2006 in a closed session that was subsequently voided by the Nevada Supreme Court. See Amended Complaint, paragraphs 28-33. Edison includes the fact that once the 2006 decision was voided the Commission held hearings on September 9, 2008 and December 1, 2008 and that the Commission denied the refund in a decision dated February 27, 2009. See Amended Complaint, paragraphs 36 and 38.

Included in the original Complaint, but inexplicably left out of the Amended Complaint, was the fact that the Commission first held a hearing on the case on December 8, 2003 and remanded the case to a Hearing Officer. See Complaint, paragraph 17. Prior to being heard by the Commission in 2004, this matter was heard by a Hearing Officer on December 22, 2003 and January 28, 2004 and the Hearing Officer issued a written decision on July 14, 2004. See Complaint, paragraph 18. There exists an administrative record of documents, agendas and transcripts in this case well in excess of 3,000 pages.

In the Amended Complaint, Edison addresses three separate sets of claims for refund. Claim Set 1 is the set of claims for refund that was the subject of the Decision by the Commission. See Amended Complaint, Exhibit 2.¹ Edison alleges that Claim Set 2, also a claim for refund, which is not included in the final Decision by the Commission, should have been included in that decision. See Amended Complaint, paragraph 48-51. Finally, Edison

¹ The exhibits attached to the Amended Complaint start with letters for Exhibit A-H, after Exhibit H the Exhibits are numbered 1-2. Exhibits 1-2 are followed by an Exhibit I.

1 includes Claim Set 3, which is includes claims for refunds for use taxes paid from October
2 2003 until Edison stopped paying use tax on the coal in March 2005. Claim Set 3 also
3 includes a claim for refund of use taxes that Edison paid in 2008 as part of the amnesty tax
4 program on the amount it owed for use taxes on coal consumed from March 2005 until
5 December 2005. See Amended Complaint, paragraph 42-43. Claim Set 3 has never been
6 the subject of any action by the Commission.

7 ARGUMENT

8 A. STANDARD OF REVIEW

9 Edison's Amended Complaint should be dismissed pursuant to NRCP Rule 12(b),
10 which states in relevant part, "every defense. . . to a claim for relief in any pleading. . . shall be
11 asserted in the responsive pleading thereto if one is required, except that the following
12 defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim
13 upon which relief can be granted. . ."

14 When reviewing an order granting a motion to dismiss, the court considers whether the
15 challenged pleading sets forth allegations sufficient to establish the elements of a right to
16 relief. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 19 (2001). Dismissal is
17 appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts
18 which, if accepted by the trier of fact, would entitle him or her to relief. *Simpson v. Mars*, 113
19 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas*, ___ Nev.
20 ___, 181 P.3d 670, 672 (Adv Op 21, April 17, 2008). The pleadings must be liberally
21 construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v.*
22 *City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

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1 B. A PETITION FOR JUDICIAL REVIEW IS THE PROPER MEANS OF BRINGING THIS
2 MATTER BEFORE THE COURT.

3 Edison has chosen to file this action as an Amended Complaint. To the best of
4 Defendant's knowledge and belief Edison did not file a Petition for Judicial Review of the
5 Commission's decision.² The Amended Complaint was served on the Department and on the
6 Office of the Attorney General. In the administrative proceedings below, Clark County and the
7 City of Henderson were parties. The Amended Complaint was not served on Clark County or
8 the City of Henderson. The Amended Complaint includes Nine Claims for Relief which are not
9 available on a Petition for Judicial Review. The Amended Complaint includes matters and
10 claims that are beyond the record that was before the Commission and therefore beyond the
11 scope of a Petition for Judicial Review. The Amended Complaint requests the cost of suit and
12 other remedies not available in a Petition for Judicial Review.

13 Under the Nevada Rules of Civil Procedure an Amended Complaint requires that an
14 answer must be filed and ultimately that a trial on the merits is held. The foregoing procedure
15 is inappropriate to the appeal of a state agency decision. NRS 233B.130 et. seq. With the
16 adoption of the Administrative Procedure Act, NRS Chapter 233B, in 1965, the Legislature
17 has stated its intention that the provisions in such chapter "are the exclusive means of judicial
18 review of, or judicial action concerning, a final decision in a contested case involving an
19 agency to which this chapter applies." NRS 233B.130(6).

20 The provision that Edison chose to file suit under, NRS 372.680³, was revised in 1999.
21 NRS 372.680 provides as follows:

22 **1. Within 90 days after a final decision upon a claim filed**
23 **pursuant to this chapter is rendered by the Nevada Tax**
24 **Commission, the claimant may bring an action against the**
25 **Department on the grounds set forth in the claim in a court of**
26 **competent jurisdiction in Carson City, the county of this State where**
27 **the claimant resides or maintains his principal place of business or**
28 **a county in which any relevant proceedings were conducted by the**
Department, for the recovery of the whole or any part of the amount
with respect to which the claim has been disallowed.

² Pursuant to NRS 233B.130(5) a person filing a Petition for Judicial Review has 45 days to serve the Petition on the agency and every party. While such a Petition has not been served to date, 45 days from the last date to file a Petition have not passed.

³ The sales and use tax statutes relevant to this case found in chapters 372 and 374 of the NRS are identical; hence only the statutes in Chapter 372 are cited herein.

2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

(emphasis added).

NRS 372.680 speaks specifically to filing a claim for refund in district court after a final decision by the Commission. The claim for refund in district court must be on the same grounds set forth in the claims that were before the Commission. There is ambiguity as to whether NRS 372.680 seeks to provide some other remedy than appellate review to a taxpayer aggrieved by a decision of the Commission.

The Nevada Supreme Court in *Hansen-Neiderhauser v. Nevada State Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), discusses NRS 372.680 prior to the passage of the Administrative Procedures Act. Clearly a civil remedy for claims of overpayment existed prior to the enactment of NRS Chapter 233B. In the legislative intent section of NRS Chapter 233B it states that "provisions of this chapter are intended to supplement statutes applicable to specific agencies." NRS 233B.020(2). Because of the ambiguity regarding the remedy available to a taxpayer seeking a refund that is aggrieved by a final decision by the Commission it is appropriate to look to the legislative history for clarification. See *Chanos v. Nevada Tax Comm'n*, ___ Nev. ___, 181 P.3d 675, 680-681 (2008).

A review of the legislative history from the 1999 changes to NRS 372.680 clears up any ambiguity about the remedy available. In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General regarding *Senate Bill (S.B.) 362* and the changes to NRS 372.680 it states:

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the

1 event that S.B. 362 becomes law, a taxpayer whose claim for
2 refund is denied by the Department to (sic) Taxation will proceed
3 initially to an administrative hearing officer for an administrative
4 trial. In the event the taxpayer is aggrieved by the decision of the
5 administrative hearing officer, the taxpayer may appeal the hearing
6 officer's decision to the Nevada Tax Commission for an
7 administrative appellate review. In the event a taxpayer is still
8 aggrieved after a Tax Commission decision, the taxpayer may file a
9 petition with a district court in a judicial review proceeding. It is this
10 filing of a petition for judicial review which is the subject of the
11 venue provisions in S.B. 362. Thus, S.B. 362 contemplates a
12 change from past practice where refund claims upon passage of
13 S.B. 362 will now be subject to the requirements of Chapter 233B
14 of the Nevada Revised Statutes.

15 See Exhibit 1.

16 Mr. Azevedo's explanation is reiterated by other documents from the legislative record.
17 Mr. Azevedo provided testimony to the Senate Committee on Taxation on March 23, 1999,
18 which was recorded as follows:

19 [T]his particular provision was addressed in NRS chapter 232B (sic)
20 and he did not see a problem with it being brought to other courts in
21 the state. He explained the purpose of this bill and what it would
22 achieve. He said the amendments clarified the language with great
23 specificity so that in almost every instance the sequence would be
24 hearing officer, the tax commission, and, if it went to a court, it
25 would be pursuant to NRS chapter 233B in the form of a petition for
26 judicial review. He said NRS chapter 233B would address most
27 sales- and use-tax statutes that go to the commission.

28 See Exhibit 2.

29 The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on
30 May 6, 1999 states further that change to NRS 372.680 "[p]rovides that an action for judicial
31 review of a claim for refund of sales tax follows a decision of the tax commission, not the
32 department of taxation, and that such action may be brought in Clark County⁴ as well as
33 Carson City." See Exhibit 3, Section 33.

34 Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the
35 procedure a taxpayer is required to follow pursuant to NRS 372.680. Edison was originally
36 heard by an administrative hearing officer. When Edison was aggrieved by the decision of the
37 administrative hearing officer, Edison appealed the hearing officer's decision to the Nevada
38

⁴ Clark County was later dropped from the language. As adopted the venue language in NRS 372.680 mirrored the venue language in NRS 233B.130.

1 Tax Commission for an administrative appellate review. When Edison was still aggrieved
2 after a Tax Commission decision, Edison had the option to file a petition with a district court in
3 a judicial review proceeding.

4 Inexplicably, rather than preserve their right to review by filing a Petition for Judicial
5 Review, Edison has instead filed a civil Complaint and an Amended Complaint and seeks a
6 new civil court proceeding. Edison exercised its right to the administrative process,
7 accumulated a record in excess of 3,000 pages, received an unfavorable decision from the
8 Commission, and failed to timely serve a Petition for Judicial Review on the Commission, the
9 Department, the Office of the Attorney General, Clark County or the City of Henderson. The
10 decision of the Commission is now final and preclusive.

11 C. FAILURE TO FILE A TIMELY PETITION FOR JUDICIAL REVIEW DEPRIVES THIS
12 COURT OF JURISDICTION TO HEAR THIS MATTER..

13 NRS 233B.130 states in pertinent part:

14 1. Any party who is:

15 (a) Identified as a party of record by an agency in an administrative
16 proceeding; and

17 (b) Aggrieved by a final decision in a contested case,
18 is entitled to judicial review of the decision. Where appeal is
19 provided within an agency, only the decision at the highest level is
20 reviewable unless a decision made at a lower level in the agency is
21 made final by statute. Any preliminary, procedural or intermediate
22 act or ruling by an agency in a contested case is reviewable if
23 review of the final decision of the agency would not provide an
24 adequate remedy.

25 2. Petitions for judicial review must:

26 (a) Name as respondents the agency and all parties of record to
27 the administrative proceeding;

28 (b) Be instituted by filing a petition in the district court in and for
Carson City, in and for the county in which the aggrieved party
resides or in and for the county where the agency proceeding
occurred; and

(c) Be filed within 30 days after service of the final decision of the
agency.

Cross-petitions for judicial review must be filed within 10 days after
service of a petition for judicial review.

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1 The final decision by the Commission was dated February 27, 2009. Thirty days from
2 the date of service as provided in NRS 233B.130(2)(c) would have been on or about April 1,
3 2009. The sole means of this court taking action in this administrative case or reviewing the
4 final decision by the Commission was by way of a Petition for Judicial Review. NRS
5 233B.130(6). No Petition for Judicial Review was filed. The failure to file a Petition for
6 Judicial Review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't*, 105
7 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

8
9 When a party seeks judicial review of an administrative decision,
10 strict compliance with the statutory requirements for such review is
11 a precondition to jurisdiction by the court of judicial
12 review...Noncompliance with the requirements is grounds for
13 dismissal of the appeal...Thus, the time period for filing a petition
14 for judicial review of an administrative decision is mandatory and
15 jurisdictional...In the past, this court has upheld the dismissal of
16 appeals for failure to timely commence them.

17 *Id.* at 25, 68 (citations omitted).

18 Judicial review was the only means for Edison to access a court for action on the
19 claims for refund heard by the Commission. Instead, Edison filed a civil action that was not
20 served on all of the parties to the administrative proceedings. Neither Clark County nor City of
21 Henderson, parties to the administrative proceedings below, has been served with this
22 Amended Complaint. The time for filing for judicial review is passed and the court lacks
23 jurisdiction. Edison's Amended Complaint should be dismissed.

24 D. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES
25 JUDICATA.

26 Nevada has adopted a general rule of administrative res judicata. *Britton v. City of N.*
27 *Las Vegas*, 106 Nev. 690, 799 P.2d 568 (1990). The Nevada Supreme Court in *Britton*
28 identifies three inquiries that are pertinent to the application of administrative res judicata. *Id.*
at 692-693 and 569-570. The inquiries are "(1) whether the issue decided in the prior
adjudication was identical to the issue presented in the action in question; (2) whether there
was a final judgment on the merits; and (3) whether the party against whom the judgment is

1 asserted was a party, or in privity with a party to the prior adjudication." *Id.*

2 If the factors from *Britton* are applied to the facts alleged in the Amended Complaint, it
3 is clear that administrative res judicata applies. The first factor is whether the issue decided in
4 the prior adjudication was identical to the issue presented in the action in question. The
5 issues decided in the previous action are outlined in the Order issued by the Commission that
6 is attached as Exhibit 2 to the Amended Complaint. This court in reviewing the action of the
7 Commission is limited to the record that was before the Commission. NRS 233B.135(1)(b).
8 Since the court is so limited, the issues decided by the Commission are identical to the issues
9 that are properly before this court.

10 The second factor is whether there was a final decision on the merits. Because no
11 Petition for Judicial Review has been filed and the date for filing one has passed, the decision
12 by the Commission is final. As is apparent from the Commission's Order, it was a decision on
13 the merits of Edison's claims for refund. See Amended Complaint, Exhibit 2.

14 The final factor is whether the party against whom the judgment is asserted was a
15 party, or in privity with a party to the prior adjudication. The Commission's judgment in the
16 administrative proceeding below was against Edison. The judgment is being asserted against
17 Edison in the current case.

18 The Court further addressed the doctrine of administrative res judicata in a case that,
19 like the present case, related to a request for refund of taxes. *Campbell v. Dep't of Taxation*,
20 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the
21 current case. Like the current case there had been unsuccessful appeals before an
22 administrative hearing officer and the Nevada Tax Commission. *Campbell* at 216, 834. The
23 taxpayer in *Campbell* also failed to file a Petition for Judicial Review and instead filed a
24 separate action pursuant to NRS 372.680. The district court judge granted summary
25 judgment in favor of the Department on the grounds that "all of the elements necessary to
26 apply the doctrine of res judicata to the decision of the administrative tribunal...exist in this
27 case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference
28 between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes

1 until after he had been through the administrative procedure, whereas in the current case the
2 taxpayer paid the taxes prior to going through the administrative procedure. See Amended
3 Complaint, paragraph 1.

4 The Nevada Supreme Court, while reaffirming the doctrine of administrative res
5 judicata, concluded that there were unique circumstances involved in *Campbell* that justified a
6 different result than granting summary judgment.⁵ The Court remanded the case for judicial
7 review after making clear that "pursuant to *Britton*, the Campbells **do not have a right to a**
8 **second evidentiary hearing.**" *Campbell* at 219, 836 (emphasis added).

9 Because Edison failed to file a Petition for Judicial Review and because there does not
10 exist any of the circumstances that were unique to the *Campbell* case, Edison's Amended
11 Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

12 E. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION.

13 The Court in *Five Star Capital Corp. v. Ruby*, ___ Nev. ___, 194 P.3d 709, 711 (2008) does
14 not specifically discuss administrative res judicata, but does discuss in depth the term res
15 judicata and breaks down the differences between claim preclusion and issue preclusion. The
16 *Five Star* Court wrote:

17 In addressing claim preclusion the *Tarkanian* court stated that the
18 doctrine 'is triggered when a judgment is entered. A valid and final
19 judgment on a claim precludes a second action on that claim or any
20 part of it.' Further, the court recognized that the claim preclusion
21 doctrine 'embraces all grounds of recovery that were asserted in a
22 suit, as well as those that could have been asserted, and thus has
23 a broader reach' than the issue preclusion doctrine.

24 *Id.* at 711.

25 The Court then set forth the test for claim preclusion as follows:

26 We begin by setting forth the three-part test for determining
27 whether claim preclusion should apply: (1) the parties or their
28 privies are the same, (2) the final judgment is valid, and (3) the
subsequent action is based on the same claims or any part of them

⁵ Those unique circumstances included payment of the taxes under protest in reliance on instructions from the Department, which limited their subsequent remedies. At the time the statute allowed an action to be filed after the initial denial of a refund by the Department. As noted above in 1999 the statute was amended to require denial by the Tax Commission prior to filing an action for judicial review in district court.

1 that were or could have been brought in the first case. These three
2 factors in varying language, are used by the majority of the state
3 and federal courts. This test maintains the well-established
principle that claim preclusion applies to all grounds of recovery
that were or could have been brought in the first case.

4 *Id.* at 713.

5 Applying those factors to the current case it is clear that the parties, Edison and the
6 Department, are the same in the administrative proceeding below and in the Amended
7 Complaint. As argued above, the judgment by the Commission is final.

8 The third factor is whether the subsequent action is based on the same claims or any
9 part of them that were or could have been brought in the first case. As noted above, Edison
10 has improperly added Claim Set 2 and Claim Set 3 that were not a part of the decision by the
11 Commission below. Because they have not been the subject of a final decision by the
12 Commission, they are not properly included in this suit pursuant to either NRS 233B.130 or
13 NRS 372.680.

14 NRS 233B.130 states that a party may file for judicial review if they are "[a]ggravated by
15 a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial
16 review is limited to the record before the agency. NRS 233B.135(1)(b). Claim set 2 and 3
17 were not included in the decision by the Commission. NRS 372.680 states a taxpayer may
18 file an action "after a final decision upon a claim filed pursuant to this chapter is rendered by
19 the Nevada Tax Commission, the claimant may bring an action against the Department on the
20 grounds set forth in the claim..." So under both NRS Chapter 233B and under NRS 372.680
21 Edison may not bring any claims that have not been actually decided below by the
22 Commission.

23 If the claims that have been improperly included in the Eighth and Ninth Claims for
24 Relief by Edison are stricken, then the final factor of the test for claim preclusion is met. This
25 matter should be dismissed based on the doctrine of claim preclusion.

26 ///

27 ///

28 ///

F. THIS CIVIL ACTION IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION.

The *Five Star* case also addressed the doctrine of issue preclusion. The Court indicated the following factors were necessary for the application of issue preclusion:

- (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;
- (2) the initial ruling must have been on the merits and have become final;...
- (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and;
- (4) the issue was actually and necessarily litigated.
- (5)

Five Star at 713.

The Commission in its final Decision dealt with the following issues:

1. The nature of the coal slurry product at issue and whether it is a raw mineral that would be subject to the exemption in NRS 372.270.

The Commission's decision on this issue precludes re-litigation of the issues included in the Amended Complaint's First Claim for Relief.

2. Whether the payment of use tax by Edison violated the Commerce Clause of the United States Constitution, or any Nevada statutory or constitutional provision.

The Commission's decision on this issue precludes re-litigation of the issues included in the Amended Complaint's Second Claim for Relief.

3. Whether Edison's claims were waived or barred by NRS 372.635, NRS 372.645 and NRS 372.650.

The Commission's decision on this issue precludes re-litigation of the issues included in the Amended Complaint's First and Second Claim for Relief.

4. Whether any of the taxes and/or fees paid by Edison or Peabody Coal Company in Arizona was entitled to a credit against Nevada's use tax.

The Commission's decision on this issue precludes re-litigation of the issues included in Amended Complaint's Third, Fourth, Fifth, Sixth and Seventh Claim for Relief.

See Amended Complaint, Exhibit 2.

Because all of the issues above were raised by the claims for refund filed by Edison, they were actually and necessarily litigated in the administrative proceedings below.

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1 The Commission's decision is final and the Commission's decisions on the issues
2 actually raised and litigated are preclusive. Edison should not be permitted to re-litigate
3 matters that have already been finally decided.

4 G. THE CLAIMS FOR REFUND THAT HAVE NOT BEEN THE SUBJECT TO A
5 DECISION BY THE COMMISSION ARE NOT PROPERLY BEFORE THE COURT.

6 As noted above, the allegations in the Amended Complaint that refer to Claim Set 2
7 and Claim Set 3 have not been the subject of a final decision by the Commission. A final
8 decision by the Commission is a condition for this court to consider a matter on a Petition for
9 Judicial Review. NRS 233B.130(1)(b), NRS 233B.135(1)(b). A final decision by the
10 Commission is also a condition to bringing an action pursuant to NRS 372.680. Allegations
11 referring to Claim Set 2 and Claim Set 3 are not properly before this Court and should be
12 stricken.

13 CONCLUSION

14 Edison, by filing an original civil action, is asking this court to preside over the re-
15 litigation of issues that have been the subject of litigation for the past eight years and relate to
16 claims for taxes that were paid over ten years ago. It would be a prodigious waste of judicial
17 resources to start anew in a case that already has an administrative record well in excess of
18 3,000 pages.

19 Edison had an adequate legal remedy available through NRS Chapter 233B whereby
20 this court could have reviewed the Decision of the Commission for violations of constitutional
21 or statutory provisions, acting in excess of its authority, unlawful procedure or other error of
22 law. This court could have determined whether the Commission's Decision was clearly
23 erroneous in view of the evidence presented to it or whether the Commission acted in an
24 arbitrary or capricious manner. If Edison were unhappy with this court's decision, it would
25 have had the ability to appeal to the Nevada Supreme Court. By failing to file a Petition for
26 Judicial Review within the statutory time limit under NRS 233B.130(2)(c), Edison has
27 abandoned its rights to review and allowed the Commission's Decision to become final.

28 ///

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Based on the doctrines of administrative res judicata, claim preclusion and issue preclusion, the Department respectfully requests that the court grant its Motion to Dismiss pursuant to NRCP 12(b)(5) and dismiss Edison's Amended Complaint with prejudice.

Respectfully submitted this 20th day of April, 2009.

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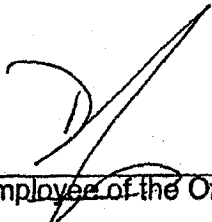
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General,
and that on this 21st day of April, 2009, I served a copy of the foregoing MOTION TO
DISMISS, by mailing a true copy to the following:

Norman J. Azevedo, Esq.
510 W. Fourth Street
Carson City, Nevada 89703



Employee of the Office of the Attorney General

REC'D & FILED

2009 MAY -8 PM 3:20

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Attorneys for Plaintiff

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SOUTHERN CALIFORNIA EDISON,
Plaintiff,

v.

THE STATE OF NEVADA *ex rel.*
DEPARTMENT OF TAXATION
Defendant.

Case No. 09-0C-00016-1B

Dept. No. 1

OPPOSITION TO MOTION TO DISMISS
(ORAL ARGUMENT REQUESTED)

Plaintiff Southern California Edison ("Edison") hereby opposes Defendant State of Nevada *ex rel.* Department of Taxation's Motion to Dismiss and respectfully requests that the court hear oral argument.

INTRODUCTION

Defendant, the Department of Taxation (the "Department"), admits that after the Nevada Tax Commission (the "Commission") denied Edison's claims for refund of use tax, Edison filed this action against the Department on the grounds set forth in the claims exactly as directed by

OPPOSITION TO MOTION TO DISMISS

1 NRS 372.680. In its motion to dismiss ("Motion"), the Department seeks to deprive Edison of
2 this statutory remedy by moving to dismiss Edison's Amended Complaint *with prejudice* on the
3 theory that Edison's *exclusive* remedy following the Commission's denial was to petition for
4 judicial review of the Commission's decision under the provisions of an *entirely separate law*,
5 *i.e.*, NRS Chapter 233B (the Administrative Procedures Act or "APA"). The Department's
6 Motion must be denied because every argument it makes simply reads NRS 372.680 out of the
7 sales and use tax laws.

8 The Department's indefensible position creates a trap for the unwary sales and use
9 taxpayer who, after filing a complaint exactly as directed by NRS 372.680, is then served with a
10 motion to dismiss *with prejudice* on the grounds that the taxpayer should have *ignored* NRS
11 372.680 and instead used a different and more limited remedy provided by a completely different
12 law. While the Department may prefer this result, there is no getting around the unequivocal
13 language in the sales and use tax law requiring the filing of "an action against the Department"
14 rather than a petition for judicial review filed pursuant to NRS 233B.130 in order to obtain a
15 refund of sales and use tax.

16 Indeed, the Department is well aware that NRS 372.680 allows a taxpayer to file an
17 original action against the Department, and has recently defended such a case that went to the
18 Nevada Supreme Court. *See Sparks Nugget, Inc. v. Nevada ex rel Dep't of Tax'n*, 124 Nev. Adv.
19 Rep. 15, 179 P.3d 570 (2008), *infra* at 9-10. Inexplicably, the Department takes the *exact*
20 *opposite position* in response to Edison's suit. In sum, there is no sound basis for concluding, and
21 the Department advances no credible argument to support its contention, that despite its plain
22 language, NRS 372.680 must somehow be read to *require* a taxpayer to file a petition for judicial
23 review pursuant to NRS 233B.130. In fact, that conclusion is utterly implausible because, as
24 discussed below, the requirements for filing a refund action against the Department conflict with,
25 and are different in all material respects from, those for filing a petition for judicial review. For
26 these and the other reasons discussed below, the Department's Motion must be denied.

27 STANDARD OF REVIEW

28 On a motion to dismiss for failure to state a claim, dismissal is appropriate "only if it

1 appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle
2 it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. Adv. Rep. 21, 181 P.3d 670, 672
3 (2008). All factual allegations of the complaint must be accepted as true, and the court must draw
4 all inferences in favor of the non-moving party. *Id.*

5 ARGUMENT

6 The Department's Motion must be denied because (A) Edison's Amended Complaint was
7 properly filed pursuant to NRS 372.680 (and the Department admits that Edison complied with
8 this provision); (B) the Department has not presented any credible arguments or evidence to
9 support its position that Edison was required to file a petition for judicial review pursuant to the
10 APA instead of a complaint against the Department as directed by the sales and use tax law (NRS
11 372.680); (C) the doctrines of administrative res judicata, claim preclusion and issue preclusion
12 do not apply; and (D) Edison's claims for declaratory relief are properly before this Court.

13 A. Edison's Amended Complaint Timely Complied With All 14 Requirements of NRS 372.680

15 The Department's Motion must be denied because Edison's Amended Complaint states
16 claims upon which relief can be granted. In fact, the Department *expressly concedes* that Edison
17 alleged all of the elements establishing its right to a refund of use tax, and complied with all of
18 the statutory requirements necessary to commence a tax refund action against the Department
19 pursuant to NRS 372.680. By conceding that Edison has stated a claim under NRS 372.680, the
20 Department has failed to make a valid motion to dismiss pursuant to NRCP 12(b)(5).

21 NRS 372.680 provides:

22 "1. Within 90 days after a final decision upon a claim filed pursuant to this
23 chapter is rendered by the Nevada tax commission, the claimant may bring an
24 action against the department on the grounds set forth in the claim in a court of
25 competent jurisdiction in Carson City, the county of this state where the claimant
26 resides or maintains his principal place of business or a county in which any
27 relevant proceedings were conducted by the department, for the recovery of the
28 whole or any part of the amount with respect to which the claim has been
disallowed.

2. Failure to bring an action within the time specified constitutes a waiver of any
demand against the state on account of alleged overpayments."

Edison fully and timely complied with the requirements for bringing an action pursuant to NRS

1 372.680. The following facts cannot be disputed:

- 2 • Edison filed claims for refund for the periods March 1998 through and including
- 3 December 2005 (*i.e.*, Claims Set 1-3) challenging Nevada's imposition of use tax in
- 4 respect of out-of-state coal consumed at Edison's Mohave Project as required by NRS
- 5 372.675.
- 6 • The Department denied the claims for refund for the periods March 1998 through and
- 7 including September 2003, *i.e.*, Claims Set 1 and 2.
- 8 • Edison appealed the Department's denials of its claims for refund to the Commission as
- 9 required by NRS 360.245(1).¹
- 10 • The Commission rendered a final decision on Edison's Claims Set 1 and 2 on February
- 11 27, 2009.
- 12 • Edison brought an action against the Department by filing its Amended Complaint on
- 13 March 27, 2009—28 days after the Commission rendered its final decision. Edison
- 14 named the Department as defendant and stated as grounds for relief the same grounds that
- 15 were "raised by the claims for refund filed by Edison." (Motion at 12.)

16 In sum, there is no dispute that Edison satisfied the requirements of NRS 372.680. Thus,

17 this Court has jurisdiction over Edison's Amended Complaint and the Amended Complaint

18 cannot be dismissed for failure to state a claim upon which relief can be granted.

19 **B. Edison Was Required To File a Complaint Pursuant to NRS 372.680**

20 **and Not a Petition For Judicial Review Pursuant to NRS 233B.130**

21 Contrary to the Department's assertions, NRS 372.680 is not ambiguous. The

22 Department cannot create ambiguity by claiming that another more general statute applies. The

23 comparison of NRS 372.680 and NRS 233B.130 below shows that the refund action against the

24 Department is a separate and distinct action from a petition for judicial review. Since Edison

25

26 ¹ The Department initially assigned Edison's appeal to a Department hearing officer. However, in a letter dated

27 July 2, 2003, the Department acknowledged that the Department's denial of Edison's claims for refund should

28 have been referred directly to the Commission pursuant to NRS 360.245(1) and redirected Edison's case to the

Commission for a hearing. (*See Exhibit 1.*) NRS 360.245(1)(a) provides: "All decisions of the Executive Director or other officer of the Department made pursuant to this title are final unless appealed to the Nevada Tax Commission."

1 properly filed an action pursuant to NRS 372.680, the Department's Motion must be denied.

2 1. **NRS 372.680 Is Unambiguous In Providing the Right to File a**
3 **Direct Action Against the Department**

4 "When presented with a question of statutory interpretation, the intent of the legislature is
5 the controlling factor and, if the statute is clear on its face, a court can not go beyond the statute in
6 determining legislative intent." See *Robert E. v. Justice Court*, 99 Nev. 443, 445 (1983); see also
7 *Worldcorp v. Dep't of Tax'n*, 113 Nev. 1032, 1035-36 (1997). The test for ambiguity is whether
8 two or more competing constructions are "reasonably supported by the language of the statute."
9 *Justice Court*, 99 Nev. at 446.

10 The Department's claim that NRS 372.680 is ambiguous necessarily fails because the
11 Department agrees with Edison that the plain language of NRS 372.680 provides for an action
12 against the Department. (Motion at 4.) Thus, there are no competing constructions of the statute.
13 Instead, the Department tries to create ambiguity by arguing that an entirely different statute
14 applies. According to the Department, NRS 372.680 is ambiguous because NRS 233B.130(6)
15 states that the APA is "the exclusive means of judicial review of, or judicial action concerning, a
16 final decision in a contested case involving an agency to which this chapter applies." (Motion at
17 5.) This contention is not "reasonably supported by the language of the statute" or by any
18 authority for that matter. Nothing in the language of NRS 372.680 indicates that the action in
19 district court is merely an appeal from, or limited to judicial review of, the Commission's
20 decision. Rather, NRS 372.680 treats the Commission's denial of a claim as nothing more than a
21 condition precedent to a taxpayer's bringing an original action against the Department.²

22 In sum, the only ambiguity in NRS 372.680 is the one concocted by the Department to
23 reach a result it cannot achieve. The Department's conclusion that NRS 372.680 is ambiguous is
24 based on its contention that another statute applies. That is not a basis for concluding that NRS
25 372.680 is ambiguous. Since NRS 372.680 is clear on its face, there is no basis for looking to
26 legislative history for clarification of the statute's language.

27 _____
28 ² If the Commission decides *in favor of the taxpayer*, the Department may not appeal or otherwise take action
on the Commission's decision. See NRS 360.245(5).

1 2. **NRS 372.680 and NRS 233B.130 Have Different**
2 **Requirements and Provide Different Remedies**

3 NRS 372.680 is a law specific to sales and use taxes, allowing a taxpayer to bring a refund
4 action against the Department within 90 days after the Commission renders a final decision
5 denying a taxpayer's claims for refund. NRS 233B.130, on the other hand, is a statute of general
6 administrative law, authorizing an aggrieved party to file a petition naming an administrative
7 agency as respondent and seeking review of the agency's decision within 30 days after the agency
8 serves its final decision. The Department's position is that NRS 233B.130 somehow trumps NRS
9 372.680, eliminating the latter statute's clear language providing for an original action against the
10 Department, and instead offering taxpayers the very different and more limited remedy of a
11 petition for judicial review of the Commission's decision. In fact, there is no such relationship
12 between these two statutes. They provide separate remedies and impose different requirements.
13 Relevant judicial authority confirms that the two statutes provide separate remedies, and the
14 Department's own past practice has been that NRS 372.680 authorizes a taxpayer to initiate a
15 civil action against the Department by filing a complaint in district court.

16 a. **NRS 372.680 Specifically Applies to Sales and Use Tax Refund Actions**
17 **and the Department Reads it Out of the Statute Books**

18 The Department's "interpretation" of NRS 372.680 violates basic rules of statutory
19 construction. First, it violates the rule that statutes must "not be read in a way that would render
20 words or phrases superfluous or make a provision nugatory. Further, every word, phrase, and
21 provision of a statute is presumed to have meaning." *Butler v. State*, 120 Nev. 879, 892-93
22 (2004) (internal citations omitted); *see also Tomlinson v. State*, 110 Nev. 757, 761 (1994). The
23 Department's interpretation of NRS 372.680 renders the entire statute inoperative.

24 Second, the Department violates the rule that when there is a statute "dealing expressly
25 and in detail with a particular subject", the specific statute controls over a "general provision
26 relating only in general terms" to the subject. *Western Realty Co. v. City of Reno*, 63 Nev. 330,
27 337 (1946). The Department's contention that the requirements of NRS Chapter 233B supersede
28 the requirements imposed by NRS 372.680 also conflicts directly with the APA, which may

1 "supplement statutes applicable to specific agencies" but emphatically "does not abrogate or limit
2 additional requirements" imposed by other statutes or otherwise recognized by law. (NRS
3 233B.020(2)). Contrary to the Department's argument, each requirement imposed by NRS
4 372.680 conflicts with the requirements imposed by NRS Chapter 233B, and NRS 372.680 takes
5 precedent.

- 6 • First, NRS 372.680(2) provides that a taxpayer who fails to bring the action described in
7 NRS 372.680(1) "within the time specified" following a final decision of the Commission
8 "*waive[s] . . . any demand against the state on account of alleged overpayments.*"
9 (Emphasis added.) Thus, contrary to the Department's position, Edison's exclusive
10 remedy to obtain a refund was to bring an action against the Department in compliance
11 with the requirements imposed by NRS 372.680(1), and not those imposed by NRS
12 Chapter 233B. (See Motion at 8 (stating that "[t]he sole means of this court taking action
13 in this administrative case . . . was by way of a Petition for Judicial Review. NRS
14 233B.130(6)."))
- 15 • Second, NRS 372.680(1) requires a taxpayer to bring an action against the Department *on*
16 *the grounds set forth in the taxpayer's claims for refund.* NRS 233B.130(1), on the other
17 hand, authorizes an aggrieved party to *seek judicial review of the administrative agency's*
18 *decision.* As the Department expressly concedes, the claims for relief contained in the
19 Amended Complaint were "raised by the claims for refund filed by Edison." (Motion at
20 12.) The Department also concedes that such claims for relief are "not available on a
21 Petition for Judicial Review" (*id.* at 4), yet takes the absurd position that Edison should
22 have styled its claims for relief as if it were filing a petition for judicial review. (Motion
23 at 13.) Clearly, that is not what NRS 372.680 requires.
- 24 • Third, NRS 372.680(1) requires the taxpayer to bring an action *against the Department.*
25 An action is initiated by filing a complaint in district court. (NRCP 2 & 3.) A petition
26 for judicial review requires the agency and all parties of record to the administrative
27 proceeding to be named as respondents. (NRS 233B.130(2)(a).) The agency is required
28 to participate in the judicial review proceeding but the other parties may elect not to

1 participate. (NRS 233B.130(3).) NRS 372.680 and NRS 233B.130 therefore require the
2 participation of different parties. Accordingly, it is completely proper that “[b]y filing an
3 Amended Complaint as opposed to a Petition for Judicial Review, Edison has initiated a
4 civil law suit with the Department as Defendant.” (Motion at 2.)

- 5 • Lastly, NRS 372.680(1) requires a taxpayer to bring an action *within 90 days after the*
6 *Commission renders its final decision* on the taxpayer’s claims for refund. NRS
7 233B.130, on the other hand, requires an aggrieved party to file a petition for judicial
8 review *within 30 days after service of the agency’s final decision.* (See NRS
9 233B.130(2)(c).) The Department’s incredible and unsupportable claim that Edison was
10 required to bring suit within 30 days after the Commission’s final decision ignores this
11 crucial difference between the two statutes for which there is not the slightest ambiguity.³

12 In sum, each element of NRS 372.680 is inconsistent with the requirements imposed by
13 NRS Chapter 233B. By suggesting the latter must control the former, the Department renders
14 each part of NRS 372.680, and the statute as a whole, void and nugatory. *See Butler*, 120 Nev. at
15 892-93. Furthermore, NRS 372.680, as the more specific statute on its face and by the express
16 operation of the APA, controls over NRS 233B.130. *Western Realty*, 63 Nev. at 337; NRS
17 233B.020(2). The Department’s position is entirely baseless.

18 **b. Nevada Supreme Court Precedent Confirms that NRS 372.680 and**
19 **NRS 233B.130 Are Separate and Distinct**

20 The Nevada Supreme Court has held that statutes authorizing an action in district court on
21 the grounds set forth in the taxpayer’s claims for refund are not governed by NRS Chapter 233B.
22 *See Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402 (1988). In *Saveway*, the
23 taxpayer had paid under protest fuel excise taxes and penalties imposed by NRS Chapter 365,
24 filed an appeal with the Commission, and after having received an adverse decision from the
25 Commission, filed a petition seeking judicial review of the Commission’s decision. The district
26

27 ³ In any event, Edison filed its Amended Complaint on March 27, 2009—28 days after the Commission
28 rendered its final decision—so there can be no argument its Amended Complaint was untimely even if it were
considered a petition for judicial review.

1 court dismissed the petition and the Nevada Supreme Court affirmed because "NRS 233B.130 is
2 specifically limited by NRS 365.460, and under NRS 365.460 Saveway's remedy was to pay the
3 excise tax under protest and bring an action against the state treasurer in the district court."⁴ *Id.*
4 at 403-04 (emphasis added). Likewise, Edison could not have filed a petition for judicial review
5 under NRS 233B.130 because a more specific statute (NRS 372.680) provided a separate and
6 exclusive remedy. See NRS 372.680(2); *Saveway*, 104 Nev. at 403-04; *Western Realty Co.*, 63
7 Nev. at 337. Had Edison filed a petition for judicial review as the Department maintains it should
8 have, the petition likely would have been dismissed as it was in *Saveway*.

9 After having its petition for judicial review dismissed and bringing an action in district
10 court to recover its overpayment of excise fuel taxes, the district court applied the standard of
11 review appropriate to petitions for judicial review and granted summary judgment against the
12 taxpayer because the Commission's decision "was neither clearly erroneous, arbitrary, nor
13 capricious." *Saveway*, 104 Nev. at 404. The Supreme Court held that the district court erred in
14 applying a judicial review standard because the action authorized by NRS 365.460 did not
15 contemplate a review of an administrative agency's decision but rather a trial *de novo*. *Id.* Thus,
16 *Saveway* affirmed that "actions to recover taxes paid are equitable in nature, and the burden of
17 proof is on the taxpayer to show that the taxing body holds money that in equity and good
18 conscience it has no right to retain" and this means that "the burden is not that of a showing of
19 lack of substantial evidence, rather, it is to support the elements of an independent action for
20 restitution."⁵ *Saveway*, 104 Nev. at 404 (citing *State of Nevada v. Obexer & Sons, Inc.*, 99 Nev.
21 233, 237 (1983)). Thus, the Supreme Court has explicitly rejected — twice — the same argument

22
23 ⁴ NRS 365.460, as in effect at the time of the *Saveway* decision, provided: "After payment of any excise tax
24 under protest duly verified, served on the department, and setting forth the grounds of objection to the legality
25 of the excise tax, the dealer paying the excise tax may bring an action against the state treasurer in the district
26 court in and for Carson City for the recovery of the excise tax so paid under protest." NRS 365.470 further
27 provides that "[n]o action authorized by NRS 365.460 may be instituted more than 90 days after the last day
28 prescribed for the payment of the excise tax without penalty. Failure to bring suit within the 90 days shall
constitute a waiver of any and all demands against the state on account of alleged overpayment of excise
taxes." (Emphasis added.)

⁵ The court also summarily dismissed the government's argument that employing a judicial review standard, as
opposed to allowing a trial *de novo*, would promote judicial economy. The court stated that "none of the cases
cited by respondent involves a suit for a tax refund. While respondent may be correct in arguing that judicial
review would promote judicial economy, such a rule is best left in the hands of the state legislature." *Id.*

1 the Department advances here.

2 **c. The Department Has Previously Understood NRS 372.680 to Be**
3 **a Civil Action Initiated By the Filing of A Complaint.**

4 The Department's position in its Motion contradicts the position that it has taken with
5 other taxpayers in the same circumstances. In *Sparks Nugget, Inc. v. Nevada ex rel Dep't of*
6 *Tax'n*, 124 Nev. Adv. Rep. 15, 179 P.3d 570 (2008), the taxpayer filed a complaint pursuant to
7 NRS 372.680 against the Department after it had received an adverse decision on its claims for
8 refund from the Commission. The Department answered and the case was ultimately resolved on
9 summary judgment. (See Exhibit 2.) The Nevada Supreme Court characterized the taxpayer's
10 administrative proceedings as simply the exhaustion of administrative remedies prior to bringing
11 a district court action against the Department:

12 "[T]he Nugget administratively appealed the Tax Department's decision to the tax
13 commission. That appeal proved unsuccessful, however, and having exhausted its
14 administrative remedies, *the Nugget then sued the Tax Department in district*
15 *court, again seeking a refund of the use taxes that it had paid.*"

16 *Sparks Nugget*, 179 P.3d at 573 (emphasis added). By filing this Motion and reversing course on
17 its prior practice, the Department has abandoned its obligation to treat taxpayers fairly and
18 consistently. (See NRS 360.291(a).)

19 Although required to by statute, the Department has also failed to provide "written
20 instructions indicating how the taxpayer may petition for a refund or credit for overpayment of
21 taxes." (NRS 360.291(f)(2).) The Commission's February 27, 2009 decision contains no
22 information as to the action Edison should take following the Commission's decision, nor has the
23 Department provided any such guidance to Edison, written or otherwise.⁶ The Department's
24 failure to inform Edison that it believed NRS 372.680 required the filing of a petition for judicial
25 review is especially egregious in light of the fact that (1) the Department takes the position that the

26 ⁶ As discussed *supra*, n. 1, when the Department originally denied Edison's refund claims, it provided
27 information regarding the procedures for appealing the Department's denial. While it erroneously advised
28 Edison that it had to file a petition for redetermination within 45 days pursuant to NRS 360.360, the Department
did subsequently correct this oversight and redirected Edison's appeal to the Commission pursuant to NRS
360.245(1). (See Exhibit 1.)

1 procedure for pursuing a refund of use taxes pursuant to NRS 372.680 is ambiguous; (2) the
2 Department has previously treated NRS 372.680 as requiring the filing of a complaint as opposed
3 to a petition for judicial review; (3) prior to Edison's filing its Amended Complaint, Edison
4 attempted to engage the Department in a discussion of how best to organize the litigation currently
5 pending before this Court and the Department declined (*see Exhibit 3*)⁷; and (4) the Department
6 now asks this Court to dismiss Edison's Amended Complaint *with prejudice*.

7 3. **The 1999 Amendments to NRS 372.680 Did Not Change the**
8 **Nature of the Taxpayer's Suit For a Refund in District Court**

9 As discussed above, NRS 372.680 is not ambiguous and its plain language controls.
10 Thus, there is no basis for looking to legislative history. In any event, the materials relied on by
11 the Department do not support the Department's position that the enactment of Senate Bill 362 in
12 1999 ("S.B. 362") changed the remedy afforded to a taxpayer pursuant to NRS 372.680 from a
13 civil action against the Department to a petition for judicial review pursuant to the APA. The
14 Department's position is utterly implausible since both *prior to and after* the enactment of S.B.
15 362, NRS 372.680 required a taxpayer to "bring an action against the department on the grounds
16 set forth in the claim in a court of competent jurisdiction in Carson City" to obtain a refund of
17 sales and use tax previously paid.

18 S.B. 362 amended NRS 372.680 in two respects. Prior to the enactment of S.B. 362, NRS
19 372.680 provided that a taxpayer whose claim for sales or use tax refund had been denied by the
20 Department may "bring an action against the department on the grounds set forth in the claim *in a*
21 *court of competent jurisdiction in Carson City . . .*" After the passage of S.B. 362, NRS 372.680
22 provided, and continues to provide, that a taxpayer whose claim for sales or use tax refund has
23 been denied by the Commission may "bring an action against the department on the grounds set
24 forth in the claim *in a court of competent jurisdiction in Carson City, the county of this state*
25 *where the claimant resides or maintains his principal place of business or a county in which any*

26 ⁷ In response to Edison's suggestion that the parties stipulate to time frames for filing their pleadings, the
27 Department responded: "As far as [Edison's] intention to file an amended complaint, the Department believes
28 the Nevada Rules of Civil Procedure offer sufficient guidance to the parties regarding when an amended
 complaint must be filed and, if one is filed, when the Department would be required to respond. The
 Department is prepared to respond to the complaint in compliance with those rules."

1 *relevant proceedings were conducted by the department*"

2 First, the reference to the "Department" was changed to the "Commission." This
3 amendment was required because S.B. 362 also amended NRS 360.245. The amendment to NRS
4 360.245 provided that a taxpayer whose claim for refund was denied by the Department may
5 appeal it to the Commission.⁸ The jurisdictional prerequisite for the *district court action* to
6 obtain a refund provided by NRS 372.680 had to be changed accordingly. Second, the venues in
7 which the district court action could be brought were expanded to include jurisdictions in addition
8 to Carson City. Accordingly, neither amendment had any bearing on the nature of the district
9 court action provided by NRS 372.680. Both before and after the amendment a taxpayer's
10 remedy was to "bring an action against the Department." Nonetheless, the Department uses three
11 exhibits to attempt to magically change the meaning of "an action against the Department" to a
12 "petition for judicial review pursuant to NRS 233B.130." Two of the exhibits relate to the venue
13 amendments and are selectively quoted from to support this false proposition. The third is an
14 abbreviated summary of an interim draft bill that has no indicia of legislative intent and conflicts
15 with other bill summaries.

16 Exhibit 1 to the Department's Motion is a copy of a memorandum from then-Deputy
17 Attorney General Norman J. Azevedo to the Chairman of the Assembly Committee on Judiciary
18 dated May 7, 1999 entitled "Venue Sections of S.B. 362" (the "Venue Memorandum"). Exhibit 2
19 to the Department's Motion is a copy of minutes of the March 23, 1999 meeting of the Senate
20 Committee on Taxation (the "Senate Committee"), at which Mr. Azevedo was present to answer
21 questions regarding the venue provisions of S.B. 362 (the "Committee Minutes"). The Venue
22 Memorandum and Mr. Azevedo's remarks to the Senate Committee were provided in response to
23 specific questions relating to the venue provisions in S.B. 362, *i.e.*, the amendments to existing
24 tax refund statutes that expanded the jurisdictions in which tax refund actions could be brought.
25 (See Affidavit ¶ 4, attached hereto as Exhibit 5.) These amendments did not make refund actions

26
27 ⁸ This change was made to reduce the number of cases that proceeded to district court. "The change allowed
28 the taxpayer to appeal to the Tax Commission before the business and the state had incurred the legal
 expenses." (See Committee Minutes of the Assembly Committee on Taxation, May 6, 1999, attached hereto as
 Exhibit 4)

1 in the district court subject to the APA, as the Department suggests is the case. (See Affidavit
2 ¶ 7.) In fact, the only discussion of the APA in the legislative history concerns conforming the
3 venue provisions of the various tax refund actions that were amended to be consistent with the
4 venue provisions in NRS 233B.130. (See Exhibit 4; Affidavit ¶ 6.) Although there is a statement
5 in the Venue Memorandum suggesting that, following a final decision from the Commission the
6 taxpayer may file a petition for judicial review, that statement was part of an overview that was
7 not specifically addressing actions seeking refunds of sales and use taxes pursuant to NRS
8 372.680. (See Affidavit ¶ 7b.)

9 In any event, the exhibits do not constitute legislative history and cannot be viewed as
10 reflecting the intent of the legislature. It is well established that “testimony before a committee is
11 of little value in ascertaining legislative intent, at least where the committee fails to prepare and
12 distribute a report incorporating the substance of the testimony” and where the party makes “no
13 showing that [the] testimony was endorsed or relied on by the committees.” See *Justice Court*, 99
14 Nev. at 446. While the Venue Memorandum arguably rises to the level of testimony, the
15 Department has failed to show, and our independent investigation has not uncovered any
16 evidence, that the Assembly Committee on Judiciary (1) prepared and distributed a report
17 incorporating the substance of the Venue Memorandum and (2) relied on or endorsed the Venue
18 Memorandum, in each case insofar as the Venue Memorandum speaks to amendments other than
19 to the venue provisions. It is doubtful that the Committee Minutes even rise to the level of
20 “testimony” since they constitute a third-person’s *summary* of Mr. Azevedo’s remarks to the
21 Senate Committee. But even if the remarks attributed to Mr. Azevedo in the Committee Minutes
22 constitute testimony, the Department has failed to make the required showings discussed above
23—at least insofar as Mr. Azevedo’s remarks relate to amendments other than venue—that would
24 permit a court to treat Mr. Azevedo’s summarized statements as representing the intent of the
25 Nevada Legislature.

26 The Department’s Exhibit 3 does not show that the amendments to NRS 372.680 change
27 the meaning of “an action against the Department” to a “petition for judicial review pursuant to
28 NRS 233B.130.” First, the summary explanation of NRS 372.680 does not state that the action is

1 a review of the Commission's decision. Second, the summary cited by the Department conflicts
2 with a summary explanation of identical statutory language in NRS 372.685.⁹ (See Department's
3 Exhibit 3, Section 34.) Third, the Department's Exhibit 3 is an interim draft summary that does
4 not accurately reflect the final changes made by S.B. 362 and conflicts with other bill summaries.
5 (See Exhibit 6 (stating that the amendments to NRS Chapter 372 clarify the time frames and
6 procedures for filing appeals [from the Department to the Commission] and claims, *i.e.*, claims
7 for refund [from the Commission to district court].)

8 **C. The Amended Complaint is Not Subject To Administrative Res Judicata,**
9 **Claim Preclusion or Issue Preclusion**

10 Continuing to ignore the plain language of NRS 372.680, the Department also claims that
11 the doctrines of administrative res judicata, claim preclusion and issue preclusion bar Edison from
12 litigating the claims for relief raised in its Amended Complaint. Each of these arguments fails for
13 the same reason; if applicable, these doctrines would *always* bar refund actions brought under
14 NRS 372.680. These arguments, like the others of the Department, render NRS 372.680
15 inoperative.

16 First, each of the Department's arguments rests on the premise that the Commission's
17 decision denying Edison's claims for refund constitutes a final decision having preclusive effect
18 — but it does not. NRS 372.680(1) affords Edison a specific remedy—to pursue a court action
19 against the Department within 90 days after the Commission renders its final decision. Only the
20 “[f]ailure to bring an action within the time specified” by NRS 372.680(1) “constitutes a waiver
21 of any demand against the State on account of alleged overpayments.” (NRS 372.680(2).) Since
22 Edison filed its Amended Complaint pursuant to NRS 372.680 well within the 90-day period,
23 there has been no final decision that bars Edison from litigating in district court the claims denied
24

25 ⁹ NRS 372.685, as amended by S.B. 362, provides: “If the Department fails to mail notice of action on a claim within
26 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with a hearing
27 officer within 45 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the
28 hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada Tax
Commission. If the claimant is aggrieved by the decision of the Commission on appeal, he may, within 45 days after
the decision is rendered, *bring an action against the Department on the grounds set forth in the claim* for the
recovery of the whole or any part of the amount claimed as an overpayment.” (Emphasis added.)

1 by the Commission.

2 Second, if administrative res judicata, claim preclusion and issue preclusion were to apply
3 to sales and use tax refund actions brought pursuant to NRS 372.680, that statute would be
4 entirely inoperative and void of any function. The fact that hearings were held and a decision was
5 reached at the administrative level cannot bar a taxpayer from bringing suit under NRS 372.680,
6 since those very circumstances are now preconditions for bringing such an action in the first
7 instance.¹⁰

8 The Department mistakenly relies on *Campbell v. State of Nevada*, 108 Nev. 215 (1992)
9 to support its position that administrative res judicata bars Edison from bringing an action under
10 NRS 372.680. In *Campbell*, the Department claimed that the taxpayer had underpaid his tax
11 liability and accordingly issued a *deficiency determination* assessing additional taxes and
12 penalties. Following the procedures specifically applicable to deficiency determinations, the
13 taxpayer appealed the Department's assessment to an administrative hearing officer and, when the
14 hearing officer upheld the determination, the taxpayer appealed to the Commission. When the
15 taxpayer was aggrieved by the Commission's decision, the *proper* procedure would have been to
16 challenge the Commission's final decision by filing a petition for judicial review pursuant to the
17 APA. (See NRS 360.395.) At the suggestion of the Attorney General, however, the taxpayer
18 paid the tax liability, filed a claim for refund and brought an action against the Department
19 pursuant to NRS 372.680 *instead of filing a petition for judicial review* of the Commission's
20 decision. Because the taxpayer in *Campbell* had had a hearing in front of and received a decision
21 from the Commission prior to bringing an action against the Department pursuant to NRS
22 372.680, the court ruled that the taxpayer's action was barred by administrative res judicata.¹¹

23 ¹⁰ To attain a refund, a taxpayer must file administrative claims for refund with the Department. See NRS
24 372.675. The Department's denial of a taxpayer's claim for refund is final unless appealed to the Commission.
25 See NRS 360.245(1)(a); Nevada Administrative Code 360.496 ("Except as otherwise provided by specific
26 statute, if the Department denies any claim, the claimant may appeal the decision in the manner provided in
27 NRS 360.245."). And a taxpayer must have received an adverse decision from the Commission prior to
28 bringing an action against the Department under NRS 372.680.

¹¹ However, in *Campbell*, the Attorney General had induced the taxpayer to pay the tax after receiving an
adverse decision from the Commission and then to file a claim for refund, thus barring the taxpayer from
pursuing judicial review under the APA (since NRS 372.680 is the exclusive remedy for claims for refund).
The taxpayer was also barred from bringing an action under NRS 372.680 (because prior to SB 362
administrative res judicata applied when the taxpayer had held a hearing at the administrative level). But

1 SB 362 overturned the result in *Campbell*. With the enactment of SB 362, the sales and
2 use tax claim for refund procedure was changed to require all taxpayers that file sales or use tax
3 claims for refund to appeal the Department's denial to the Commission before bringing an action
4 against the Department in district court pursuant to NRS 372.680. As discussed above,
5 administrative res judicata therefore cannot apply to sales and use tax refund actions brought
6 pursuant to NRS 372.680 because a hearing in front of and a decision from the Commission is
7 now a statutory prerequisite for bringing such an action in the first instance.

8 **D. Edison's Eighth and Ninth Claims for Relief In Its Amended Complaint Are**
9 **Properly Before This Court.**

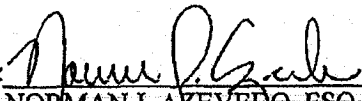
10 The Department alleges that the Eighth and Ninth Claims for Relief contained in Edison's
11 Amended Complaint should be dismissed because neither of those claims for relief may be
12 brought pursuant to NRS 372.680 or NRS 233B.130. (Motion at 13.) The Department's
13 argument misses the mark. Both of those claims for relief seek a declaratory judgment from this
14 Court and were properly and explicitly brought pursuant to NRS 30.030, *i.e.*, the Uniform
15 Declaratory Judgments Act. (See Amended Complaint ¶¶ 6-7, 80-90.) NRS 30.030 provides that
16 "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status
17 and other legal relations whether or not further relief is or could be claimed. *No action or*
18 *proceeding shall be open to objection on the ground that a declaratory judgment or decree is*
19 *prayed for.*" (Emphasis added.) Accordingly, Edison's Eighth and Ninth Claims for Relief are
20 properly before this Court and are not subject to dismissal.

21 **CONCLUSION**

22 Edison fully and timely complied with the clear requirements of NRS 372.680. Nothing
23 in the Department's Motion impugns this basic and undisputed fact. The Department
24 nevertheless asks this Court to take the extreme and draconian measure of dismissing Edison's
25 because of the Attorney General's suspect behavior, *i.e.*, providing advice that left the taxpayer with no
26 meaningful remedy, the court converted the case to a petition for judicial review and allowed it to proceed. The
27 facts in *Campbell* are inapplicable to the instant case. Edison originally filed claims for refund with the
28 Department and is properly subject to the procedures governing claims for refund, not the procedures for
deficiency determinations. The claim for refund procedure required Edison to file an action against the
Department in district court following the Commission's decision pursuant to NRS 372.680 and Edison
properly followed that statutory mandate.

1 Amended Complaint with prejudice because the Department contends there is "ambiguity" about
2 what NRS 372.680 actually requires. But even if the Department were correct that there is
3 ambiguity regarding whether NRS 372.680 authorizes an original action against the Department
4 or some form of judicial review pursuant to NRS 233B.130, its conclusion that Edison had 30
5 days in which to bring an action under NRS 372.680 borders on the frivolous. The time frame
6 within which Edison has to bring an action under NRS 372.680 is 90 days after the Commission
7 rendered its final decision. Edison filed its Amended Complaint 28 days after the Commission's
8 final decision and therefore satisfied both statutes. The most the Department could possibly be
9 entitled to is the conversion of this action into a petition for judicial review rather than dismissing
10 it outright. As Edison has shown, however, there is no basis for filing a petition for judicial
11 review, the Department has conceded that Edison properly complied with the specifically
12 applicable statute (NRS 372.680), and all inferences must be drawn in Edison's favor. NRS
13 372.680 requires Edison to file a complaint against the Department and Edison did so well within
14 the specified time frame. The Department's Motion must be denied and Edison respectfully
15 requests the Court hear oral argument.

16
17 Dated: May 8th, 2009

18
19 By: 
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24 (775) 883-7000

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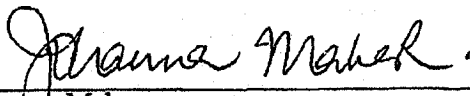
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CERTIFICATE OF MAILING

I hereby further certify that on the 8th day of May, 2009, I caused a hand delivered a
copy of the foregoing to be delivered as follows:

Gina Session, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701




Johanna Maher

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2
3 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR CARSON CITY
5

6 AFFIRMATION
7 Pursuant to NRS 239B.030
8

9 The undersigned does hereby affirm that the preceding document, OPPOSITION TO
10 MOTION TO DISMISS filed in Case No. 09 0C 00016 1B DOES NOT CONTAIN THE
11 SOCIAL SECURITY NUMBER OF ANY PERSON.

12 DATED this 8th day of May, 2009.

13
14 
15 NORMAN J. AZEVEDO, ESQ.
16 Nevada Bar No. 3204
17 510 West Fourth Street
18 Carson City, NV 89703
19 775.883.7000
20 Attorney for Plaintiff
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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

1 Case No. 09 OC 00016 1B

2 Department No. 1

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

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Southern California Edison)

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Plaintiff,)

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vs.)

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STATE OF NEVADA ex rel. Department of)
Taxation)

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Defendants)

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Defendant State of Nevada ex rel. Department of Taxation (Department), by and through its attorney, Catherine Cortez Masto, Attorney General, by Gina C. Session, Chief Deputy Attorney General, hereby submits it's Reply to Plaintiff's Opposition to Motion to Dismiss in this matter. This reply is filed pursuant to NRCP Rule 12(b)(5), and also based upon the following memorandum of points and authorities, and the other papers and pleadings on file with the court in this matter.

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**REPLY TO OPPOSITION
TO MOTION TO DISMISS**

ARGUMENT

1. A FAILURE TO APPLY ADMINISTRATIVE RES JUDICATA WOULD RENDER MEANINGLESS NRS CHAPTER 233B, NUMEROUS EVIDENTIARY HEARINGS HELD BY THE DEPARTMENT AND THE NEVADA TAX COMMISSION (COMMISSION), THE PARTICIPATION OF CLARK COUNTY AND CITY OF HENDERSON IN THE ADMINISTRATIVE PROCEEDINGS, THE FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE COMMISSION AND THE ADMINISTRATIVE RECORD OF MORE THAN THREE THOUSAND PAGES.

The United States Supreme Court in *Astoria Fed. Sav. and Loan Ass'n*, 501 U.S. 104 (1991), analyzes the doctrine of administrative res judicata. The Court declines to give final decisions by state administrative agencies preclusive effect in age discrimination claims in federal court. While limiting its application in certain federal actions, the Court describes the importance of the finality of decisions and resolution of actions without re-litigating matters that have already been decided. The Court wrote:

We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. 'When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.' . . . Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. . . The principle holds true when a court has resolved an issue and should do so equally when the issue has been decided by an administrative agency, be it state or federal . . . which acts in a judicial capacity.

Id. at 107-108 (citations omitted).

If administrative res judicata is not applied in this case and Edison is allowed to go forward with a de novo civil action, the Department is faced with the daunting task of starting over from scratch after engaging in adversarial administrative proceedings with Edison over the course of the last eight years. Edison's civil suit, as a losing litigant seeking a rematch after defeat, raises the exact issues that led the United States Supreme Court to discuss the doctrine of administrative res judicata with approval.

1 The Supreme Court of Mississippi in *Davis v. Attorney Gen.*, 935 So.2d 856 (2006)
2 applied administrative res judicata in a tax case that while obviously involving different state
3 statutes, bears a remarkable similarity to the current case. In *Davis* a taxpayer sought the
4 refund of income taxes erroneously paid. After losing before the Mississippi State Tax
5 Commission, the taxpayer paid the taxes and did not appeal the final order of the Tax
6 Commission. *Id.* at 857. Two years later, the taxpayer sought a refund of the taxes from the
7 Department of Finance and Administration under a separate statutory process for refund.
8 When his claim was denied, taxpayer filed a Complaint with the Chancery Court. *Id.* The
9 Chancery Court found that "because the taxes were affirmed by the final Order of the Tax
10 Commission . . . he was 'without authority to review the findings of [the Tax Commission] or to
11 find the assessment to be erroneous.'" *Id.* at 860. In considering the operation of the two
12 statutes, the Mississippi Supreme Court concludes that:

13 The Tax Commission fully considered the issue and entered a
14 determination against Appellants under Section 27-7-73. When
15 Appellants chose not to appeal the Tax Commission's
16 determination and paid the tax, finality attached under Section 27-
17 7-73. As the doctrines of res judicata and collateral estoppel apply
18 to administrative decisions, the finality of Section 27-7-73 judicially
19 forecloses the Appellants from now utilizing Section 27-7-73-1. . . To
20 hold otherwise would effectively strip Sections 27-7-71, and-73 of
21 the force they were legislatively created to possess and make a
22 mockery of the time-honored principles of res judicata and collateral
23 estoppel.

19 *Id.* at 864 (citations omitted).

20 While the *Davis* case may differ in some respects to the current case, the underlying
21 principal applies. That principal is that once a litigant has received the benefit of a full and fair
22 hearing on the merits in an administrative proceeding that has become final, the litigant must
23 be barred from pursuing a refund under some other statutory scheme. Allowing Edison to go
24 forward anew with a civil suit would render meaningless the entire administrative process
25 engaged in by the Commission.

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1 2. EDISON DOES NOT DISPUTE THAT THE DEPARTMENT HAS SATISFIED THE
2 FACTORS INCLUDING A FINAL JUDGMENT ON THE MERITS FOR THE
APPLICATION OF ADMINISTRATIVE RES JUDICATA.

3 While Edison argues that administrative res judicata should not apply in this case, it
4 does not argue that the factors required for the application of administrative res judicata are
5 not met. The Nevada Supreme Court in *Britton* identifies three factors that are pertinent to the
6 application of administrative res judicata. *Britton v. City of N. Las Vegas*, 106 Nev. 690, 692-
7 693, 799 P.2d 568, 569-570 (1990). The factors are "(1) whether the issue decided in the prior
8 adjudication was identical to the issue presented in the action in question; (2) whether there
9 was a final judgment on the merits; and (3) whether the party against whom the judgment is
10 asserted was a party, or in privity with a party to the prior adjudication." *Id.*

11 Courts in applying administrative res judicata frequently analyze the second factor,
12 whether there was a final judgment on the merits. The United States Supreme Court in
13 *Astoria* referred to whether the state agency "resolves disputed issues of fact properly before
14 it which the parties have had an adequate opportunity to litigate..." *Astoria* at 107. For a
15 decision of an administrative agency to have preclusive effect by either claim preclusion or
16 issue preclusion the agency must have conducted adjudicatory proceedings. Administrative
17 res judicata applies when an "agency has conducted a trial-type hearing, made findings, and
18 applied the law." *State of N. Dakota v. JFK Raingutters*, 733 N.W.2d 248, 255 (2007).

19 In an earlier United States Supreme Court case, the Court discussed the importance of
20 administrative res judicata when an administrative agency resolves issues of fact. *United*
21 *States v. Utah Constr. and Mining Co.*, 384 U.S. 394, 422 (1966). The Court wrote:

22 When an administrative agency is acting in a judicial capacity and
23 resolved disputed issues of fact properly before it which the parties
24 have had an adequate opportunity to litigate, the courts have not
25 hesitated to apply res judicata to enforce repose. . . In the present
26 case the board was acting in a judicial capacity when it considered
27 the . . . claims, the factual disputes resolved were clearly relevant to
28 issues properly before it, and both parties had a full and fair
opportunity to argue their version of the facts and an opportunity to
seek court review of any adverse findings. There is, therefore,
neither need nor justification for a second evidentiary hearing on
these matters already resolved as between these two parties.

Id. (citations omitted).

1 Edison in its Opposition does not suggest that administrative res judicata should not
2 apply in this case because the administrative procedure before the Commission was summary
3 in nature or that it did not have the opportunity to fully litigate the issues that it wished to raise.
4 The Decision of the Commission attached as Exhibit 2 to the Amended Complaint
5 demonstrates that hearings were held and factual findings were made by the Commission. As
6 stated by the United States Supreme Court in *Utah Constr. and Mining Co.* there is no need or
7 justification for giving Edison a second evidentiary hearing on matters that have already been
8 fully and finally litigated between Edison and the Department in the lengthy administrative
9 process conducted by the Commission.

10 3. NRS 372.680 WOULD NOT BE RENDERED MEANINGLESS BY APPLICATION OF
11 ADMINISTRATIVE RES JUDICATA.

12 Edison argues that administrative res judicata cannot apply because it would render
13 NRS 372.680 meaningless as there would be no instance where a civil action could be filed
14 that would not be precluded by administrative res judicata. Edison presumes that
15 administrative res judicata would apply to all decisions by the Commission and since a
16 decision by the Commission is a condition to filing an action under NRS 372.680, an action
17 could never be brought. This is not true. Decisions by the Commission that were not final
18 decisions **on the merits** would not have the preclusive effects of administrative res judicata.
19 Other states have also found that cases that are decided with a summary disposition are
20 generally subject to de novo review by district court limited to whether issues of law were
21 properly decided. See *Briggs Tax Service, LLC v. Detroit Pub. Sch.*, 282 Mich.App. 29, 33,
22 761 N.W.2d 816, 819 (2008).

23 An example of a decision by the Commission that would not be a final decision on the
24 merits of a claim for refund would be if Edison made a request for refund on a number of
25 factual claims and the Commission summarily denied the request without an evidentiary
26 hearing on the factual claims based on a legal issue such as statute of limitations. In such a
27 case, Edison would not have the opportunity to fully litigate the factual claims it made. Edison
28 could then file a Complaint pursuant to NRS 372.680 within 90 days to challenge the final

1 decision by the Commission and include the factual claims made for refund. Even if no
2 petition for judicial review was filed and the Commission's decision became final, it would not
3 have a preclusive effect on Edison's factual claims that were not fully and fairly litigated on the
4 merits before the Commission.

5 Similarly a claim for refund that comes before the Commission based on a stipulation of
6 facts, such as the *Sparks Nugget* case referred to by Edison can be brought as a civil action
7 pursuant to NRS 372.680. When there is a stipulation of fact the decision of the Commission
8 is purely a matter of law with no finding of fact. Even if the decision of the Commission is final
9 and no petition for judicial review is filed, a court is unlikely to apply administrative res judicata
10 when the case does not involve an agency's findings of fact, but only its conclusions of law
11 which are often subject to de novo review.

12 So it is true, as then Senior Deputy Attorney General Azevedo stated in his testimony
13 to the Senate Committee on Taxation on March 23, 1999 that "in almost every instance the
14 sequence would be hearing officer, the tax commission, and, if it went to a court, it would be
15 pursuant to NRS chapter 233B in the form of a petition for judicial review." Though this may
16 be the case in "almost every instance" there remain instances when a complaint for refund
17 could be brought pursuant to NRS 372.680.

18 The current case is not one of those cases. This case was not a summary disposition.
19 This case was not dismissed by the Commission based on a procedural irregularity. This
20 case was fully and fairly litigated on the facts. The Commission acting in its area of expertise
21 weighed the evidence, took testimony and made findings of fact and conclusions of law.
22 Because no petition for judicial review has been filed, the Commission's decision is final and
23 precludes Edison's civil suit.

24 4. NRS CHAPTER 233B SUPPLEMENTS AND IS NOT PRE-EMPTED BY NRS 372.680.

25 There is nothing in the language of NRS 372.680 indicating that it pre-empts the
26 application of NRS Chapter 233B. When NRS 372.680 was amended in 1999 the legislature
27 had the opportunity to include language that after a final decision by the Commission an
28 aggrieved taxpayer had the right to file a civil suit de novo in lieu of a petition for judicial

1 review. Instead it changed the statute so that the action could only be filed after a decision by
2 the Commission, not based on a decision by the Department¹, and brought the venue
3 provisions in line with the provisions in NRS Chapter 233B.

4 The practical effect of the change from a decision by the Department to a decision by
5 the Commission is that it ensures that in most cases a request for refund will be heard in an
6 administrative proceeding subject to NRS Chapter 233B. The Commission acts as an
7 appellant body reviewing the decisions of the Department or its agents. NRS 360.245(1)(a).
8 NRS 360.245(5) provides that "[a] decision of the Nevada Tax Commission is a final decision
9 for the purposes of judicial review."

10 Edison cites the language in NRS 233B.020(2) which states that the "provisions of this
11 chapter are intended to supplement statutes applicable to specific agencies." Edison artfully
12 only cites to a portion of the second sentence of the statute to suggest that NRS Chapter
13 233B does not abrogate the application of NRS 372.680. Actually the entire second sentence
14 reads: "This chapter does not abrogate or limit additional requirements imposed on **such**
15 **agencies** by statute or otherwise recognized by law." (emphasis on portion of the statute
16 omitted by Edison). The statute refers to additional requirements on agencies in passing
17 regulations or conducting contested cases included in agency statutes. When read as a
18 whole NRS 233B.020, when applied to NRS 372.680, stands for the proposition that NRS
19 Chapter 233B is supplemental to NRS 372.680.

20 Edison argues that NRS 372.680 is more specific and should pre-empt the judicial
21 review provisions of NRS Chapter 233B which Edison characterizes as more general. The
22 APA was enacted to "establish minimum procedural requirements for...adjudication procedure
23 of all agencies of the Executive Department of State Government and for judicial review of
24 both functions..." NRS 233B.020(1). NRS 233B.121 et. seq. sets out the minimum procedure
25 that the Department and the Commission are required to follow in the adjudication of all cases
26 brought before them. NRS 233B.125 sets out the specific requirements for a final decision by
27 the Commission. A final decision must include findings of fact and conclusions of law and be

28 ¹ As will be more fully discussed below, this change distinguishes this case from the *Saveway v. Cafferata*, 104
Nev. 402, 760 P.2d 127 case cited by Edison in its opposition.

1 supported by substantial evidence. NRS 233B.125. NRS 233B.130 sets out the procedure
2 for filing a petition for judicial review. NRS 233B.131-140 provides very specific details
3 regarding procedure before district court, transmittal of the record, briefing schedule, standard
4 of review. Of particular importance in this case, NRS 233B.135(1)(b) confines the judicial
5 action to a review of the record before the agency. Finally, 233B.150 provides a party
6 aggrieved by the District Court decision the right to appeal to the Nevada Supreme Court.

7 NRS Chapter 360 and the regulations in NRS Chapter 360 provide further detail
8 regarding adjudicatory proceedings before the Commission that are consistent with the
9 provisions of NRS Chapter 233B. Specifically NRS 360.245 describes the appeal process of
10 Department decisions before the Commission. It also includes the information that the
11 decision of the Commission is final for purposes of judicial review. NRS 360.245(5).

12 When Edison was the prevailing party in the Order of the Commission that was voided
13 by the Nevada Supreme Court and Clark County and City of Henderson were aggrieved by
14 the Commission decision, Clark County and City of Henderson appropriately filed a Petition
15 for Judicial Review which included Edison as a party to the proceeding. Yet Edison argues
16 that when they are an aggrieved party, NRS 233B no longer applies and they are allowed to
17 commence a civil action de novo and exclude Clark County and City of Henderson from the
18 suit. Edison can not pick and choose when and how NRS Chapter 233B applies to
19 adjudicatory proceedings before the Commission. It either applies or it does not apply.

20 Both the Department and the Commission fall within the definition of "agency" provided
21 in NRS 233B.031. NRS 233B.039 sets out not only the agencies that are completely exempt
22 from the application of NRS Chapter 233B, but also more specifically agencies whose special
23 statutory provisions prevail over the more general provisions of NRS Chapter 233B. See NRS
24 233B.039(3). The carve-out does not include any statutory provisions applicable to the
25 Department or the Commission. The legislature could have easily included NRS 372.680 and
26 the Commission's decisions regarding tax refunds in the list specifically exempt from the
27 application of judicial review pursuant to NRS Chapter 233B, but the legislature did not do so.
28 The Commission is not exempt from NRS Chapter 233B therefore NRS Chapter 233B applies

1 to the Commission and its decisions.

2 The procedure for appealing the Department's decision to deny Edison request for
3 refund is detailed and specific and supplemented by the provisions of NRS Chapter 233B.
4 NRS Chapter 233B provides very detailed rules for judicial action available to a party
5 aggrieved by the decision of an agency of the Executive Department of the State Government.
6 In comparison the availability of "an action against the Department" provided in NRS 372.680
7 is devoid of specific details regarding the nature of the action. NRS 372.680 also provides
8 that action must be based "on the grounds set forth in the claim..." This requirement is
9 consistent with NRS 233B.135(1)(b) which confines judicial review to the record below.

10 There is nothing to suggest NRS 372.680 is intended to be a more specific statute that
11 pre-empts NRS Chapter 233B. As discussed above, there are applications for NRS Chapter
12 233B and NRS 372.680. They are not conflicting and they are not mutually exclusive. It is not
13 an either/or proposition. As specifically intended by the legislature, NRS Chapter 233B
14 supplements NRS 372.680.

15 5. THE SAVEDAY CASE CITED BY EDISON DID NOT INCLUDE THE TYPE OF
16 ADMINISTRATIVE PROCEDURE THAT EDISON WAS A PARTY TO BEFORE THE
COMMISSION.

17 Edison argues that *Saveday v. Cafferata*, 104 Nev. 402, 760 P.2d 127(1988) stands for
18 the proposition that taxpayer's claims for refund are not governed by NRS Chapter 233B. The
19 problem with Edison's argument is that the facts in *Saveday* are easily distinguishable from
20 the facts in this case and the Nevada Supreme Court came to a conclusion in *Saveday* that
21 supports the application of NRS Chapter 233B to the current case.

22 The statute analyzed in *Saveday* is NRS 365.460.² At the time of the decision NRS
23 365.460 read as follows:

24 After payment of any excise tax under protest duly verified, served
25 on the department, and setting forth the grounds of objection to the
26 legality of the excise tax, the dealer paying the excise tax may bring
an action against the state treasurer in the district court in and for
Carson City for the recovery of the excise tax so paid under protest.

27 *Saveday* at 404, 128.

28 ² At the time of the Court's decision in 1988, the fuel tax at issue here was administered by the Department.
Today the fuel tax is administered by the Department of Motor Vehicles.

1 There are notable differences between NRS 365.460 and NRS 372.680. Pursuant to
2 NRS 365.460 a taxpayer can bring an action after paying the tax under protest without any
3 further administrative proceeding. Additionally the action the taxpayer can bring pursuant to
4 NRS 365.460 is not against an administrative body, but against the state treasurer in an
5 independent action for restitution for the return of money wrongfully held. *Id.*

6 There is no requirement to exhaust administrative remedies in NRS 365.460. This is in
7 contrast to NRS 372.680 which requires a taxpayer to obtain a final decision from the
8 Commission. Only after exhausting its appeals before the Commission can the taxpayer bring
9 an action under NRS 372.680.

10 This is the specific change that was made to NRS 372.680 in 1999, from a decision by
11 the Department to a decision by the Commission, that brought NRS 372.680 under the
12 purview of NRS Chapter 233B. By making that change it was ensured that there would be the
13 opportunity for an evidentiary hearing, findings of facts and conclusions of law and the
14 opportunity for review by the Commission prior to a decision becoming final. With the change
15 the legislature limited the scope of NRS 372.680. When the statute allowed an action against
16 the Department after a decision by the Department and not the Commission, it was more like
17 the statute at issue in NRS 365.460 where there is no administrative proceeding.

18 No administrative procedures are required before filing an action under NRS 365.460.
19 The Court in *Saveway* thought this was an important distinction. The Court wrote:

20 We conclude that the district court erred in applying standards of
21 judicial review properly applied to **appeals** from administrative
22 decisions. NRS 365.460 states that the taxpayer may bring the
23 action to recover taxes illegally assessed.

24 *Id.* (emphasis in the original).

25 NRS 372.680 does not indicate that a taxpayer can bring an action to recover taxes
26 illegally assessed. It specifically states that the action is to be filed after a final decision by the
27 Commission. The action is not against the state treasurer for holding money rightfully
28 belonging to the taxpayer.

///

1 The Court in *Saveway* indicated that "authority from other jurisdictions supports
2 *Saveway's* contention that the statute gives the taxpayer a right to bring an independent
3 action for restitution." *Id.* While that may have been the case in 1988 a review of recent case
4 law indicates that judicial review is the common standard in other states for resolving tax
5 refund cases coming to district court from an administrative body. A recent decision by the
6 Court of Appeals of North Carolina is particularly on point. *In the Matter of the Denial of NC*
7 *Idea's Refund of Sales and Use Tax*, 2009 WL 10458893 (N.C.App.)(April 21, 2009). The
8 Court of Appeals held that the Tax Review Board was not subject to pure de novo review.
9 The Court of Appeals wrote:

10 According to well-established law, it is the responsibility of the
11 administrative body, not the reviewing court, 'to determine the
12 weight and sufficiency of the evidence and the credibility of the
witnesses, to draw inferences from the facts, and to appraise
conflicting and circumstantial evidence.

13 *Id.* at 4. See also *Comptroller of the Treasury v. J/Port, Inc.*, 184 Md.App. 608, ___, 967 A.2d
14 253, 261 (2009); *Comptroller of the Treasury v. Science Applications International*, 405 Md.
15 185, 192-193, 950 A.2d 766, 770 (2008); *Posner v. Comptroller of the Treasury*, 180 Md.App.
16 379, 383-384, 951 A.2d 112, 115 (2008); *Briggs Tax Service, LLC v. Detroit Pub. Sch.*, 282
17 Mich.App. 29, 33, 761 N.W.2d 816, 819 (2008); *Ins. Co. of the State of PA*, 269 S.W.3d 32,
18 34; *In the Matter of the Sales Tax Claim For Refund Of the Home Depot v. Oklahoma Tax*
19 *Comm'n*, 198 P.3d 902, 903 (2008); *Becton, Dickson and Co. v. Nebraska Dep't of Revenue*,
20 276 Neb. 640, 645, 756 N.W.2d 280,285 (2008); *The Goodyear Tire & Rubber Co. v. State of*
21 *Nebraska*, 275 Neb. 594, 598-599, 748 N.W.2d 42, 47 (2008); *TD Banknorth, N.A. v. Dep't of*
22 *Taxes*, 967 A.2d 1148, 1157-1158 (2008); *US Xpress Leasing, Inc. v. The Dep't of Revenue*,
23 385 Ill.App.3d 378, 380-381, 894 N.E.2d 890, 892, 323 Ill.Dec. 864, 866 (2008); *Sioux Falls*
24 *Shopping News, Inc. v. Dep't of Revenue and Regulation*, 749 N.W.2d 522, 524 (2008).

25 Judicial review is routinely applied to tax refund cases across the United States.
26 *Saveway* involves a procedure for refund that does not require an exhaustion of administrative
27 remedies and permits a plaintiff to go straight to court. *Saveway* does not stand for the
28 proposition that NRS 372.680 precludes application of NRS Chapter 233B when there has

1 been an administrative proceeding or that administrative res judicata cannot be applied to a
2 subsequent civil suit. As noted above, the *Saveway* court indicated judicial review would be
3 appropriate in an appeal from an administrative decision. *Saveway* at 404, 128.

4 CONCLUSION

5 Edison participated in complex and lengthy administrative proceedings during which it
6 had the opportunity to present evidence and legal argument on its requests for refund. Edison
7 made its arguments before an administrative hearing officer. Edison made its arguments
8 before the Commission. When Edison prevailed before the Commission, Clark County and
9 City of Henderson filed a petition for judicial review of the Commission's decision. When that
10 decision was voided by the Nevada Supreme Court, Edison had a new opportunity to present
11 witnesses, file briefs and to argue its case before the Commission. In the end, Edison did not
12 prevail. Having lost in the administrative proceeding, Edison is asking to begin anew in a civil
13 action. The doctrine of administrative res judicata as discussed by Justice Souter in the
14 *Astoria* was created to apply to this exact circumstance.

15 Allowing Edison to go forward with its civil suit renders many hours of arguments,
16 reams of briefs, difficult deliberation and decision making by the Commission and NRS
17 Chapter 233B utterly meaningless. It would render the doctrines of administrative res
18 judicata, claim preclusion and issue preclusion utterly meaningless. This is not a case like
19 *Saveway* where the taxpayer did not have recourse to an administrative remedy. This was
20 not a case of summary disposition. Edison's claims were fully and fairly litigated before the

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Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

1 Commission. There is neither need nor justification for a second evidentiary hearing on
2 Edison's claims. We respectfully request that this Court grant the Motion to Dismiss.

3 Respectfully submitted this 15th day of May, 2009.

4 CATHERINE CORTEZ MASTO
5 Attorney General

6 By: AC. Session
7 GINA C. SESSION
8 Chief Deputy Attorney General
9 Nevada State Bar No. 5493
10 100 N. Carson Street
11 Carson City, Nevada 89701-4717
12 (775) 684-1207

13 Attorneys for State of Nevada
14 Department of Taxation

15 **AFFIRMATION**
16 **(Pursuant to NRS 239B.030)**

17 The undersigned does hereby affirm that the Motion to Dismiss filed April 20th, 2009,
18 and the preceding Reply to Opposition to Motion to Dismiss, filed herewith, in District Court
19 Case No. 09 OC 00016 1B does not contain the social security number of any person.

20 Dated this 15th day of May, 2009.

21 CATHERINE CORTEZ MASTO
22 Attorney General

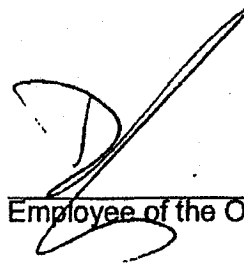
23 By: AC. Session
24 GINA C. SESSION
25 Chief Deputy Attorney General
26 Nevada State Bar No. 5493
27 100 N. Carson Street
28 Carson City, Nevada 89701-4717
(775) 684-1207

Attorneys for State of Nevada
Department of Taxation

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General,
and that on this 15th day of May, 2009, I served a copy of the foregoing REPLY TO
OPPOSITION TO MOTION TO DISMISS, by mailing a true copy to the following:

Norman J. Azevedo, Esq.
510 W. Fourth Street
Carson City, Nevada 89703



Employee of the Office of the Attorney General

1 CASE NO. 09 OC 00016 1B

2 DEPT. NO. 1

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5

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR CARSON CITY

8 SOUTHERN CALIFORNIA EDISON, TRANSCRIPT OF PROCEEDINGS
Plaintiff,

9

Hearing

vs.

10

June 16, 2009

11 THE STATE OF NEVADA, EX REL
DEPARTMENT OF TAXATION,
Defendant.

12

13

THE HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE PRESIDING

14

APPEARANCES

15

16 ON BEHALF OF THE PLAINTIFF: CHARLES C. READ
Attorney at Law

17

18 NORMAN J. AZEVEDO
Attorney at Law

19

20 ON BEHALF OF THE DEFENDANT: GINA C. SESSION
Chief Deputy Attorney General

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-o0o-

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24

25 REPORTED BY: Julietta Forbes, CCR #105, Official Reporter

1 CARSON CITY, NEVADA, TUESDAY, JUNE 16, 2009, 1:30 P.M.

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3
4 THE COURT: Please be seated.

5 This is Case No. 09 0C 00 -- 00016 1B, Southern
6 California Edison versus the State of Nevada, ex rel
7 Department of Taxation.

8 Ms. Session? Is that correct?

9 MS. SESSION: Yes. Yes.

10 THE COURT: And for the Southern California Edison,
11 we have Charles Churchill Read? Is that correct?

12 MR. READ: Yes, Your Honor. Good morning -- or
13 good afternoon.

14 THE COURT: And Norm Azevedo.

15 MR. AZEVEDO: Good morning -- good afternoon, Your
16 Honor.

17 THE COURT: We're here today in respect to a motion
18 to dismiss filed by the State of Nevada Department of
19 Taxation.

20 Are you ready to proceed, Ms. Session?

21 MS. SESSION: Yes, I am, Your Honor.

22 THE COURT: Go ahead.

23 MS. SESSION: Your Honor, if I were to boil this
24 case down to one concept, one important concept, it would be
25 the concept that a litigant is not entitled to a second

1 evidentiary hearing or proceeding. And this is a consistent
2 concept, whether you're talking about cases res judicata,
3 administrative res judicata, the tax refund cases that I've
4 cited to in my brief; they've all come to the same
5 conclusion, that if you've had an administrative trial and a
6 full evidentiary hearing and a final decision, that you're
7 not entitled to then begin again on a civil complaint.

8 And if there's one case that I would choose out of
9 the cases that I've cited that is on point, it would be the
10 first *Campbell* decision by the Nevada Supreme Court. The
11 big question that we're wrestling with in this case is the
12 interplay between NRS 372.680 and NRS Chapter 233B.

13 THE COURT: Well, if I was to follow your analysis
14 in this particular case, I wouldn't give any weight at all
15 to NRS 372.680 at all. I'd just have to totally ignore
16 that, yet it's on the books. Right?

17 MS. SESSION: Right. That's right. And there were
18 some changes made to that statute that certainly limited its
19 application. I wouldn't say it eliminated its application,
20 but it certainly limited it.

21 THE COURT: But didn't the *Campbell* case also
22 indicate -- and I, maybe I'm referring to one of the
23 *Campbell* cases -- but it went on to indicate, even though
24 they were -- brought suit under that particular statute, and
25 the statute in question was 372.680 --

1 MS. SESSION: Uh-huh.

2 THE COURT: -- that the court still said, "No. I'm
3 going to go ahead and allow them the right of judicial
4 review" in respect to the decision that was rendered.

5 MS. SESSION: They -- the court did take that --
6 and I -- I would have to point out that that's kind of an
7 unusual step for a court to take. But it indicates how
8 strongly the court felt that once you had an administrative
9 proceeding, that your proper remedy was judicial review.
10 They felt so strong, and they, in fact, said that, "You
11 don't get a second evidentiary proceeding. We'll convert
12 your action and let you go forward on a petition for
13 judicial review, but you don't get a new civil action, after
14 having already gone through the administrative proceeding."

15 And -- and so I think they clearly came down on the
16 side of Chapter 233B as being the applicable law in -- in a
17 tax refund case with 372.680. And I -- I think that that's
18 binding authority by the Supreme Court on how those chapters
19 are -- are supposed to be read together.

20 THE COURT: What about the argument made by the
21 plaintiffs, Southern California Edison, that under the
22 *Sparks Nugget, Inc.*, case, a fairly recent case in the
23 Nevada Supreme Court? Basically, in that particular case,
24 you are allowed to -- they're allowed to go ahead and file a
25 complaint under that, provisions of 372.680, and there was

1 no motion to dismiss or no -- nothing filed --

2 MS. SESSION: Right.

3 THE COURT: -- by the Department of Taxation in
4 that case. They went ahead and allowed that case to proceed
5 under that basis.

6 MS. SESSION: And -- and, you know, different
7 times, different attorneys. I wasn't the attorney at that
8 time. Perhaps I would have attempted that argument. I
9 don't think it would have been successful in *Sparks Nugget*,
10 or in any case where there's some kind of summary decision,
11 summary denial of the refund, where there hasn't been a full
12 evidentiary hearing.

13 You know, I've kind of -- I've brought the record
14 below with me today, just as a, kind of demonstrative
15 evidence of, you know, we didn't stipulate to facts. Facts
16 were entered into the record, witnesses were heard for [sic]
17 and evaluated by the Tax Commission, who sits as the
18 professionals, or the experts in the area.

19 And in *Sparks Nugget*, we had a stipulation of
20 facts, and it was kind of a fast track to the courts to make
21 a determination on legal issues. And I think, certainly, a
22 court can look at legal issues de novo, but when you've had
23 a full evidentiary hearing --

24 THE COURT: Isn't that --

25 MS. SESSION: There's no court that says you get to

1 start over again if you lose the first time.

2 THE COURT: What -- in this particular case, what
3 if the Court goes ahead and denies your motion to dismiss?
4 How does the Court, then, make a determination in regards to
5 what standard applies in regards to the review of the case?
6 In other words, that -- that's a little different issue.

7 MS. SESSION: Yes.

8 THE COURT: And by that, I'm saying either you have
9 a trial de novo, as argued by Southern California Edison, or
10 you come back under the judicial review statute, as argued
11 by you, in respect to the standard. Basically reading,
12 essentially, NRS 233B in conjunction with Chapter 372 gets
13 you back to -- even though maybe they didn't use the right
14 vehicle to get back in front of this Court, but at least
15 they're entitled to a review of that particular decision
16 made by the Department of Taxation, under their final
17 decision.

18 MS. SESSION: And I think if I follow your
19 question, you're asking me whether this could be converted
20 to a petition for judicial review.

21 THE COURT: That's essentially what I'm implying --

22 MS. SESSION: Yes.

23 THE COURT: -- to some extent.

24 MS. SESSION: And that's certainly what the court
25 decided to do with --

1 THE COURT: In *Campbell*.

2 MS. SESSION: With *Campbell*. There's different
3 facts here, though, that complicate that matter. We -- you
4 know, I'll start with the -- the *Came* -- and I don't know if
5 I'm pronouncing that correctly -- the *Came* case, that said
6 if you don't file a petition -- an appeal within the time,
7 that is jurisdictional, and that your -- the time for filing
8 it ends.

9 THE COURT: But wasn't there a complaint filed
10 within the 30 days, in respect to a petition for judicial
11 review? And --

12 MS. SESSION: Yes.

13 THE COURT: -- I'm wondering whether or not the
14 plaintiffs were kind of testing the waters, so to speak --

15 MS. SESSION: They, you know --

16 THE COURT: -- to determine which route to go under
17 in respect to that particular -- whether or not I would
18 allow a trial de novo, or would I, basically, treat it as a
19 petition for a judicial review?

20 MS. SESSION: Well, kind of a risky task, I
21 would -- I would venture. But one of the problems -- one of
22 the distinctions between this case and the *Campbell* case is
23 that we had other parties below. In the administrative
24 proceeding, the State was not the only party. There were
25 intervenors: the City of Henderson, Clark County, and

1 neither of those parties have been served with anything or
2 gotten any kind of notice. For them, the time has passed.
3 The decision of the Tax Commission is final, something they
4 could rely on, make economic budget decisions based on that,
5 because it's final. The time's passed for a petition, and
6 they haven't been served. And I --

7 THE COURT: Isn't there some confusion in this
8 case, to some extent? Because back in 2003 or '4, whenever
9 the first decision was entered, then it was re -- went up to
10 the Supreme Court, went back down. The Tax Commission, in
11 the first decision, made a decision in favor of Southern
12 California Edison in respect to the refunds. And then when
13 it came back from the Supreme Court, based upon the Open
14 Meeting Law issue, to some extent, then it was --

15 MS. SESSION: Voided.

16 THE COURT: -- voided, and the Commission came out
17 with a new decision. And I presume, maybe there were new
18 members on the Commission at that time, or maybe things had
19 changed, and it's just kind of an interesting aspect.

20 MS. SESSION: It is certainly an interesting
21 aspect, and all aspects that could be thoroughly explored on
22 judicial review.

23 And I think the -- you know, we have the -- we had
24 other parties that were in both. And -- and interesting
25 that you should bring that up. When the first decision went

1 against the Department of Taxation, and the Tax Commission
2 said there should be a refund, what was the remedy for Clark
3 County and the City of Henderson? They filed a petition for
4 judicial review.

5 And so I would venture that that's become part of
6 the law of the case as well, that once there was a final
7 decision, that that was a -- something that was --

8 THE COURT: But --

9 MS. SESSION: -- subject to judicial review.

10 THE COURT: But that, isn't that, the reason for
11 that is because NRS 372.680 doesn't allow the Tax Commission
12 to go file a separate cause of action, does it?

13 MS. SESSION: The Tax -- no, it doesn't allow the
14 Tax Commission, it doesn't allow the other entity, municipal
15 entity, City of Henderson, Clark County --

16 THE COURT: Anybody to file. It only allows
17 whoever paid the tax under protest, so to speak.

18 MS. SESSION: Right.

19 THE COURT: They're the ones that are allowed
20 that --

21 MS. SESSION: Right.

22 THE COURT: -- specific cause of action.

23 MS. SESSION: And the term "tax under protest,"
24 really, is an interesting term here, too, because we don't
25 really have a tax paid under protest.

1 THE COURT: This is long term.

2 MS. SESSION: This was voluntarily -- voluntarily
3 paid by Southern California Edison, and then a petition for
4 refund, after they had voluntarily paid the tax, which is
5 another distinguishing factor from *Campbell*, where there was
6 a circumstance where the tax hadn't been paid. There had
7 been direction by the Department of Taxation to the taxpayer
8 that they may want to pay the tax, which kind of limited how
9 they could go forward, at that point, which is why the court
10 was -- tended to want to convert this.

11 THE COURT: You know, there -- there are three
12 claims indicated in reference to this particular matter.
13 The Tax Commission, to the best of my knowledge, reviewing
14 the record and everything else, has only ruled on one of the
15 claims. Is that correct?

16 MS. SESSION: Right. And the -- that is kind of
17 the part of the, again, part of the sort of twisted or
18 turning history of the case.

19 The -- I -- we called them Claim Set 1, Claim Set
20 2, Claim Set 3.

21 THE COURT: Three.

22 MS. SESSION: Claim Set 1 has always been a part of
23 the case. Interestingly enough, there was the
24 administrative proceeding on Claim Set 1, and then when
25 Southern Cal Edison prevailed, they wrote the order for the

1 Tax Commission and included Claim Set 2 in that order. Then
2 that decision was voided, and Southern Cal Edison came back
3 before the Tax Commission, and in their opening brief on
4 that second administrative hearing, they set out which
5 claims were before the Tax Commission, and it was only tax
6 claim, or Claim Set 1 that was in their brief that they said
7 that they were going back before the Commission on.

8 And so the final decision, the one, the final
9 decision of the Tax Commission clearly states that it's --
10 refers to Claim Set 1.

11 THE COURT: And your essential argument here is the
12 motion to dismiss should be, basically, granted, primarily
13 from the standpoint that they failed to file for judicial
14 review in respect to the final decision rendered; and, as a
15 result of that, they're barred, then, essentially, from
16 basically proceeding under NRS 372.680, it not being -- not
17 being the proper procedure, based upon the legislative
18 history that I read. It appears to me Mr. Azevedo --

19 MS. SESSION: Azevedo. .

20 THE COURT: Azevedo was --

21 MS. SESSION: Yeah, he appeared to be very
22 knowledgeable about it, you know, as far as the application
23 of 233B.

24 THE COURT: He made an argument, though -- I
25 believe that argument was made that only dealt with the

1 venue in respect to that, those arguments, and it didn't
2 deal with the actual merits in regards to the case.

3 MS. SESSION: Well, I -- I think the documents
4 speak for themselves, and -- and I think that certainly
5 Mr. Azevedo is going to have an explanation for that today
6 that might not be consistent with what he was saying at the
7 time.

8 THE COURT: Okay.

9 MS. SESSION: I'm trying to think if there's -- you
10 know, I just --

11 THE COURT: Well, I have a way of asking questions,
12 because I've read pretty much most of the briefs and --

13 MS. SESSION: Which I -- I appreciate very much,
14 Your Honor.

15 THE COURT: So --

16 MS. SESSION: It's evident that you're very well
17 versed on all of the ins and outs of this kind of
18 interesting case.

19 THE COURT: Well, I think it's a -- it is a very
20 interesting case from an administrative law standpoint, and
21 the true aspects of what is the real implications of
22 NRS 372.680. If -- if you follow your argument, again, I'm
23 back to the premise that I give it no meaning, and --

24 MS. SESSION: Well --

25 THE COURT: -- I don't think it's up to this Court

1 not to give any meaning to a --

2 MS. SESSION: Right. But I think in my reply
3 brief, I gave you some -- some applications for it.

4 Certainly, if we -- you have some summary decision,
5 where there hasn't been an evidentiary proceeding -- which
6 is certainly not this case -- but if there -- if there were
7 something that came before the Tax Commission, they denied
8 it without having any kind of evidentiary proceeding, then
9 you wouldn't have administrative res judicata. You'd have a
10 final decision, but it wouldn't have the preclusive effect
11 that you had litigated, actually litigated the issues. In
12 this case, we've litigated the issues up one side and down
13 the other, made factual findings.

14 But there are -- *Sparks Nugget* is a case, and that
15 *Saveway* case that is cited in Edison's brief is a
16 circumstance where you can pay under protest and then go
17 straight to District Court. And here, if you had some kind
18 of summary denial, I think you could go straight to District
19 Court and have a -- a first-time hearing on evidence.

20 THE COURT: Don't we have to presume that the
21 Legislature, essentially, has full knowledge of the existing
22 statutes related to the same topic, and that you have to,
23 basically, read them all? And I -- it's a term called "in
24 pari materia," so you give essential effect to all of them?
25 And if I --

1 MS. SESSION: Right.

2 THE COURT: -- if I don't, then I think there's an
3 issue, I'm not following the legislative intent, then?

4 MS. SESSION: Yeah, I think you -- I think 233B
5 says they're a supplement to the statutes that are in
6 existence.

7 THE COURT: Well, you cited to that.

8 MS. SESSION: Yeah.

9 THE COURT: And I thought that was a -- that was
10 NRS 233B(1) -- 233B.020(2).

11 MS. SESSION: Yeah. And then, also, as I pointed
12 out, and I'm sure that you read, 039, I believe -- 233B,
13 yeah, 039 --

14 THE COURT: Well, you also cite the --

15 MS. SESSION: -- is the applicability where they
16 carve out things, decisions by state agencies that are not
17 subject to certain parts of 233B. And, certainly, the
18 Legislature could have carved out the Department of
19 Taxation, in its entirety, or the decisions by the
20 Commission, or even, they have pretty specific special
21 provisions that they've carved out. They could have carved
22 out 372.680 as not -- as being --

23 THE COURT: Subject.

24 MS. SESSION: -- subject to.

25 And, also, when those changes were made, you know,

1 I think there is some ambiguity in 372.680. It just says
2 "action." It doesn't say appellate action, it doesn't say
3 de novo action. It doesn't clarify what kind of action you
4 can file. So...

5 THE COURT: Anything further?

6 MS. SESSION: I think -- I think I've made --
7 you've helped me make all the points that I wish to make.

8 I'd just, in conclusion, I would just say that a
9 failure to recognize 233B in this case would -- you know,
10 we've talked a lot about rendering 372.680 meaningless, but
11 to say they get a trial de novo would make this record
12 behind me, the efforts of the Tax Commission, eight years of
13 litigation meaningless; we'd have to start all over again.
14 And -- and I don't think that's what the Legislature
15 intended either, and certainly not what the court in
16 *Campbell* decided.

17 And if the case were to go that way, I think you
18 would end up with a lot of refund cases, where the Tax
19 Commission would -- would make some kind of summary
20 decision, and you'd have the entire administrative, or
21 evidentiary proceeding before the courts, as opposed to the
22 Tax Commission that's set up to -- to hear those cases.

23 So, we're asking that this complaint be dismissed.
24 And I would just like to reserve some time to respond as to
25 the arguments they have.

1 THE COURT: You may. I'll give you additional
2 time. Thank you.

3 MS. SESSION: Thank you very much, Your Honor.

4 THE COURT: Mr. Read.

5 MR. READ: Thank you, Your Honor.

6 I appreciate the -- your questions. It gives me
7 some guidance on the issues I want to be sure I cover,
8 including, particularly, the *Campbell* decision; although,
9 there are a couple of preliminary items before that that I'd
10 like to -- to note.

11 And, of course, Mr. Azevedo, while I'll handle the
12 argument, he is available to answer any questions that you
13 may have regarding his 1999 statements and his current
14 affidavit.

15 I think as Your Honor has clearly indicated,
16 section 372.680 is on the books. It hasn't been repealed.
17 Its provisions under which we filed for a direct action in
18 this court remain in effect. And, indeed, section
19 372.680(2) is -- is an imperative to a taxpayer in a refund
20 denial situation, which is our case, that if you fail to
21 bring the action, pursuant to 680, on the time specified,
22 that's a waiver of any demand against the State regarding
23 these overpayments.

24 I am utterly certain that had we brought a 233B
25 action, as the State -- as the Department is now suggesting,

1 that we'd be here on a motion to dismiss because we had
2 waived our 680 requirements.

3 THE COURT: Well, what -- what about NRS 360.245,
4 sub (5), which says, "A decision of the Nevada Tax
5 Commission is a final decision for purpose of judicial
6 review"? Doesn't that contemplate, clearly, that under
7 those provisions, that it will go forward on a judicial
8 review process?

9 MR. READ: I think that what that section indicates
10 is that from -- for the administrative process, that
11 decision by the Tax Commission is a final decision within
12 the administrative process. Once that process is concluded,
13 the -- the question is, then: What is the judicial remedy
14 that is thereafter available to the taxpayer?

15 And I think at that point, you take a look at the
16 statute, the specific statute that is clearly applicable --
17 nothing the Department has said suggests it's not -- and
18 that is 372.680. And that does provide that, in the
19 language indicated, that we are to file a complaint against
20 the Department, not a petition for judicial review. Those
21 are not the -- those are not the words in the statute. And
22 that is a proceeding that then is undertaken in this court.

23 THE COURT: But then, again, aren't we rendering
24 NRS 360.245(5) meaningless to -- I'm taking the other
25 side --

1 MR. READ: Sure.

2 THE COURT: -- of the argument now, and the other
3 side of the argument, to me, is that somehow I have to read
4 all these statutes together to come up with some meaning to
5 give to all of them.

6 And NRS 233B.020(2) says, "The provisions of this
7 chapter are intended to supplement statutes applicable to
8 specific agencies." Nothing precludes that from being
9 applicable to the Nevada Department of Taxation, does it?
10 Or Tax Commission, excuse me.

11 MR. READ: It -- I think the 233B, in general, is
12 applicable. It is not the Department of Tax -- of Taxation
13 is not exempt from it altogether. But 233B.020(2) says that
14 the provisions of this chapter are intended to supplement
15 the statutes that are applicable to specific agencies, and
16 not to abrogate or limit other requirements.

17 And I think that, clearly, 372.680 is the specific
18 statute that is applicable to the agency. And you can read
19 them together. I do not believe, and it's not Edison's
20 position, that there is an inherent conflict in any respect
21 between 233B and its provisions and the right of a taxpayer,
22 clearly provided for by the Legislature, to provide for a
23 direct complaint to be heard in this court.

24 And the -- this does not mean that the proceedings
25 below, and the impressive record, paper that Ms. Session has

1 been kind enough to -- to bring this afternoon, are to be
2 ignored in any respect. We are -- we will urge the Court,
3 certainly, to review and have available to -- to it the
4 record below. We are anxious for the Court to look at the
5 peculiarity, where the Tax Commission can make
6 determinations of fact and law on the identical record, yet
7 come out in one case to give us the refund, and in the
8 second case, on the very same record, no change of facts or
9 circumstances or law, deny it.

10 The vast majority of this paper are our exhibits.

11 THE COURT: But the --

12 MR. READ: We have no reason not to have those in
13 front of this Court as well.

14 THE COURT: But --

15 MR. READ: We are not anxious to have a proceeding
16 that repeats things that have gone on before it.

17 THE COURT: But then that doesn't -- doesn't that
18 beg the issue of whether or not -- are you indicating and
19 submitting that it is a substantial evidence review that
20 this Court does, then, in respect to that record? Or, are
21 you indicating you're entitled to a trial de novo?

22 MR. READ: No, I -- it is a trial de novo, and I
23 think there is clear support for that and guidance on that
24 point from the Nevada Supreme Court. It is not a
25 substantial evidence review, and that is the distinction,

1 and that is the reason why we are proceeding under the
2 statute that we are entitled and, indeed, under -- under
3 372.680(2) we are required to file. If we want our money
4 back, we are required to file under this statute.

5 If I may, I would note that the -- the Department's
6 argument that the -- the amendment of 680 -- I mean this is
7 where the Department started out was, it's S.B. 362, back in
8 1999, somehow writes section 372.680 out of the statute
9 books.

10 All that -- all that amendment did was two things:
11 One, it expanded the venue in which a 372.680 action, direct
12 action, could be filed, expanding it beyond Carson City to
13 the residency or place of business of the taxpayer, or the
14 location of the substantial proceedings below.

15 The second thing it did, in S.B. 362, was to insert
16 the proceedings before the Tax Commission in the case of a
17 refund proceeding. Prior to this time, the taxpayer was
18 free to file the direct action in the District Court,
19 immediately after the denial of the refund claim by a member
20 of the Department.

21 The 362 inserted the administrative process of the
22 Tax Commission making a determination, offering a hearing
23 and a written decision on the facts and the law. But it did
24 not, the Legislature did not touch the language I've
25 referred you to in 680 that provides for the right, after

1 the Commission, now, has completed its work in the
2 administrative process, to bring an action against the
3 Department on the grounds set forth in the claim. And that
4 language was untouched. There's no ambiguity created by
5 362. It simply adds an additional step in the process that
6 includes the Tax Commission.

7 THE COURT: Well, I don't -- I buy your argument,
8 to some extent, that you can file an action under 372.680,
9 provided you've done it within the time period. But I --
10 I'm still trying to figure out what standard applies in
11 review.

12 MR. READ: Yes.

13 THE COURT: And to me, that's the ultimate issue in
14 respect to this, because I don't -- I don't intend,
15 necessarily, to grant the motion to dismiss. I -- and I'm
16 kind of telling you what I'm probably going to do.

17 MR. READ: Right.

18 THE COURT: Because I believe I have to read those
19 statutes, again, in pari materia and give effect to all the
20 statutes, and have -- essentially, have everything have
21 meaning.

22 But I think that under the *Campbell* case, I think
23 that the standard that you have to -- that I have to review
24 this thing is, essentially, the substantial evidence
25 standard under a petition for judicial review. And I -- and

1 I'm relying on the *Campbell* case.

2 MR. READ: Okay. Let me go directly to address the
3 *Campbell* case, along with another companion case of
4 consequence on exactly that point, and that's the *Saveway*
5 decision.

6 With respect to *Campbell*, first of all, and I think
7 it's important to understand the -- the procedural history
8 in that case, which was relatively unique -- first of all,
9 the *Campbell* -- the *Campbell* case dealt with a tax
10 deficiency finding. It was not a tax refund case. In the
11 proceedings, or in the applicable statutes for the -- the --
12 that would apply to a tax deficiency, the -- the process for
13 judicial remedy, after completion of the administrative
14 process, was a -- to file a petition for judicial review
15 under 233B. That was the appropriate procedure in that
16 case.

17 This, of course, is not that case. This is a
18 refund case, and the statutory scheme for a refund case
19 simply is different. The Campbells went ahead with that
20 approach, under the -- the deficiency procedures, and they
21 had, as was -- as was applicable to a tax deficiency case,
22 they had a hearing within the tax department, as provided
23 for.

24 Then, after that determination went against them,
25 the Attorney General's Office provided some faulty advice to

1 the Campbells and their attorney, and suggested that what
2 they ought to do, at that point, was to pay the tax that was
3 in dispute and proceed thereafter under the -- under section
4 372.680.

5 Now, that was incorrect advice. This was a
6 deficiency case. They should have proceeded to the District
7 Court by filing a petition for review. They did not. They
8 went ahead and filed the -- the six -- the action, a direct
9 action. And the -- the Supreme Court, at that point, when
10 it came up to the Supreme Court, the high court indicated,
11 quite clearly, that the Campbells were not entitled to a --
12 a direct action or a trial de novo in the District Court.
13 They were entitled only to a -- a review of their -- the
14 adverse decision under the judicial review standards. And
15 they indicated that while that -- there was an argument that
16 because now the Campbells had proceeded under 680, they
17 were -- essentially, they had lost; that was not
18 appropriate, and there was -- and they were out of time for
19 a petition for judicial review. That would not be fair,
20 because they had been, essentially, led down the wrong path
21 by the -- by the Attorney General.

22 So, what the Court said was, to the Campbells, "You
23 will get the judicial remedy you're entitled to as a
24 taxpayer in a deficiency case. You will get, in the
25 District Court, a review of the agency action, under the

1 terms and approach of a petition for judicial review.
2 That's what you're entitled to." That's what they got.
3 There is nothing inconsistent about the Campbell case and
4 where we are. We are in a different factual statutory
5 position.

6 THE COURT: But, again -- and, again, I'm back to
7 NRS 360.245, sub (5), which says, "A decision of the Nevada
8 Tax Commission is a final decision for the purpose of
9 judicial review."

10 Why would that -- why would the Legislature have
11 used the -- that specific language "for purposes of judicial
12 review"? Because that's a word of art, obviously, under the
13 Administrative Procedures Act. And -- and if I have to give
14 that specific statute some credence in regards to reviewing
15 all these things, doesn't that indicate that that's what --
16 what they intended, was there would be a review, not a trial
17 de novo, not a -- a new particular, whole hearing on the
18 issue, but to go back, review the record on what
19 transpired -- transpired in this particular case and come up
20 with a determination?

21 MR. READ: Well, I think that the -- the broad term
22 of "judicial review," without -- you know, you need to have
23 some more elaboration on what that term would mean, and
24 further guidance from the Supreme Court, or from the
25 Legislature. And I think I can provide that to Your Honor,

1 that -- that a judicial -- for purposes of judicial review,
2 that can mean a trial de novo, if there are other clear
3 specifications that that's what the Legislature intended.

4 Now, let me address, in that regard, because I
5 think it -- it answers your question, the Saveway decision.
6 Now, the Saveway decision is one where the taxpayer was
7 proceeding. This -- this case involved a -- NRS 365.460,
8 which deals with appeals from a determination of fuel tax
9 liability, a different statute, admittedly, but directly
10 comparable, because it provides for a direct action. It --
11 it is, in that sense, perfectly on all fours with section
12 680. It requires the taxpayer to pay the tax and bring a
13 direct action, in that case, against the State Treasurer.

14 Nevertheless, in Saveway, the taxpayer, for who
15 knows what reasons, went ahead and brought a petition for
16 judicial review, citing 233B.130. In fact, that taxpayer
17 did exactly what Ms. Session says we should have done.
18 We -- we had a statute that said a direct action. The
19 taxpayer ignored that in that case -- unlike Edison -- and
20 went ahead with a 233B action.

21 The Supreme Court dismissed that as an appropriate
22 action, saying that the specified statutory remedy must be
23 followed. You must file a direct action.

24 And now we come to the point that I think answers
25 Your Honor's question about scope, scope and standard of

1 review.

2 Furthermore, later on, in *Saveway*, when the -- the
3 taxpayer followed the directions of the Supreme Court and
4 brought a direct action in the District Court, the District
5 Court announced that it was going to apply the substantial
6 evidence test; in other words, the -- the standard of -- the
7 limited standard of review that Your Honor is questioning as
8 to whether or not it should be applied here, and the
9 taxpayer appealed.

10 The Supreme Court clarified again, to the District
11 Court this time, saying, "No. The statute says it is a
12 direct action." And that means that the statute means what
13 it says, that a direct action, under that language, which is
14 identical to ours, is to mean a trial de novo. That's --
15 that's the language in the decision of the *Saveway* case.

16 Furthermore, on the question of what standard the
17 Legislature intended when it adopted the direct action
18 language of section 372.680, I would refer you to the
19 material that we submitted yesterday, in terms of the source
20 of the language here in Nevada. And that is, that it -- it
21 clearly comes from, and that's the -- acknowledged in the
22 1971 Nevada AG Opinion -- it comes from the California
23 Revenue and Tax Code for sales and use tax. It was adopted
24 by this state in 1955.

25 And the Attorney General's Opinion notes that when

1 one state adopts a sales and use tax piece of legislation
2 from another, the Legislature can be presumed to make that
3 adoption in light of the construction of the statute that
4 exists at the time.

5 Well, at that time, in 1955, the California courts
6 had already addressed exactly the question Your Honor is
7 posing in the *Marchica* decision, which held -- that's 107
8 Cal.App.2d 501, at 513, with the very same language that we
9 see in section 680, that it says that, in California, that
10 this language, the direct action language provides for a
11 hearing de novo.

12 Now, I agree that there are questions, when we get
13 to the actual trial before Your Honor, a direct action, a
14 trial de novo, there are practical questions, which we're
15 ready and anxious to address. In fact, we've attempted to
16 engage the Attorney General's Office on this question, to
17 prepare in an intelligent, expedited, efficient fashion for
18 the trial in -- before Your Honor.

19 There are questions that exist. How -- how would
20 this proceed in a fashion that -- that gives full effect to
21 the fact of a trial de novo, but does not ignore, throw out,
22 or brush aside the proceedings below? And we think that
23 it's clear that there are opportunities for efficiencies
24 here, but that the state Legislature, it clearly provided
25 that a taxpayer in this situation is entitled to a trial de

1 novo.

2 And there are many other examples in the Nevada
3 statutes where a -- an action is allowed to be brought
4 against the Department, even after the Tax Commission holds
5 hearings. And those include NRS 363A.190, on refunds of tax
6 on financial institutions; 363B.180, claims for refunds of
7 business tax; and NRS 368A.330, claims for refund of a tax
8 on live entertainment. So, there are -- there are numerous
9 examples where the Legislature has provided for a direct
10 action, and that means a trial de novo.

11 There are, by the way, a variety of states, in
12 addition to California, which, of course, has the exact
13 language and source of the Nevada language -- there are, in
14 addition, a number of states that provide for exactly the
15 relief we're seeking, indicating here, a de novo proceeding,
16 even though you've already had an administrative proceeding.

17 And the practical answer is that the Legislature, I
18 submit, understood that it was appropriate to give a
19 taxpayer an opportunity for the full presentation of his
20 case, law and facts, in front of the independent tribunal
21 represented by this Court, even though the taxpayer had
22 already presented a -- a -- his case in front of the Tax
23 Commission, which is an agency who specifically is charged
24 with focusing on the collection of revenue. It is not the
25 same tribunal, and there is nothing inappropriate or

1 illogical about permitting the trial de novo.

2 But we are prepared to put forward the efficiencies
3 and the way in which the standard of review and the other
4 details that could -- could govern, should govern this Court
5 in an efficient fashion and give full understanding to, and
6 effect to the statutory language, and, indeed, the
7 instructions from the Nevada Supreme Court, that a direct
8 action means a trial de novo.

9 Let me add just a couple of things that, again,
10 focus on the trial de novo as -- as the standard, and that
11 is, that we brought before Your Honor's attention, at the
12 time we requested the oral argument, the -- a diagram of
13 Nevada's tax judicial remedies that appears in the B & A
14 publication that is widely used by tax practitioners, and is
15 originally based on input from the state agencies
16 themselves. And you can see in that diagram, that on the
17 left-hand side, under the schematic that is related to a
18 refund claim, which is where we are, that the action is
19 filed in the Carson City District Court. Now, of course,
20 that venue has been expanded. But the District Court
21 conducts a de novo trial, limited, however, to the issues
22 raised in the refund claim, which, of course, is what we are
23 about here.

24 So, I -- I grant you that it's important to
25 recognize the -- the way in which a de novo trial need not

1 ignore or throw out the proceedings below, but it is the
2 taxpayer's right to have Your Honor apply your independent
3 judgment -- that's the key in a de novo proceeding, your
4 independent judgment to the law and the facts. And, in
5 particular, in our situation, to the facts. There are
6 factual disputes in this, in this proceeding, that this --
7 that Edison, as the taxpayer, is entitled to your
8 unfettered, original interpretation, evaluation and
9 judgment, and that is critical.

10 I think Your Honor is correct, has indicated -- and
11 Ms. Session's comeback, is very -- is, I think, weak, that
12 her -- her approach simply reads 372.680 out of the statute
13 books. Her suggestion that it's really limited to cases
14 where there is some kind of truncation of the proceedings
15 below is itself an admission that those, those proceedings
16 would themselves be a violation of 233B, which does apply to
17 govern the fairness and completeness of the -- of the
18 actions at the administrative level.

19 And, again, I come back to the fact that 372.680 is
20 the specific language, where 233B is general language.

21 I think that since I don't get a further
22 opportunity, I'll just make note of the fact that the
23 arguments about res judicata and collateral estoppel simply
24 don't apply. We are not at a final decision for purposes of
25 those doctrines, and that would simply throw us out of court

1 altogether.

2 THE COURT: Well, the Court doesn't intend to do
3 that, so you don't need to make any further argument on
4 that.

5 I -- to me, the toughest decision in this
6 particular case is -- is not necessarily before me right
7 now, and that's what standard --

8 MR. READ: Yes.

9 THE COURT: -- really, I will apply in regards to a
10 review in regards to this case. And I am having difficulty,
11 based upon trying to read the statutes and give them all
12 effect.

13 And, additionally, the *Campbell* case is -- the
14 Supreme Court very clearly indicate that we do not have --
15 they didn't, the Campbells didn't have a right to a second
16 evidentiary hearing. And the Supreme Court kind of clearly
17 implies that the purpose, even if I look at allowing you to
18 proceed, which I -- I'm going to do, that -- that you don't
19 get another, fully, evidentiary hearing.

20 Now, whether or not that means what kind of
21 standard do I review this under, I'm not sure, because,
22 again, you're making the argument, essentially, that it's
23 not a substantial evidence review. And even though you
24 don't get another evidentiary hearing, but at least the
25 Court should make an independent review in respect to all

1 the facts and all, everything provided, and I think that's
2 your argument, to a large extent.

3 MR. READ: That is correct.

4 I think that you are also -- I agree with Your
5 Honor that the issue of exactly what standard you apply and
6 how to apply it to various aspects of the case that will be
7 before you is not -- is not the question today. The
8 Department simply wants us out of here.

9 Well, all right. If you are going to deny that, as
10 you've indicated, and is absolutely correct, we will then, I
11 think, face the issues in a more specific fashion, and we
12 can brief them, or otherwise, perhaps, resolve them amicably
13 with the Department; we're certainly prepared to try to do
14 that, and bring to Your Honor only the remaining
15 questions -- and there probably are some that deserve to be
16 focused -- briefed by the parties and decided. And I agree,
17 those are -- those are open questions, and I'm only asking,
18 on that point, that you recognize they are open questions,
19 and that we have a position that varies from the Department,
20 and Your Honor has questions that we should address.

21 So, with that, I think, you know, while -- while we
22 think that we have been badly treated by the Department with
23 respect to this kind of effort, after our going ahead with
24 a -- the -- you know, inquiring of the Department what it
25 thought was the proper scope of this proceeding, and getting

1 no indication that it felt that, in Ms. Session's own
2 letter, indicating that while there may be issues with
3 respect to Claim Set 1, 2, and 3, she -- she herself, in
4 correspondence, indicated that at least as to Claim Set 1,
5 372.680 was the perfectly appropriate statute under which we
6 were proceeding. Now, she turns around and comes back at us
7 with this effort to throw us out.

8 But I -- I think that since Your Honor's indicated,
9 you know, where you're going on that, I'm not going to take
10 more time. But I do, you know, respectfully ask that you
11 keep an open mind with respect to the nature of the standard
12 of review and the details of how we proceed, and we'll
13 certainly be prepared to work with the Department and bring
14 up only those issues we can't resolve amicably.

15 Thank you very much.

16 THE COURT: Thank you, Mr. Read.

17 Ms. Session?

18 MS. SESSION: Thank you, Your Honor.

19 You know, I would like to note at the outset that
20 there were a lot of post-briefing filings with this Court
21 that I did not have the opportunity to -- some of them that
22 I didn't have the opportunity to review, and so I may not be
23 as prepared as I could be to respond to.

24 THE COURT: And that's fine. The Court understood
25 that. And, primarily, what they did file, I have some

1 additional authorities. I think they -- I looked through
2 them, and to a large extent, they weren't dispositive in
3 respect to what I felt in respect to this.

4 I -- I truly believe that I have to, again, read
5 all statutes to give them all meaning and effect, and if I
6 don't, then, to some extent, I'm -- I'm superseding what the
7 Legislature did or did not intend. And sometimes I'm not
8 sure what the Legislature intended.

9 MS. SESSION: Certainly.

10 THE COURT: Clearly understood. But I think it's a
11 factor in this particular case.

12 And, again, I think my intent here, more than
13 anything, and I've sort of conveyed it, is that I'm not
14 going to grant the motion to dismiss. And then the issue
15 before the Court is, to me, which is the toughest issue, and
16 I -- it's not before me today, totally, and I'm going to
17 allow everybody to opportunity to really brief it --

18 MS. SESSION: Uh-huh.

19 THE COURT: -- probably, to more extent, is what
20 kind of hearing do we have? What standards do I really
21 apply in respect to the decision? Because those are really
22 kind of a key issue in this case, because as we know under
23 the Administrative Procedure Act, the substantial evidence
24 rule is -- kind of gives a fair, a more meaningful
25 determination to an administrative agency if the decision --

1 MS. SESSION: That's --

2 THE COURT: -- was made on their basis, because I
3 can't supplement my decision for that of the agency, under
4 that particular standard.

5 MS. SESSION: That's correct.

6 THE COURT: But if, in fact, it is a de novo kind
7 of a hearing, and I -- and I did read the *Saveway* case in
8 respect to that, and the court kind of implies that it --
9 although I know there's some arguments on -- on whether it
10 really applies in this case. And --

11 MS. SESSION: I did have some comments on that
12 *Saveway* case.

13 THE COURT: I'd like to hear that.

14 MS. SESSION: Okay.

15 I think that the *Saveway* case, it took place before
16 the *Campbell* case and before the change in 1999 to 372.680.
17 And in *Saveway*, it was -- it was more akin to what 680 was
18 before it was amended, in that you had the ability to -- to
19 pay under protest and then go straight to court without an
20 administrative proceeding.

21 And I think what the Court is saying in *Saveway* is,
22 you don't have -- you don't have judicial review if you
23 didn't have an administrative proceeding. And so I think --

24 THE COURT: See, I think your strongest argument is
25 the *Campbell* case, which --

1 MS. SESSION: Absolutely. It came after Saveway.
2 And if they thought that Saveway said you -- you always got
3 a direct action, and you didn't get 233B administrative
4 review, then they wouldn't have converted *Campbell*.

5 THE COURT: Well, then, we're, what we're doing is
6 we're essentially saying, to a large extent, forget --
7 whatever happened in the administrative proceedings --

8 MS. SESSION: Forget it, yeah.

9 THE COURT: -- before, forget whatever happened,
10 come up here, and it doesn't matter, and you can proceed de
11 novo and that.

12 So, I am going to keep an open mind in respect to
13 that issue. I -- to me, that's the heart and soul of this
14 particular case, to a large extent. And I can see why, to a
15 large extent -- you know, I used to do litigation -- why
16 Southern California Edison chose the path they chose rather
17 than a petition for judicial review.

18 MS. SESSION: Well, certainly. They'd love to
19 litigate it all again. You know, they --

20 THE COURT: Absolutely. It doesn't take --

21 MS. SESSION: It didn't come out the way they
22 wanted the first time, so...

23 THE COURT: It doesn't take a rocket scientist to
24 figure out, you know, procedurally, what they were doing,
25 and it's kind of a -- kind of a nice way to try to do it.

1 But I also think they were clever enough to file within the
2 30-day period for a judicial review. And I don't know if
3 that was intentional or not intentional, but it was
4 tactically, I think, that somebody made some good decisions
5 in respect to that.

6 But I do believe that's the main issue, and so I'm
7 not going to really focus on that today, because I -- I
8 think I'd rather you, both parties, when we get down the
9 road, and the parties can stipulate or come to some
10 procedure where the Court can fully review this matter.

11 I certainly don't know about having a full
12 evidentiary hearing in respect to coal, and coal being
13 converted to -- put with water and transferred and whatever
14 the determinations are, but if I have to, I'm more than
15 prepared to do that.

16 MS. SESSION: Well, and -- and the one question
17 that I raise -- all of that raises for me is: What about
18 Clark County? What about City of Henderson? They're almost
19 the real parties in interest, because it's their money that
20 would have to go back to Southern --

21 THE COURT: Well, I think they probably are real
22 parties in interest in this particular case. And I think,
23 you know, that's another motion somebody could file in
24 respect to this particular case, the failure to join
25 indispensable parties, I guess, under the Nevada Rules of

1 Civil Procedure. I'm not giving anybody ideas or --

2 MS. SESSION: Yeah.

3 THE COURT: -- making any determination in respect
4 to that. But, obviously, I think if they have significant
5 interests and that...

6 But, again, when we get to the major hearing and
7 what we do in this particular case, I think, to me, the real
8 true issue is going to be, is the standard that I do apply,
9 have to apply. And, again, I -- I've looked at, and I think
10 good arguments are made on both sides, but -- and I haven't
11 made a determination. But I -- I -- to me, the language in
12 NRS 360.245(5) is very interesting, because why would they
13 use those words of art in that --

14 MS. SESSION: The final decision. And,
15 interestingly enough, as you'll note, that when they made
16 the change to 372.680 -- and this is where all that
17 judicial, or that legislative history comes in -- they said
18 that they -- that they changed it from a final decision by
19 the Department to a final decision by the Commission,
20 specifically so there would be, that it would come under
21 233B. There would be a final decision that would be subject
22 to 233B, be subject to 233B review. That's exactly why they
23 made that change. And it is another way that it
24 distinguishes it from Saveway.

25 THE COURT: Well, I've looked at both arguments.

1 MS. SESSION: All right.

2 THE COURT: And, again, I think those are the
3 interesting issues in respect to that. So, any further
4 comment on the motion to dismiss?

5 I don't believe it's applicable. I -- I just truly
6 don't. I have to give meaning. I think -- I understand
7 your argument, and I appreciate it, but I, if I follow your
8 argument, then I have to totally disregard NRS 372.680, and
9 I don't think that I can do that. I think I'm required to
10 at least indicate -- as I indicated, give the Legislature
11 their due in respect to the fact that they did intend, to
12 some extent, to not abrogate that particular provision. And
13 so that's kind of where I am.

14 MS. SESSION: All right. Well, and would you be --
15 could you certify that decision, if you did deny the motion
16 to dismiss?

17 THE COURT: You mean under 54?

18 MS. SESSION: Yes.

19 THE COURT: Allow you to go up on appeal?

20 MS. SESSION: If we decided to go that direction.

21 THE COURT: Well, I'm going to go ahead and -- you
22 can sit down, then.

23 MS. SESSION: Okay.

24 THE COURT: And I'll think about that.

25 MS. SESSION: Okay.

1 THE COURT: That's a nice question in respect to
2 that.

3 MS. SESSION: Thank you.

4 MR. READ: On that point, Your Honor, all we'd ask
5 for is the opportunity to, if -- if the Department is
6 seeking that, to -- to be able to reply before that goes
7 forward, because that's a huge delay potential.

8 THE COURT: It's a huge issue and a delay, and I
9 understand that.

10 MR. READ: We want to be heard on that. Thank you.

11 THE COURT: Essentially, it's going to be the
12 decision of this Court -- and, Mr. Read, you can draft the
13 decision for the Court. It doesn't have to be anything
14 extensive. But the Court's decision, primarily, is going to
15 be the motion to dismiss is denied.

16 The principal basis for it is, primarily, is that I
17 do have to read all laws and give them effect. I think I
18 have to presume that the Legislature presumed to have full
19 knowledge of the existing statutes related to the same
20 topic.

21 These statutes must be considered in pari materia,
22 and I have to give -- legal effect must be given to each
23 statute so it has some meaning and effect in regards to
24 that. And both statutes relate pretty much the same
25 decision, the final decision by the Tax Commission in

1 respect to that.

2 I am not going to make any decision, at this point
3 in time, in regards to what standard of review I will make
4 in this case. I think that's an issue that I need to
5 fully -- have full briefs on, and the parties -- give the
6 parties an opportunity in respect to do that.

7 I do believe, however, that there are -- it's a
8 very interesting argument, and I think there's strong points
9 on both sides. And I think -- again, I'm not going to lean
10 one way or the other at this point in time, but I do believe
11 that there were changes in the statute that kind of imply,
12 at least, that a judicial review was being made, to some
13 extent, in respect to that. But I'm keeping an open mind,
14 Mr. Read, in respect to that.

15 So, I -- as to the certification under NRCP 54, I
16 believe, I'm going to go ahead and allow you to go ahead and
17 make an application for that. I think Mr. Read's correct, I
18 think he should have an opportunity to respond in respect to
19 whether or not that's appropriate at this time or not.

20 MS. SESSION: Do -- is there a time period for
21 doing that, Your Honor?

22 THE COURT: You know, I'll have to take a look.
23 Take a look --

24 MS. SESSION: I will take a look.

25 THE COURT: Take a look at Rule 54 in respect to

1 that. I think it does indicate that there has to be some
2 kind of time period. But it wouldn't run until I sign
3 the --

4 MS. SESSION: Sign the order.

5 THE COURT: -- final determination in respect to
6 the motion to dismiss.

7 So, Mr. Read, go ahead and prepare that order. You
8 can provide it to Ms. Session, so she can review it.

9 MR. READ: Certainly.

10 THE COURT: We have a First Judicial District Court
11 rule that allows for that review, and I'll take a look at it
12 in respect to that.

13 And, again, thank you for your briefs. The
14 arguments -- I hope I didn't ask too many questions of you.

15 MS. SESSION: That's great.

16 THE COURT: Because I do read it, and I do kind of
17 understand the issues in respect to that, and kind of looked
18 at it.

19 Again, and I'm going to say this again, because I
20 think the evidence -- to me, it's the standard that -- of
21 review that is the most interesting issue in this particular
22 case, and -- and I'm not sure where we go with that, yet.
23 And, hopefully, we'll get to the point where we make a
24 determination in respect to that.

25 So, thank you both for your time.

1 MS. SESSION: Thank you, Your Honor.
2 MR. AZEVEDO: Thank you, Your Honor.
3 MR. READ: Thank you, Your Honor.
4 THE COURT: Court will be in recess.
5 (Proceedings concluded.)
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1 STATE OF NEVADA)
2 : ss.
3 CARSON CITY)

4 I, JULIETTA FORBES, Official Reporter and Certified
5 Court Reporter, do hereby certify:

6 That I was present in court and took stenotype
7 notes of the proceedings had in the matter entitled herein,
8 and that I thereafter reduced the same into typewriting
9 through the use of computer-aided transcription;

10 That the foregoing transcript, consisting of pages
11 1 through 44, is a full, true and accurate transcription of
12 said proceedings had.

13 Dated this 17th day of June, 2009.

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17 _____
JULIETTA FORBES, CCR #105
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BEFORE THE NEVADA
TAX COMMISSION

In re:

SOUTHERN CALIFORNIA EDISON,

Petitioner.

Claim for Refund

BRIEF OF THE NEVADA DEPARTMENT
OF TAXATION

COMES NOW, the respondent, the Nevada Department of Taxation (the "Department"), through its counsel, Brian Sandoval, Attorney General, by his deputy, Gregory L. Zunino, Senior Deputy Attorney General, and submits the Department's Brief in Support of Denial of Claims for Refund filed by Southern California Edison ("Edison"). Given Edison's posture in this case, namely its submission of new claims not previously submitted in conjunction with its original claims, the Department is unable to agree to the filing of a joint pre-hearing statement.

I. ISSUES FOR CONSIDERATION

1) Is Edison's consumption of coal in Nevada exempt from taxation by virtue of NRS 372.185, NRS 372.270 and/or the Commerce Clause of the United States Constitution (the "Commerce Clause")?

2) If Edison's consumption of coal is not exempt from taxation, must Edison's remittances of use tax be credited, under NAC 372.055 and/or the Commerce Clause, by the amount of the Transaction Privilege Tax paid to Arizona?

3) Assuming that Edison's consumption of coal in Nevada is subject to use tax, should the following items be excluded from the measure of Edison's use tax liability, to wit:

(a) Taxes paid by Peabody to Arizona under the Transaction Privilege Tax;

(b) Fees paid by Peabody to the federal government under the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1997;

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(c) Such other fees, taxes and items as have been recently identified by Edison, including taxes paid by Peabody to the Navajo Nation and fees paid by Peabody for transporting the coal from Arizona to Nevada by way of the Black Mesa Pipeline.

4) Are the claims outlined in paragraphs 1 and 3(c) barred by the statute of limitations?
See NRS 372.635.

II. INTRODUCTION

A. Summary of Claim.

Edison operates a power plant in Clark County, where it consumes coal to produce electricity for transmission to Central and Southern California. Edison purchases the coal from Peabody Coal Company ("Peabody"), which extracts the coal in Arizona. When Peabody sells the coal to Edison, Peabody pays the Arizona Transaction Privilege Tax ("TPT"), codified at Title 42, Chapter 5 of the Arizona Revised Statutes (A.R.S.).¹ Edison incurred a contractual obligation to reimburse Peabody for the amount of the TPT remitted to Arizona.

Whereas Peabody extracts the coal in Arizona, Edison consumes the coal at its plant in Nevada. As Edison consumes the coal in Nevada, it remits sales/use tax to the Department. Between March of 1998 and December of 2000, Edison remitted more than \$23 million in tax in connection with its consumption of coal purchased from Peabody. See Exhibit A (Spread Sheet Summary of Claims).

B. Procedural History of Claim.

By letters dated April 6, 2001, June 26, 2001, October 25, 2001, December 5, 2001, June 26, 2002, November 6, 2002, and February 25, 2003, Edison submitted claims for refund covering, in total, the period from March of 1998 through December of 2000. See Tabs 6 and 7 (Binders Prepared by Mr. Azevedo on behalf of Edison). The claims were based upon "(1) [Edison's] inadvertent failure to claim credits against the use tax for sales tax legitimately paid for the same purchases of tangible personal property to another state, and

¹ As discussed below, the TPT is not comparable to Nevada's sales tax because the incidence of the Arizona Tax falls squarely upon the retailer rather than the consumer. See *Arizona Department of Revenue v. Robinson's Hardware*, 721 P.2d 137, 141 (Az. App. 1986). Consequently, the TPT is not complementary to Nevada's use tax.

(2) [Edison's] inadvertent failure to subtract United States taxes included in gross receipts subject to Nevada's use tax." See Tab 6, Letter of February 25, 2003 (emphasis added).

By letters dated December 17, 2002, December 30, 2002, and May 16, 2003, the Department denied Edison's claims for refund.² See Tab 9. On January 31, 2003, Edison submitted a document styled "Petition for Redetermination." See Tab 10. In that document, Edison raised for the first time the claim that Edison's consumption of coal was exempt from the imposition of Nevada's use tax. Although the Department had neither completed an audit nor issued a deficiency determination of any kind, the Department mistakenly referred the matter to a hearing before the Department's hearing officer, in accordance with Edison's request. See Tab 11 (Letters dated May 15 and 28, 2003). Thereafter, by letter dated July 2, 2003, the Department notified Edison that it had redirected the matter to the Nevada Tax Commission (the "Commission") for a final administrative determination of Edison's claims for refund.

Edison was initially represented in this matter by Paul Bancroft & Associates. By letter dated July 14, 2003, the Bancroft firm notified the Department that it would no longer be representing Edison in connection with its claims for refund. Also by letter dated July 14, 2003, Norman Azevedo, Esq., notified the Office of the Attorney General that he had undertaken the representation of Edison. In his letter, Mr. Azevedo questioned the process that the Department had initiated in order to resolve Edison's claim for refund. On behalf of the Department, the Office of the Attorney General responded with a letter dated July 17, 2003. The parties thereafter exchanged letters and e-mail correspondence regarding the scheduling and presentation of this matter to the Commission. All pertinent communications are attached hereto as Exhibit B.³

² The letters erroneously characterize the TPT as a "severance" tax.

³ This information may be relevant to the extent that it tends to rebut Edison's anticipated contention that the Department deliberately stalled the processing of the refund claim. It may also be relevant to the extent that it tends to rebut Edison's anticipated contention that the Department's counsel failed to provide adequate guidance concerning procedures. The Department, through staff and counsel, encouraged Edison on several occasions to file a brief in this matter. See Exhibit B.

1 During a meeting at the Department on November 14, 2003, and again in a letter dated
2 November 16, 2003, Edison, through counsel, continued to question the process that the
3 Department had initiated to resolve this matter. At the meeting, Mr. Azevedo indicated that
4 Edison would likely require an evidentiary hearing before the Commission, at which point
5 Edison would introduce documentary evidence that Edison had not previously submitted in
6 support of Edison's original claims for refund. See Tabs 1, 2, 3, 5, 15, 16 and 17. The Office
7 of the Attorney General received the new evidence on November 10, 2003.

8 The Bancroft firm previously submitted all of the documentation that the Department
9 requires in order to resolve Edison's original claims for refund. See Tabs 6 and 10. Edison's
10 additional documentation serves to raise new claims that are now barred by the statute of
11 limitations. See NRS 372.365. Edison seeks to characterize these new claims as
12 "amendments" or "revisions" to its original claims, presumably under the theory that the
13 purported "amendments" relate back to the dates of the original claims. See Tab 15.

14 As discussed below, the purported amendments do not relate back to the dates of
15 Edison's original claims. Consequently, to the extent that Edison's additional documentary
16 evidence raises new claims, it is irrelevant and should be disregarded. Edison's claims for
17 refund, as originally set forth in its letters dated April 6, 2001, June 26, 2001, October 25,
18 2001, December 5, 2001, June 26, 2002, November 6, 2002, and February 25, 2003, can
19 readily be resolved without an evidentiary hearing.⁴

20 C. The Statutory Process for Resolving Claims for Refund.

21 To initiate a claim for a refund, a taxpayer must submit a written claim stating "the
22 specific grounds upon which the claim is founded." NRS 372.645. The claim must be
23 accompanied by:

- 24 (a) A statement setting forth the amount of the claim;
25 (b) A statement setting forth all grounds upon which the claim is based;

26 ⁴ It is notable that the Commission recently reviewed IBM's refund claim without first
27 conducting formal evidentiary proceedings. In that case, as is contemplated by the applicable
28 statutes and regulations, the Department verified the applicable figures through its review of
the documentation submitted by IBM. The Commission remanded the matter not for
evidentiary proceedings, but for additional legal briefing concerning apportionment. IBM has
since indicated that it may not pursue the claim.

- (c) All evidence the claimant relied upon in determining the claim, including affidavits of any witnesses; and
(d) Any other information and documentation requested by the department."

NAC 360.480 (emphasis added).

Moreover, the taxpayer must submit the claim "within 3 years after the last day of the month following the close of the period for which the overpayment was made." NRS 372.365. Failure to file a claim within this 3-year period "constitutes a waiver of any demand against the state on account of overpayment." NRS 372.650. If after reviewing the claim the Department disallows the claim in whole or in part, the Department must serve the taxpayer with written notice of its determination. NRS 372.655. The taxpayer may then appeal the Department's determination to the Commission. NRS 360.245. If the Commission upholds the Department's determination, the taxpayer may file a law suit against the Department "on the grounds set forth in the claim. . . for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed." NRS 372.680.

The statutory process for resolving claims for refund does not specify an evidentiary hearing unless (a) the Department fails to mail notice of action on a claim within 6 months after the claim is filed, or (b) the claim arises in connection with a deficiency determination resulting from an audit. NRS 372.685 and NRS 360.360. Indeed, NAC 360.480 provides that the taxpayer must supply all relevant documentation, including "affidavits of any witnesses," when the taxpayer initially submits a claim for refund. Therefore, the Department would respectfully request that the Commission limit its review to the parties' legal arguments as applied to the facts developed by the Department in its review of the documentation supplied by the Bancroft firm, as filed in support of Edison's original claims for refund. See Exhibit A and Tab 6.

If Edison believes, following the Commission's review of this matter, that the administrative record is deficient in some respect, it may exercise its right to file a law suit against the Department under NRS 372.680. Unlike NRS 361.420, which addresses appeals from decisions of the State Board of Equalization, NRS 372.680 in now way purports to limit the district court's review to the administrative record on appeal. Consequently, Edison would have an opportunity before the district court to more fully develop the facts, if

1 appropriate. Since Edison just recently disclosed additional documentary evidence, it would
2 be unreasonable to require the Department to review the evidence at this late juncture -- even
3 if the evidence somehow relates to a claim that is not barred by the statute of limitations.

4 **D. Edison's New Claims are Barred by the Statute of Limitations.**

5 As noted above, Edison just recently disclosed documentary evidence not previously
6 submitted in connection with its original claims for refund. Most of the evidence appears to
7 relate to Edison's purported amendments to the original claims for refund. See Tab 15. More
8 specifically, it appears to relate to Edison's claim that state, local and/or tribal taxes, together
9 with transportation charges, must be excluded from the measure of Edison's use tax liability.

10 As previously noted, NRS 372.635 states that "[n]o refund may be allowed unless a
11 claim for it is filed with the department within 3 years after the last day of the month following
12 the close of the period for which the overpayment was made." NRS 372.650 further provides
13 that "[f]ailure to file a claim within the time prescribed in NRS 372.635 constitutes a waiver of
14 any demand against the state on account of overpayment."

15 Edison originally claimed no overpayment with respect to tax paid on transportation
16 charges, or tax imposed by state, local or tribal governments (other than the TPT). See Tabs
17 6 and 10. Likewise, Edison provided no documentation to substantiate that it had ever paid
18 tax on transportation charges, or that it had ever paid tax imposed by state, local or tribal
19 governments (other than the TPT). Edison claimed only that it had made an overpayment
20 with respect to alleged Arizona "sales tax" (i.e., the TPT), as well as certain taxes or fees
21 imposed by the federal government. Edison did not raise its exemption claim until January
22 31, 2003, which was well outside the 3-year period of limitations.

23 NRS 372.645 states that "[e]very claim must be in writing and must state the specific
24 grounds upon which the claim is founded." Unlike the Nevada Rules of Civil Procedure
25 (NRCP), NRS 372.645 is not based upon the concept of "notice pleading," which holds that a
26 civil complaint will suffice so long as it puts the opposing party on reasonable notice of the
27 potential claims against him. See, e.g., *Langevin v. York*, 111 Nev. 1481, 907 P.2d 981
28 (1985). To the contrary, NRS 372.645 requires that a taxpayer plead his claim for refund with

1 specificity. Consequently, NRS 372.645 in no way contemplates that an amendment or
2 revision may relate back to the date of the filing of the original claim. Edison's revisions
3 amount to a new claim, given that they were not set forth in the original claims.

4 Furthermore, even if the principles embodied in the NRCP are applied to this case by
5 analogy, Edison's so-called amendments may not relate back to the dates of the original
6 filings of its claims for refund. Under NRCP 15, an amendment to a civil complaint relates
7 back to the original filing of the complaint only "[i]f the original pleadings give fair notice of the
8 fact situation from which the new claim for liability arises." *Nelson v. City of Las Vegas*, 99
9 Nev. 548, 556, 665 P.2d 1141, 1146 (1983). In this case, Edison's original claims did not give
10 fair notice that Edison had accrued liability on transportation charges, or that it had accrued
11 liability on taxes other than those specifically mentioned in its original claims.

12 For example, transportation charges were never at issue in Edison's original claims for
13 refund. Edison's new claims for tax on transportation charges would indicate that perhaps
14 Peabody delivered the coal via the Black Mesa pipeline, within Nevada's borders. In other
15 words, Edison's new claim would indicate that there may be a question as to whether
16 Peabody retained title to the coal until it reached its destination. See NAC 372.101. If
17 Peabody did in fact retain title to the coal until it reached its destination, then Peabody, or its
18 agent or factor, should have paid sales tax in connection with the transaction, thereby
19 extinguishing Edison's use tax liability. See NRS 372.050(2) and NRS 372.345.

20 Edison's original claims, however, state unequivocally that Edison paid use tax to
21 Nevada, thus suggesting that Peabody delivered the coal to Edison within Arizona's borders.
22 See Tab 6. In short, Edison's supposed accrual of use tax on transportation charges conflicts
23 with assumptions about conventional business behavior. Assuming that Edison is a
24 reasonably sophisticated taxpayer, Edison's decision to accrue and remit tax on
25 transportation charges suggests that there is at least a question as to whether Peabody
26 delivered the coal to Edison in Nevada or Arizona.⁵

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28

⁵ It is probably reasonable to assume that Edison is a sophisticated taxpayer.

Of course, a question or debate concerning the point of delivery of the coal would have potentially undermined Edison's claim to credit for the alleged "sales tax" paid to Arizona. It would have defeated Edison's claim for credit because Arizona would have had no claim to sales tax on a retail sale occurring in Nevada. Apparently, Edison is now changing the theory of its case. In other words, Edison is relying upon its exemption argument to the exclusion of the credit argument, and merely inserting the claim for transportation charges as a fall-back position.

Edison must proceed with its original claim for credit under NAC 372.055, as unpersuasive as it may be.⁶ Edison is time-barred from pursuing its claim for an exemption. Likewise, Edison is time-barred from pursuing its claim for a reduction in the measure of the tax (except as it relates to certain taxes or fees imposed by the federal government).

III. ARGUMENT

A. The TPT Is not a Sales Tax.

The TPT is not a sales tax for the simple reason that it "is not a direct tax upon the goods [a vendor] sells." *Arizona Dep't of Revenue v. Robinson's Hardware*, 721 P.2d 137, 141 (A. App. 1986). "Rather, it is a tax directly and specifically on [the vendor] for the privilege of conducting business within the State of Arizona." *Id.* To refer to the TPT as a sales tax "confuses two dissimilar types of taxes, since the [Arizona courts] have repeatedly held that a transaction privilege tax is not a 'sales' tax." *Id.* at p. 141, footnote 2.

Under Arizona law, a privilege tax, such as the TPT, is considered to be "an exaction for the privilege of doing business." *Phoenix v. West Publishing Co.*, 712 P.2d 944, 947 (Az. App. 1985). "This is to be distinguished from a sales tax, which is generally added to the selling price and is borne by the consumer, with the vendor being made an agent of the taxing authority for purposes of collection. Also to be distinguished is a use tax which is complementary to the sales tax and is also borne by the consumer." *Id.* Nevada, unlike

⁶ Interestingly, in the Petition for Redetermination, Mr. Bancroft, on behalf of Edison, raised the exemption argument but failed to note the transportation charge issue. One suspects that this was a calculated decision on his part, given that he made the credit issue the focal point of the claim and presumably did not want to detract from his argument concerning the alleged payment of "sales tax" to Arizona. See Tab 10.

1 Arizona, imposes a sales tax upon retailers. The retailer has a statutory right to collect the tax
2 from the consumer. NRS 372.110. In Arizona, by contrast, the retailer may negotiate with
3 the customer for a contractual reimbursement of the tax, but the retailer possesses no
4 statutory right to collect the tax from the consumer.

5 Peabody has made such a contractual arrangement with Edison. However, Peabody
6 is statutorily obligated to pay the tax. As noted above, the tax is assessed against Peabody
7 directly and specifically for the privilege of conducting business in Arizona. *Robinson's*
8 *Hardware*, 721 P.2d at 141. The tax is not assessed against the underlying sales
9 transaction, as it is in Nevada. See *Worldcorp v. Department of Taxation*, 113 Nev. 1032,
10 1036, 944 P.2d 824 1997). Unlike the Nevada sales tax, the TPT has no complementary use
11 tax. See, e.g., *Nevada Tax Commission v. Nevada Cement Company*, 36 P.3d 418, 117 Nev.
12 Adv. Op. No. 79 (December, 2001)(holding that Nevada sales and use taxes are
13 complementary). Accordingly, Edison is not entitled to credit for having supposedly paid
14 Arizona sales tax. According to NAC 372.055, the credit is applicable only when an out-of-
15 state sale has been subject to sales tax in another state.

16 The rule embodied in NAC 372.055 is consistent with the U.S. Supreme Court's
17 interpretation of the Commerce Clause. In *Oklahoma Tax Commission v. Jefferson Lines*, the
18 Court recognized that "the Commerce Clause does not forbid the actual assessment of a
19 succession of taxes by different states on distinct events as the same tangible object flows
20 along." 514 U.S. 175, 187-188 (1995). In this case, Arizona imposes a tax upon Peabody for
21 the privilege of conducting business there, while Nevada imposes a tax upon Edison for the
22 act of consuming coal here. These are distinct events in the stream of commerce.
23 Accordingly, the Commerce Clause does not require that the Department provide a credit to
24 Edison for the amount of tax remitted by Peabody under the TPT.⁷

25
26
27 ⁷ Mr. Bancroft apparently recognized this flaw in Edison's original claim for credit when he
28 filed the "Petition for Redetermination." Subtly, Mr. Bancroft added the exemption claim. See
Tab 10. By adding the claim for tax on transportation charges (which raises a question as to
the point of delivery of the coal), Edison has further shifted the focus away from the claim for
credit.

1 B. The Measure of the Tax Includes the Amount of Taxes, Other Than Sales
2 Taxes, Imposed by Other Jurisdictions.

3 Fees and taxes paid by Edison under the Surface Mining Control & Reclamation Act of
4 1977 and the Black Lung Benefits Revenue Act of 1997 are not taxes "imposed by the United
5 States upon or with respect to retail sales." See NRS 372.025. Rather, they are fees and
6 taxes imposed upon the coal producer for the activity of producing coal. Neither the fee
7 imposed under the Surface Mining Control & Reclamation Act of 1977 (the "Reclamation
8 Fee"); nor the tax imposed under the Black Lung Benefits Revenue Act of 1997 (the "Black
9 Lung Tax"), possesses the characteristics of a tax on retail sales. See 26 U.S.C. § 4121
10 (attached as Exhibit C) and 30 U.S.C. § 1232 (attached as Exhibit D).

11 For example, the Reclamation Fee is characterized in the law as a fee, not a tax. 30
12 U.S.C. § 1232. The payment of the fee is required of "all operators of coal mining operations
13 subject to the provisions of [the Surface Mining Control & Reclamation Act]." *Id.* There is
14 nothing in the act to indicate that the imposition of the fee is in any way dependent upon the
15 level or stage at which the coal is sold. In other words, the Reclamation Fee is imposed upon
16 the mining operator regardless of whether the mining operator sells the coal for resale or at
17 retail. See *id.* Likewise, the Black Lung Tax is imposed upon the coal producer regardless of
18 whether the coal producer sells the coal for resale or at retail. See 26 U.S.C. § 4121. This is
19 evidenced by IRS Revenue Ruling 79-119, which addresses the computation of the tax in
20 connection with a sale for resale. See Exhibit E. Consequently, both the Reclamation Fee
21 and the Black Lung Tax must be included within the measure of the tax assessed against
22 Edison.

23 NRS 372.025 defines "gross receipts" for purposes of the sales tax. The term is
24 significant because the sales tax is imposed upon the "gross receipts of any retailer from the
25 sale of tangible personal property sold at retail in this state on or after July 1, 1955." NRS
26 372.105. Consequently, the "gross receipts" constitute the measure of the sales tax. As
27 previously noted, the sales tax is complementary to the use tax. *Nevada Cement Company*,
28 36 P.3d at 418. Since the sales tax is complementary to the use tax, one must necessarily
conclude that the "gross receipts" also constitute the measure of the use tax.

1 NRS 372.025(1) states that "gross receipts" means "the total amount of the sale or
2 lease or rental price, as the case may be, without any deduction on account of. . . [t]he cost
3 of the property sold. . . [t]he cost of the materials used. . . [and] [t]he cost of transportation of
4 the property prior to its sale to the purchaser." According to NRS 372.025(3), however,
5 "gross receipts" does not include any of the following:

- 6 (a) Cash discounts allowed and taken on sales.
- 7 (b) Sale price of property returned by customers when the full sale price is
8 refunded either in cash or credit. . .
- 9 (c) The price received for labor or services used in installing or applying the
10 property sold.
- 11 (d) The amount of any tax (not including, however, any manufacturers' or importers'
12 excise tax) imposed by the United States upon or with respect to retail sales,
13 whether imposed upon the retailer or the consumer.

14 NRS 372.025(3) provides an exhaustive list of exclusions from the definition of "gross
15 receipts." The statute does not purport to list mere examples of the types of items that are
16 excluded from the measure of the tax. It does not purport to exclude the amount of any tax
17 other than that which is "imposed by the United States upon or with respect to retail sales,
18 whether imposed upon the retailer or the consumer." NRS 372.025(3) is plain on its face.

19 When statutory language is clear on its face, the intention of the statute must be
20 deduced from its language. Worldcorp, 113 Nev. at 1035-36. The language of NRS
21 372.025(3) clearly indicates that no taxes shall be excluded from the measure of the tax
22 except a tax imposed by the United States upon or with respect to retail sales. Thus, the
23 measure of the use tax properly includes the amount of taxes (other than a complementary
24 sales tax) imposed by other jurisdictions upon the economic process, as these taxes all
25 become part of the "cost of the property sold." See NRS 372.025(1). The measure of the tax
26 must include the amount of the Reclamation Fee and Black Lung Tax. The measure of the
27 tax must also include the amount of the TPT, as the TPT is not a sales tax, as explained
28 above.

**C. Edison's Purchase and/or Consumption of Coal in Nevada is Not Exempt from
the Imposition of the Sales or Use Tax.**

As noted above, Edison's claim for an exemption from the tax is barred by the statute
of limitations. Nonetheless, the claim is easily refuted and is therefore addressed below.

1. Nevada Law Does not Exempt Edison's Consumption of Coal from Taxation.

Edison's coal is extracted in Arizona. Consequently, it is not subject to the taxes imposed by chapter 362 of NRS (the net proceeds of mines tax). NRS 372.270 reads as follows:

There are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this state of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS.

(Emphasis added).

Thus, the proceeds of a mine are not exempt from the imposition of the sales or use tax unless those proceeds are subject to the taxes levied pursuant to chapter 362 of NRS (the net proceeds of mines tax). The proceeds of an Arizona mine are not subject to the taxes levied pursuant to chapter 362 of NRS. Consequently, the sale or consumption of coal extracted in Arizona is subject to the sales/use tax in Nevada. NRS 372.270 is plain on its face. There is no reason to believe that the exemption applies to the sale or consumption of coal extracted anywhere but the state of Nevada.

Moreover, NRS 372.185(2) may not be interpreted to expand the scope of the exemption set forth in NRS 372.270. Tax exemptions are strictly construed in favor of finding taxability. *Shetakis v. Department of Taxation*, 108 Nev. 901, 907, 839 P.2d 1315 (1992). NRS 372.185 states that the use "tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this state."

Edison's counsel has indicated that this provision creates an exemption for Edison's consumption of coal. Presumably, counsel has drawn a negative inference from the provision, namely that if the sale of an item would not have been taxable in Nevada, its use or consumption in Nevada is not taxable. This theory presupposes, however, that Peabody's sale of the coal to Edison would not have been taxable if it had occurred in Nevada. To the contrary, Peabody's sale of coal to Edison would have been subject to sales tax if it had

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1 occurred in Nevada.⁸ It would have been subject to sales tax in Nevada because the coal
2 was extracted in Arizona. Accordingly, NRS 372.270 would not apply to exempt the sale from
3 taxation.

4 NRS 372.185 is plain on its face. It indicates that when determining whether a sale
5 would have been taxable in Nevada, a taxpayer must focus upon the "transaction" that
6 resulted in the acquisition of the property at issue, specifically the retail sale of that property.
7 A taxpayer defies the plain language of the exemption if he hypothetically imports into Nevada
8 the entire stream of commerce, from the extraction of the coal through the retail sale of the
9 coal. In other words, the taxpayer contradicts the plain language of the exemption if he
10 assumes, for purposes of NRS 372.185(2), that the extraction of the coal, as well as the retail
11 sale of the coal, occurred in Nevada.

12 In making such an assumption, ostensibly under the premise that NRS 372.185(2)
13 requires it, the taxpayer not only defies the plain meaning of NRS 372.185, but defies the
14 plain meaning of NRS 372.270. Furthermore, the assumption would obtain the absurd result
15 of subjecting the retail sale of the coal – but not the use or consumption of the coal – to
16 Nevada tax. This is because NRS 372.185 applies to the use or consumption of the coal
17 only. Consequently, the retail sale of the coal would still be subject to the sales tax.

18 A "statute's language should not be read to produce absurd or unreasonable results."
19 *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. ___, ___, 50 P.3d 546, 548 (2002). To
20 construe NRS 372.185 to create a use tax exemption for the consumption of foreign-extracted
21 minerals would produce the absurd result of treating similarly-situated taxpayers differently
22 depending upon the state where the minerals were originally delivered to the consumer. In
23 short, a consumer taking delivery of the coal in Arizona would escape the imposition of the
24 use tax, while a consumer taking delivery of the coal in Nevada would bear the incidence of
25 the sales tax.

26 2. The Commerce Clause Does Not Exempt Edison's Consumption of
27 Coal from Taxation.

28 ⁸ In fact, Edison's claim for tax on transportation charges suggests that it may have occurred in Nevada.

1 The Commerce Clause requires that a state impose no tax burden upon interstate
2 commerce that it does not also impose upon intrastate commerce. Stated differently, the
3 Commerce Clause prohibits the states from discriminating against interstate commerce to the
4 benefit of intrastate commerce. For example, in *Armco v. Hardesty*, 467 U.S. 638 (1984), the
5 U.S. Supreme Court held that West Virginia's gross receipts tax on the business of selling
6 tangible personal property at wholesale discriminated against interstate commerce because it
7 exempted local manufacturers from the imposition of the tax. Likewise, in *Tyler Pipe*
8 *Industries v. Washington Department of Revenue*, 482 U.S. 232, the Court held that
9 Washington's manufacturing tax discriminated against interstate commerce because it was
10 imposed only upon products manufactured in the state but sold to out-of-state buyers.

11 In essence, the Commerce Clause prohibits a state "from taking more than its fair
12 share of taxes from the interstate transaction, since allowing such a tax in one State would
13 place interstate commerce at the mercy of those remaining states that might impose an
14 identical tax." *Oklahoma Tax Commission*, 514 U.S. at 185 (1995). To determine whether a
15 state is taking more than its fair share of taxes from an interstate transaction, the taxpayer
16 must ask whether "the imposition of a tax identical to the one in question by every other state
17 would add no burden to interstate commerce that intrastate commerce would not also bear."

18 *Id.*

19 For example, in Nevada, the sales/use tax is imposed upon minerals extracted in other
20 states but sold or consumed in Nevada. See NRS 372.270. The sales/use tax is not,
21 however, imposed upon minerals extracted in Nevada and sold or consumed in Nevada. See
22 *id.* At first glance, NRS 372.270 would appear to discriminate against interstate commerce
23 because it draws a distinction between minerals extracted within the state and those
24 extracted outside of the state. If the same distinction were drawn by every other state in the
25 union, in theory the consumption of minerals transported across state lines would bear a
26 greater use tax burden than the consumption of minerals extracted within the state where
27 they were consumed.

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1 Considered out of context, then, NRS 372.270 would appear to discriminate against
2 interstate commerce. However, one must interpret NRS 372.270 in conjunction with NRS
3 372.265, which reads as follows:

4 There are exempted from the taxes imposed by this chapter the gross receipts from
5 the sale of, and the storage, use or other consumption in this state of, tangible
6 personal property the gross receipts from the sale of which, or the storage, use or
7 other consumption of which, this state is prohibited from taxing under the Constitution
8 or laws of the United States or under the constitution of this state.

9 The Nevada Supreme Courts will interpret a rule or statute in harmony with other rules
10 and statutes. *Alliaz Insurance Company v. Gagnon*, 109 Nev. 990, 993, 860 P2d. 720, 723
11 (1993). To harmonize NRS 372.270 with NRS 372.265, one must necessarily conclude that
12 NRS 372.270 may not be applied unless the effect of its application would be
13 nondiscriminatory. In this case, the application of NRS 372.270 is nondiscriminatory. The
14 application of NRS 372.270 is nondiscriminatory because, to the best of counsel's knowledge,
15 there is no coal mining in Nevada. Assuming for purposes of argument that there is limited
16 coal mining in Nevada, it is highly improbable that any of the coal extracted in Nevada is also
17 being sold at retail within the state of Nevada. Consequently, Edison has no ability to claim
18 that its consumption of coal imported from Arizona is subject to a greater tax burden than the
19 retail sale of coal extracted in Nevada. There exists no intrastate commerce in coal. In effect,
20 Edison's interstate commerce has suffered no discrimination to the benefit of intrastate
21 commerce.⁹

22 Furthermore, NRS 372.270 does not even apply to the facts of this case. Edison
23 purchases coal slurry, not raw coal. See Tab 16. The Attorney General has opined that the
24 by-products of minerals are not exempt from taxation under NRS 372.270. See AGO 72 (6-
25 22-1995), attached as Exhibit F. In the opinion, the Attorney General addressed whether
26 hydrated lime is subject to taxation under chapter 372 of NRS. The Attorney General
27 concluded that hydrated lime is indeed subject to taxation because it is a mineral by-product.

28 ⁹ The mere possibility of future discrimination could perhaps preclude Nevada from
enforcing NRS 372.270 on a prospective basis. See *Tyler Pipe Industries*, 483 U.S. at 252.
However, to obtain a refund of taxes already paid, Edison is arguably required to demonstrate
actual discrimination. See *id.*

1 *Id.* In other words, the sale or consumption of hydrated lime does not benefit from the
2 exemption under NRS 372.270.

3 Coal slurry is hydrated coal, also a mineral by-product. Consequently, hydrated coal,
4 or coal slurry, is subject to taxation under chapter 372 of NRS, regardless of whether the raw
5 coal originates in Nevada or some other state. In short, interstate commerce in coal slurry
6 bears no additional tax burden that intrastate commerce does not also bear. NRS 372.270
7 does not discriminate against interstate commerce in coal slurry because NRS 372.270 does
8 not exempt from taxation the sale or consumption of coal slurry.

9 Finally, NRS 372.270 is nondiscriminatory because it creates a valid compensating
10 measure to insure that Nevada mining companies are not competitively disadvantaged with
11 respect to out-of-state companies who pay no state taxes comparable to the net proceeds of
12 mines tax under chapter 362 of NRS. See *Armco Inc. v. Hardesty*, 467 U.S. 638, 643 (1984).
13 So long as the Nevada sales/use tax is not applied to commerce that originates in a state with
14 a tax on mining activity or the severance of minerals, NRS 372.270 is not discriminatory
15 because it merely places intrastate commerce on an equal footing with interstate commerce.

16 As noted above, the TPT is a general tax on the privilege of doing business in Arizona,
17 and is not specifically levied on the activity of mining or the severance of minerals.
18 Accordingly, any discrimination resulting from the existence of NRS 372.270 is merely
19 hypothetical. It places no actual discriminatory burden upon commerce originating in Arizona.
20 This is because, as previously noted, "the Commerce Clause does not forbid the actual
21 assessment of a succession of taxes by different states on distinct events as the same
22 tangible object flows along." *Oklahoma Tax Commission*, 514 U.S. at 187-188 (1995). Just
23 because a stream of commerce originating in Arizona bears the incidence of the TPT as well
24 as the Nevada use tax does not mean that the application of Nevada's use tax is
25 discriminatory. *Id.*

26 IV. CONCLUSION

27 There are only two substantive issues to be decided by the Commission: (1) whether
28 Edison is entitled to credit for the TPT paid to Arizona; and (2) whether the measure of

1 Edison's use tax liability must exclude the amount of the Reclamation Fee and Black Lung
2 Tax paid to the federal government. Edison's additional claims are barred by the statute of
3 limitations.

4 The two substantive issues to be decided by the Commission are purely questions of
5 law. Since the Department has already verified Edison's figures on its amended returns, there
6 is no need for an evidentiary hearing or additional administrative proceedings in this case. As
7 discussed above, Edison is not entitled to credit for having paid the TPT to Arizona, since the
8 TPT is not a sales tax.

9 Respectfully submitted this 21st day of November 2003.

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11 Attorney General

12
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16 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
17 **IN AND FOR CARSON CITY**

18 SOUTHERN CALIFORNIA EDISON,
19 Plaintiff,

20 v.

21 THE STATE OF NEVADA *ex rel.*
22 DEPARTMENT OF TAXATION
23 Defendant.

Case No. 09-0C-00016-1B

Dept. No. 1

**MOTION FOR AN ORDER THAT
PLAINTIFF'S REFUND ACTION UNDER
NRS 372.680 IS A TRIAL DE NOVO
(ORAL ARGUMENT REQUESTED)**

24 COMES NOW, Plaintiff Southern California Edison ("Edison"), by and through its
25 attorneys of record, and submits the following motion for an order that this case, brought under
26 NRS 372.680, is a trial de novo against the Nevada Department of Taxation ("Department"), to
27 be conducted pursuant to the Nevada Rules of Civil Procedure ("NRCP") and without deference
28 to the February 27, 2009 decision of the Nevada Tax Commission ("Commission") denying
Edison's claims for refund of use taxes. This motion is filed pursuant to the Court's June 30,
2009 Order Denying Defendant's Motion to Dismiss ("Order") at ¶ 3, and is based upon the
following memorandum of points and authorities.

EDISON'S MOTION AND MEMORANDUM THAT THIS ACTION IS A TRIAL DE NOVO

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 I. INTRODUCTION AND SUMMARY OF ARGUMENT

4 In its Order, the Court denied the Department's April 20, 2009 Motion to Dismiss
5 ("Motion to Dismiss"). The Order went on to direct the parties "to meet and confer to resolve
6 issues relating to the nature of the proceedings in this Court pursuant to NRS 372.680 and NRS
7 233B.135," and thereafter to file cross-motions on the subject if they were unable to reach
8 agreement. Order at ¶ 3. Counsel for Edison and the Department conferred, but did not reach
9 agreement. Therefore, the question before the Court is whether this action for refund of use taxes
10 pursuant to NRS 372.680 and NRS 374.685¹ is, as Edison contends, an original civil action to be
11 conducted pursuant to the NRCP and without deference to the prior administrative decision or
12 whether, as the Department contends, Edison's refund action should proceed pursuant to NRS
13 233B.135 as a judicial review of the Commission's February 27, 2009 decision denying Edison's
14 claims for refund of use taxes.

15 This question does not present a case of first impression or even a close case. In the
16 pending action, Edison filed administrative claims for refund for use taxes already paid and these
17 claims were denied by the Department and the Commission. Therefore, the nature of the
18 proceedings before the Court in this action is found in the statutes and case law that specifically
19 pertain to refund actions. These authorities conclusively establish that Edison's tax refund
20 complaint commenced a civil action against the Department that entitles Edison to a trial de novo,
21 i.e., a trial conducted pursuant to the NRCP that includes an evidentiary hearing, where Edison
22 has the burden of proof and no deference is given to the Commission's decision.

23 Indeed, the Department previously acknowledged that NRS 372.680 authorizes a trial de
24 novo, including an evidentiary hearing—the exact opposite position to the one it is now taking

25
26 ¹ NRS Chapter 372 imposes a state-wide sales and use tax which goes into the state's general fund. NRS
27 Chapter 374 essentially duplicates the provisions of NRS Chapter 372 and imposes a state-wide county
28 sales and use tax, the proceeds of which are used to support the local schools in the school districts from
which the tax is derived. Edison's refund claims encompass use taxes imposed under both NRS Chapter
372 and 374. For simplicity, all further references to NRS Chapter 372 should be assumed to include the
corresponding provisions of NRS 374 as well.

1 before this Court. The Department's initial brief to the Commission in this case, dated November
2 21, 2003, stated the law accurately: "NRS 372.680 in now [sic] way purports to limit the district
3 court's review to the administrative record on appeal. Consequently, Edison would have an
4 opportunity before the district court to more fully develop the facts, if appropriate." (Brief of
5 the Nevada Department of Taxation, p. 5, ll. 23-28; attached as Exhibit A.) (Emphasis added.)
6 Edison agrees with the Department's prior position in this case, which is indisputably correct. In
7 sum, this action is a trial de novo, meaning the matter is tried to this Court and Edison is entitled
8 to an evidentiary hearing. The parties may submit all or a portion of the record developed during
9 the administrative process as evidence for the Court's independent consideration, but the Court is
10 not limited to the record below and gives no deference to the Commission's decision.

11 In Part II of this Memorandum, Edison shows that the exclusive judicial remedy for a
12 taxpayer whose claim for refund has been denied by the Commission is to file an action pursuant
13 to NRS 372.680, which is a civil action for a trial de novo to be conducted pursuant to the NRCP
14 and without deference to any prior administrative decision.

15 Part III responds to the Court's interest in *Campbell v. State of Nevada*, 108 Nev. 215
16 (1992) and NRS 360.245(5) by first describing the separate and distinct statutory scheme and
17 judicial remedy applicable to a taxpayer, like Edison, that filed claims for refund of taxes
18 previously paid, and to a taxpayer, like the Campbells, that appeal a tax deficiency assessment
19 issued by the Department. As demonstrated below, judicial review is the required judicial
20 remedy for a taxpayer that has been issued a tax deficiency assessment, but in a refund case the
21 taxpayer's exclusive judicial remedy is an original civil action against the Department. With this
22 as background, Edison shows that the Department's reliance on *Campbell* is utterly misplaced
23 and that, in fact, *Campbell* strongly supports the conclusion that a refund action entitles the
24 taxpayer to a trial de novo. Edison also illustrates how NRS 360.245, including subsection 5,
25 functions within Nevada's statutory refund and deficiency procedures and, in general, governs
26 administrative matters between the Department and the Commission but does not prescribe the
27 judicial remedy applicable to taxpayers in either case.

1 II. NRS 372.680 UNEQUIVOCALLY AUTHORIZES AN ORIGINAL CIVIL
2 ACTION AGAINST THE DEPARTMENT AND NOT JUDICIAL
3 REVIEW OF THE COMMISSION'S DECISION

4 A. The Statutory Text and Relevant Nevada Case Law Establish
5 that NRS 372.680 Entitles Edison to a Trial De Novo

6 The plain language of NRS 372.680 and Nevada case law interpreting that provision and
7 other similar Nevada tax refund statutes compel the conclusion that NRS 372.680 creates an
8 original action against the Department and does not authorize a judicial review of the
9 Commission's decision. NRS 372.680 provides:

10 1. Within 90 days after a final decision upon a claim filed
11 pursuant to this chapter is rendered by the Nevada tax commission,
12 the claimant may bring an action against the department on the
13 grounds set forth in the claim in a court of competent jurisdiction
14 in Carson City, the county of this state where the claimant resides
15 or maintains his principal place of business or a county in which
16 any relevant proceedings were conducted by the department, for
17 the recovery of the whole or any part of the amount with respect to
18 which the claim has been disallowed.

19 2. Failure to bring an action within the time specified
20 constitutes a waiver of any demand against the state on account of
21 alleged overpayments.

22 NRS 372.680 (emphasis added).² The plain language of NRS 372.680 expressly authorizes only
23 an original civil action against the Department, governed by the NRCP, not a judicial review of
24 the legal or factual findings of the Commission. First, the NRCP define an "action" as a "civil
25 action," which is commenced by filing a complaint in district court against the defendant. NRCP
26 1 & 2. Second, an "action against the department" is incompatible with language requiring
27 judicial review of the Commission's decision. Cf. NRS 360.395(1) (requiring "judicial review
28

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² Nevada provides an identical judicial remedy for taxpayers to obtain refunds for other taxes administered by the Department and the Commission. NRS 363A.190 (refund action for Nevada's financial institutions tax), NRS 363B.180 (refund action for Nevada's business tax), and NRS 368A.330 (refund action for Nevada's live entertainment tax) are all materially identical to NRS 372.680, authorizing the taxpayer to "bring an action against the department" in district court following a denial of its refund claim by the Commission. In addition, NRS 372.685 specifies an administrative procedure, and authorizes a refund action identical to the one authorized by NRS 372.680, in circumstances where the Department fails to act on a taxpayer's sales or use tax refund claim within a specified time period.

1 pursuant to NRS 233B.130 from a final order of the Nevada Tax Commission" on a taxpayer's
2 challenge of a tax deficiency assessment).

3 Third, the requirement that a taxpayer bring an action against the Department only "after
4 a final decision upon a claim filed pursuant to [NRS Chapter 372] is rendered by the Nevada tax
5 commission" is simply a condition precedent to bringing the action. The reason for this is to
6 require the taxpayer to exhaust administrative remedies, which promotes judicial economy
7 because, as discussed below, the Department cannot appeal a Commission decision granting a
8 taxpayer's claim for refund. *See* NRS 360.245(5). Fourth, NRS 372.680(2) provides that the
9 civil action authorized by NRS 372.680(1) is the exclusive judicial remedy for a taxpayer whose
10 claim for refund of sales or use taxes has been denied by the Commission. *See also County of*
11 *Washoe v. Golden Rd. Motor Inn*, 105 Nev. 402, 404 (1989) ("[I]f a statutory procedure exists
12 either for recovery of taxes collected erroneously or for disputing an excessive assessment, that
13 procedure must be followed.") Accordingly, NRS 372.680 provides for a trial de novo and not
14 judicial review.

15 The amendments to NRS 372.680 made by Senate Bill 362 in 1999 ("S.B. 362") did not
16 change the nature of the judicial remedy afforded to a taxpayer. Both before and after S.B. 362,
17 NRS 372.680(1) authorized a civil action as follows: "the claimant may bring an action against
18 the department on the grounds set forth in the claim . . . for the recovery of the whole or any part
19 of the amount with respect to which the claim has been disallowed." (Emphasis added.) As
20 discussed in Edison's May 8, 2009 Opposition Brief to the Department's Motion to Dismiss, S.B.
21 362 amended NRS 372.680, in addition to a number of other tax refund statutes, in two respects
22 only: (1) to require a taxpayer to administratively appeal the Department's denial of its refund
23 claim to the Commission before bringing an action in district court against the Department and
24 (2) to expand the venue in which such an action can be brought. (*See* Opposition Brief, pgs. 11-
25 12.) The fact that the Legislature did not make any other changes to the text of NRS 372.680
26 shows that, while the Legislature clearly chose to amend the administrative procedure applicable
27 to claims for refund, it just as clearly chose not to amend or alter the nature of the judicial remedy
28 applicable to tax refund actions. Had the Legislature intended to change the taxpayer's judicial

1 remedy from "an action against the department" governed by the NRCP, to a judicial review of
2 the Commission's decision subject to NRS 233B.135, it would have amended the text of the
3 statute to so state. None of the amendments made by S.B. 362, however, add any reference to
4 "judicial review" or NRS Chapter 233B to Nevada's tax statutes, including NRS 372.680.

5 Indeed, Nevada's deficiency determination procedure (discussed in detail below in
6 Section III.A.1, *infra*) makes clear that the Legislature knows how to specify when it decides to
7 make judicial review the required judicial remedy. In the case of deficiency determinations, NRS
8 360.395 expressly provides that the taxpayer's judicial remedy is a "judicial review pursuant to
9 NRS 233B.130 from a final order of the Nevada tax commission upon a petition for
10 redetermination[.]" In contrast, NRS 372.680 uses altogether different language in authorizing
11 "an action against the department."

12 Nevada case law confirms that NRS 372.680 authorizes an original action against the
13 Department and not a judicial review of the Commission's decision. The Nevada Supreme Court
14 has repeatedly affirmed that Nevada tax refund actions, including sales or use tax refund actions
15 brought pursuant to NRS 372.680, are original proceedings in the district court, and not petitions
16 for review of the Commission's decision, notwithstanding that in each such case the taxpayer
17 participated in hearings before, and received a final decision from, the Commission before
18 bringing its refund action against the Department.

19 In the seminal case of *State v. Obexer & Sons, Inc.*, 99 Nev. 233, 237 (1983), an action
20 for a refund of sales taxes brought under NRS 372.680, the Nevada Supreme Court held: "Actions
21 to recover taxes paid are equitable in nature, and the burden of proof is on the taxpayer to show
22 that the taxing body holds money that in equity and good conscience it has no right to retain."
23 Reaffirming this holding in *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402, 404
24 (1988), the Supreme Court stated that "[t]he burden of proof so articulated, certainly implies that
25 the burden is not that of showing a lack of substantial evidence, rather, it is to support the
26 elements of an independent action for restitution." In *Obexer & Sons*, the taxpayer had received a
27 denial of its claim for refund from the Department and then from the Commission; in the district
28

1 court the parties stipulated to some facts and submitted a partial administrative record and the
2 case was resolved on summary judgment in favor of the taxpayer.

3 In *Saveway*, the taxpayer paid fuel excise taxes and penalties assessed by the Department
4 pursuant to NRS Chapter 365 and filed an appeal with the Commission. After receiving an
5 adverse decision from the Commission, Saveway filed a petition for judicial review of the
6 Commission's decision. The district court dismissed the petition and the Nevada Supreme Court
7 affirmed because "NRS 233B.130 is specifically limited by NRS 365.460, and under NRS
8 365.460 Saveway's remedy was to pay the excise tax under protest and bring an action against the
9 state treasurer in the district court[.]" *Id.* at 403-04. NRS 365.460 uses the same "may bring an
10 action" language as is found in NRS 372.680.³

11 In Saveway's subsequent action properly brought pursuant to NRS 365.460, the district
12 court nonetheless applied the standard of review set forth in NRS 233B.135 and granted summary
13 judgment against the taxpayer because the Commission's decision "was neither clearly erroneous,
14 arbitrary, nor capricious," even though the form of the taxpayer's action was "not a complaint for
15 judicial review." *Id.* at 404. The Supreme Court reversed, holding that the district court erred in
16 applying NRS 233B.135's judicial review standard because the action authorized by NRS
17 365.460 was "for the refund of a tax overpayment," and therefore authorized a trial de novo. *Id.*
18 at 405. (Emphasis added.) Restating its holding in *Obexer & Sons*, the Court stated that, in
19 Nevada, refund "[a]ctions to recover taxes paid are equitable in nature" and the taxpayer's burden
20 of proof "is not that of showing a lack of substantial evidence, rather, it is to support the
21 elements of an independent action for restitution." *Id.* at 404 (citing *Obexer & Sons*, 99 Nev. at
22 237). Accordingly, the Supreme Court has already expressly rejected—twice—the position the
23 Department is now advocating before this Court.

24 Edison reviewed every action that it could find that has been brought under NRS 372.680
25 subsequent to the enactment of S.B. 362, which required taxpayers to appeal the Department's
26

27 ³ NRS 365.460 provides: "After payment of any excise tax under protest duly verified, served on the
28 department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying
the excise tax may bring an action against the state treasurer in the district court in and for Carson City for
the recovery of the excise tax so paid under protest."

1 denial of a refund claim to the Commission before proceeding to district court. Each of these
2 actions has been a trial de novo against the Department, and not a judicial review of the
3 Commission's decision subject to NRS 233B.135. In *Sparks Nugget, Inc. v. Nevada ex rel. Dep't*
4 *of Tax'n*, 124 Nev. Adv. Rep. 15, 179 P.3d 570 (2008), the taxpayer filed a complaint under NRS
5 372.680 against the Department after the Commission had denied its claim for refund. The
6 Department answered and the case was ultimately resolved on summary judgment. The Nevada
7 Supreme Court characterized the taxpayer's administrative proceedings as simply the exhaustion
8 of administrative remedies prior to bringing an original action against the Department:

9 "[T]he Nugget administratively appealed the Tax Department's decision to the tax
10 commission. That appeal proved unsuccessful, however, and having exhausted its
11 administrative remedies, the Nugget then sued the Tax Department in district
12 court, again seeking a refund of the use taxes that it had paid."

12 *Sparks Nugget*, 179 P.3d at 573 (emphasis added).

13 The Department has participated in at least one other sales tax refund action brought
14 pursuant to NRS 372.680, as amended by S.B. 362, where the case was governed by the NRCP
15 and the district court held an evidentiary hearing. In *Lohse v. Nevada ex rel. Dep't of Tax'n*, Case
16 No. CV-05-00376 (Nev. 2nd Judicial District, Dec. 8, 2006) (Order on Motion in Limine), the
17 Department moved to prevent the taxpayer from presenting evidence at trial on its sales tax
18 refund claim, arguing that, because the taxpayer had failed to conduct discovery, the case should
19 be limited to the record developed before the Department and Commission and should proceed in
20 a manner similar to a petition for judicial review. The district court rejected the Department's
21 motion, ruling that "this action, brought under NRS 372.680, is an original proceeding involving
22 genuine issues of fact to be determined at trial." During the ensuing bench trial, both the taxpayer
23 and the Department presented evidence and witness testimony. The district court's decision in
24 favor of the taxpayer was affirmed in an unpublished opinion by the Supreme Court.⁴ See
25 Exhibit B.

26
27 ⁴ Edison does not cite to *Lohse* as precedent, but simply as additional evidence that the Department has
28 defended numerous cases brought against it pursuant to NRS 372.680 that have proceeded as trials de
novo and not as judicial reviews of the Commission's decision.

1 In sum, as the plain language requires and consistent Nevada case law shows, a tax
2 refund action under NRS 372.680 is conducted as a trial de novo, without deference to the
3 Commission's decision. Taxpayers, like Edison, who are properly pursuing a tax refund action in
4 district court, are entitled to a trial de novo.

5 **B. When the Legislature Adopted NRS 372.680 From California it Was**
6 **Already Well-Settled Law That the Action Was a Trial De Novo**

7 Nevada adopted its Sales and Use Tax Act from California in 1955. Nev. A.G.O. 19 (Apr.
8 21, 1971) ("Nevada's Sales and Use Tax Act (Chapter 372 of the Nevada Revised Statutes)
9 enacted by the Legislature in 1955 was substantially an adoption of the Sales and Use Tax Law
10 then in effect in California."). See also *United States v. Nevada Tax Comm'n*, 291 F. Supp. 530,
11 534 (D. Nev. 1968), *aff'd*, 439 F.2d 435 (9th Cir. 1971) ("[I]t is a fair inference that the California
12 Sales and Use Tax Act, in its then form, was used as a model for the Nevada Statute."). NRS
13 372.680 was derived from, and is materially identical to, California Revenue and Taxation Code
14 ("RTC") § 6933, which provides:

15 Within 90 days after the mailing of the notice of the board's action
16 upon a claim filed pursuant to Article 1 (commencing with Section
17 6901), the claimant may bring an action against the board
18 [referring to the California State Board of Equalization] on the
19 grounds set forth in the claim in a court of competent jurisdiction
20 in any city or city and county of this state in which the Attorney
21 General has an office for the recovery of the whole or any part of
the amount with respect to which the claim has been disallowed.
Failure to bring action within the time specified constitutes a
waiver of any demand against the state on account of alleged
overpayments. (Emphasis added.)

22 A statute "adopted from another jurisdiction will be presumed to have been adopted with
23 the construction placed upon it by the courts of that jurisdiction before its adoption." *Ybarra v.*
24 *State*, 97 Nev. 247, 249 (1981). See also *Moody v. Manny's Auto Repair*, 110 Nev. 320, 327
25 (1994); Nev. A.G.O. 19 (Apr. 21, 1971). By the time of Nevada's adoption of NRS Chapter 372
26 from California in 1955, it was already well-established law in California that sales and use tax
27 refund actions are trials de novo. See *Marchica v. State Bd. of Equalization*, 237 P.2d 725, 733
28 (Cal. Ct. App. 1951) ("[I]n a suit for refund the statute does not give any finality to the

1 determination of the board. The board does not exercise judicial power in administering the Sales
2 Tax Act and the act, in effect, in a suit for refund authorizes a hearing de novo.”). The Nevada
3 Supreme Court relied on *Marchica* when it held in *Saveway* that tax refund actions in Nevada are
4 original actions and not judicial review proceedings subject to NRS Chapter 233B. *See Saveway*,
5 104 Nev. at 404.

6 Case law regarding California’s RTC § 6933 provides further strong authority that NRS
7 372.680 is an original action and trial de novo, not a judicial review of the Commission’s
8 decision. In California, it is indisputable that the phrase in RTC § 6933—“bring an action against
9 the board on the grounds set forth in the claim”—authorizes an original action in a California
10 superior court governed by the California Rules of Civil Procedure, *i.e.*, a trial de novo. In a
11 California sales and use tax refund action, the trial court is the finder of fact, notwithstanding that
12 the California State Board of Equalization (“Board”), California’s equivalent to the Commission,
13 has held hearings and made findings during the administrative process. No deference is afforded
14 to the decision of the Board.

15 As in the case of an action brought under NRS 372.680, in an action brought in California
16 under RTC § 6933, “the burden of proof is on the taxpayer . . . to produce evidence from which a
17 proper tax determination can be made. The taxpayer must affirmatively establish the right to a
18 refund by the preponderance of the evidence, and cannot simply assert error and shift to the state
19 the burden of justifying the tax.” *Paine v. Bd. of Equalization*, 137 Cal. App. 3d 438, 442 (1982)
20 (omitting citations). The trial court conducts a bench trial and the parties may present evidence
21 and witnesses. *See, e.g., Delta Air Lines, Inc. v. Bd. of Equalization*, 214 Cal. App. 3d 518, 524
22 (1989) (following a hearing before and decision from the Board, the taxpayer brought a refund
23 action under RTC § 6933 and the “parties stipulated to certain facts, presented agreed-upon
24 exhibits and deposition testimony, as well as the testimony of two witnesses.”); *Jimmy Swaggart*
25 *Ministries v. Bd. of Equalization*, 204 Cal. App. 3d 1269 (1988). *See also Fujitsu IT Holdings,*
26 *Inc. v. Franchise Tax Bd.*, 120 Cal. App. 4th 459, 470 (2004) (income tax refund action under
27 RTC § 19382 where the taxpayer appealed the Franchise Tax Board’s decision to the Board and
28

1 then the ensuing refund action in superior court was tried “largely on stipulated facts,
2 supplemented by the testimony of witnesses and documentary evidence.”).

3 Furthermore, and contrary to the Department’s assertion that judicial review is the
4 “common standard in other states for resolving tax refund cases coming to district court from an
5 administrative body” (Department’s Reply Brief on Motion to Dismiss, p. 11), the majority of
6 Western States, as well as a number of other states, provide a trial de novo for a tax refund claim.
7 Idaho, Utah, Arizona, Colorado and Oregon each grant the taxpayer a trial de novo following a
8 final decision from the administrative body in a tax case. *See, e.g., Idaho Power Co. v. Idaho Tax*
9 *Comm’n*, 109 P.3d 170 (Idaho 2005); Utah Code Ann. § 59-1-601; Ariz. Rev. Stat. § 42-1254(3);
10 *M & J Leasing Co. v. Executive Director of Dep’t of Rev.*, 796 P.2d 28, 30 (Col. Ct. App. 1990);
11 Ore. Rev. Stat. § 305.425. *See also* Ind. Code Ann. § 6-8.1-5-1(i); Minn. Stat. § 271.06 (subd. 6);
12 N.H. Rev. Stat. Ann. § 21-J:28-b.IV; R.I. Gen. Law § 8-8-24.

13 **III. NEITHER CAMPBELL NOR NRS 360.245(5) SUPPORT TREATING**
14 **EDISON’S AMENDED COMPLAINT AS A PETITION FOR JUDICIAL**
REVIEW OR DENYING EDISON AN EVIDENTIARY HEARING

15 During the hearing on the Department’s Motion to Dismiss, the Court suggested that the
16 *Campbell* case and NRS 360.245(5) might be contrary to Edison’s position that its refund action
17 entitles it to a trial de novo, and requested briefing on these authorities. As Edison now shows,
18 both *Campbell* and NRS 360.245(5) are consistent with and support Edison’s contention that
19 NRS 372.680 expressly provides for a trial de novo.

20 **A. Deficiency Determinations and Refund Claims Have Separate**
21 **Administrative Procedures and Judicial Remedies**

22 Nevada law prescribes two distinct statutory procedures for contesting sales and use tax
23 claims at the administrative and judicial levels. Understanding these different procedures is
24 essential for understanding the Supreme Court’s holding in *Campbell* and the role NRS
25 360.245(5) plays in Nevada’s statutory scheme. The first—the “deficiency determination”
26 procedure—is initiated by the Department when it takes the position that the taxpayer has
27 underpaid its tax liability and issues the taxpayer a deficiency determination. The second—the
28 “claim for refund” procedure—is initiated by the taxpayer when it takes the position that it has

1 overpaid its tax liability by filing a claim for refund with the Department. In the deficiency
2 determination procedure, the taxpayer's sole judicial remedy provided by statute, following the
3 completion of the administrative process, is judicial review of the Commission's decision
4 pursuant to NRS 233B.130. In the claim for refund procedure, the taxpayer's exclusive judicial
5 remedy is to bring an original action against the Department in district court following the
6 taxpayer's exhaustion of its administrative remedies, rather than filing a petition for judicial
7 review of the Commission's decision. In addition to the discussion below, a chart summarizing
8 these two procedures is attached hereto as **Exhibit C**.

9 **1. Deficiency Determination Procedure**
10 **(NRS 360.300 - NRS 360.400)**

11 While Nevada's deficiency determination procedure is inapplicable to Edison's case, it is
12 summarized here to provide context and background to understanding *Campbell* and NRS
13 360.245(5). Nevada's deficiency determination procedure for all taxes administered by the
14 Department and the Commission is governed exclusively by NRS 360.300 - NRS 360.400. Prior
15 to 1995, many chapters of Nevada's tax code (including NRS Chapters 372) had their own
16 provisions for deficiency determination procedures. Nevada Senate Bill 483 (1995) ("S.B. 483")
17 consolidated these repetitive provisions into a uniform provision: NRS 360.300 *et seq.*⁵

18 When a taxpayer fails to file a tax return, or the Department is not satisfied with a
19 taxpayer's return or the amount of tax paid by a taxpayer, the Department can issue a deficiency
20 determination assessing an additional tax liability. NRS 360.300(1). In order to contest the
21 Department's determination, the taxpayer must file a petition for redetermination with the
22 Department within 45 days after service of the Department's notice of the deficiency
23 determination. NRS 360.360. The Department's decision on the petition, typically issued by a

24 ⁵ See S.B. 483 (1995) ("Purpose of Omnibus Tax Bill") ("One of the primary purposes of the bill is to
25 continue the consolidation of those statutory provisions that pertain to the administration and collection of
26 taxes presently existing throughout Title 32 into chapter 360. For example, chapters 372 and 374 contain
27 statutory provisions that specify how the Department of Taxation is to make a deficiency determination
28 against a person for tax that is due, as well as the procedure for a person to contest that deficiency, that are
nearly identical to statutory provisions already existing in chapter 360. The bill removes those repetitive
provisions from chapters 372 and 374, and clarifies that that the provisions in chapter 360 apply to all
taxes administered by the Department of Taxation."), attached hereto as **Exhibit D**.

1 Department hearing officer, becomes final unless appealed to the Commission within 30 days
2 after service. NRS 360.390(1).

3 If the Commission upholds the deficiency determination, a taxpayer's only remedy is to
4 file a petition for judicial review pursuant to NRS 233B.130. See NRS 360.395(1) ("Before a
5 person may seek judicial review pursuant to NRS 233B.130 from a final order of the Nevada tax
6 commission upon a petition for redetermination," it must either pay the amount of the
7 determination or enter into a payment agreement with the Department.); NRS 233B.130. There is
8 no statute authorizing taxpayers to bring an original action in district court against the Department
9 following an adverse decision from the Commission on a deficiency determination. Thus, a
10 Commission decision upholding a deficiency determination by the Department may be appealed
11 by the taxpayer only pursuant to NRS 233B.130. See, e.g., *Silver State Elec. Supply Co. v. State*
12 *of Nevada ex. rel. Dep't of Tax'n*, 123 Nev. Adv. Rep. 110, 157 P.3d 710 (2007); *Reynolds Elec.*
13 *& Eng'g Co. v. State of Nevada*, 113 Nev. 71 (1997); *Bing Constr. Co. v. Dep't of Tax'n*, 109
14 Nev. 275 (1993); *Campbell v. State of Nevada ex rel. Dep't of Tax'n*, 108 Nev. 215 (1992).

15 **2. Claim for Refund Procedure**
16 **(NRS 372.630 - NRS 372.720)**

17 Unlike the deficiency determination procedure contained in NRS 360.300 *et seq.*
18 described above, the administrative requirements and judicial remedy for claims for refund are
19 contained in the individual chapters of NRS Title 32 (Revenue & Taxation) pertaining to each
20 particular type of tax. The claim for refund procedure for sales and use taxes is contained in NRS
21 Chapter 372, Nevada's Sales and Use Tax Act (specifically in NRS 372.630 - NRS 372.720), and
22 in the corresponding provisions of NRS Chapter 374, Nevada's Local School Support Tax. See
23 also fn. 2, *supra*. Nevada's claim for refund procedure for sales and use taxes clearly provides a
24 separate and distinct judicial remedy from the "judicial review" remedy provided for deficiency
25 determinations.

26 If a taxpayer believes that it has overpaid its sales or use tax liability, it may seek a refund
27 of that overpayment by filing a claim for refund with the Department. NRS 372.635. The claim
28

1 must be in writing, and it must state the grounds upon which it is based and be filed within three
2 years after the overpayment was made. NRS 372.635(1); NRS 372.645.

3 If the Department denies the claim, in whole or in part, it must serve notice of its action on
4 the taxpayer within 30 days. NRS 372.655. The Department's denial of a taxpayer's claim for
5 refund becomes final within 30 days after service of the notice denying the claim unless the
6 taxpayer appeals the denial to the Commission. See NRS 360.245(1); NAC 360.496. If the
7 Commission denies the taxpayer's claim for refund, the taxpayer's clearly prescribed and sole
8 judicial remedy is to "bring an action against the department on the grounds set forth in the
9 claim" in district court. NRS 372.680(1). The failure to timely bring such an action "constitutes
10 a waiver of any demand against the state on account of alleged overpayments." NRS 372.680(2).

11 While a taxpayer's judicial remedy in the refund context differs from the taxpayer's
12 remedy in the deficiency context, the Legislature clearly intended this result as shown by the
13 separate and distinct statutory procedures summarized above. There is a logical reason for this
14 distinction. As explained in *Obexer & Sons* and *Saveway*, the statutory refund action is equivalent
15 to an equitable claim for restitution against the State as defendant. See *Obexer & Sons*, 99 Nev. at
16 237; *Saveway*, 104 Nev. at 404. A taxpayer that determines it has overpaid its tax liability and
17 files an administrative claim for refund with the taxing authority that is denied, should have the
18 right to sue the Department for restitution as if the taxpayer were suing any other defendant, with
19 the burden of proof on the taxpayer, regardless of whether a hearing was held at the
20 administrative level. In contrast, when the taxing authority examines the taxpayer's return
21 pursuant to its statutory authority to enforce compliance with the tax laws, the Legislature
22 determined that this conclusion was entitled to some deference under the judicial review standard.

23 **B. *Campbell* Does Not Support the Department's Unfounded**
24 **Position That a Litigant Is Never Entitled to More Than One**
25 **Evidentiary Hearing**

26 The Department cites to *Campbell* for the proposition that a litigant is never entitled to an
27 evidentiary hearing in trial court if it has received a final decision from an agency after an
28 administrative hearing. (Tr. 2-3.) When its unusual procedural history is carefully considered,

1 *Campbell* actually supports Edison's position that NRS 372.680 is an original action that provides
2 for a trial de novo.

3 Whereas Edison initiated the dispute pending before this Court by filing claims for refund
4 with the Department, the *Campbell* case commenced when the Department issued the Campbells
5 a "tax assessment of \$13,505.71" dated May 31, 1990, i.e., a deficiency determination. *Campbell*,
6 108 Nev. at 217 and fn. 2 (emphasis added). The Department advised Mr. and Mrs. Campbell that
7 they could contest the deficiency determination through filing a petition for redetermination, but
8 did not inform them of their option at that time to pay the deficiency assessment and file a claim
9 for refund. (This option no longer exists. Under current law, explained in Section III.A.1, *supra*, a
10 taxpayer's only administrative option for contesting a deficiency determination is to file a petition
11 for redetermination.) Following the advice they had been given by the Department, the Campbells
12 filed a petition for redetermination and commenced the deficiency determination procedure.

13 A Department hearing officer upheld the deficiency determination following an
14 evidentiary hearing. *Campbell*, 108 Nev. at 217. The Campbells appealed the hearing officer's
15 decision to the Commission. *Id.* After the Campbells had appealed the hearing officer's decision
16 to the Commission but before the Commission denied that appeal, the Attorney General's Office
17 recommended that the Campbells pay the deficiency "to cut off the accrual of additional penalties
18 and interest." *Id.* at 217. The Campbells heeded this advice, paid the deficiency and then filed a
19 claim for refund, commencing a separate refund procedure. The Department denied the refund
20 claim and the Campbells filed an action in district court pursuant to NRS 372.680. Meanwhile,
21 the Commission also denied the Campbells' separate appeal of their deficiency determination.

22 When the Commission upheld the Department's deficiency determination against the
23 Campbells, their only judicial remedy was to petition for judicial review under NRS 233B.130
24 within 30 days. Since the Campbells failed to do so, the Commission's decision upholding the
25 Department's deficiency determination became final. In the Campbells' subsequent and separate
26 refund action, the Department argued that administrative res judicata barred the Campbells'
27 refund action because the same issues had already been decided by the Commission in the
28 Campbells' separate deficiency determination appeal, which the Campbells had allowed to

1 become final by failing to file a petition for judicial review as required under Nevada's deficiency
2 determination procedure.

3 As the Supreme Court recognized, the only reason the Campbells filed a refund action
4 instead of a petition for judicial review was because they had paid the deficiency and initiated a
5 separate refund procedure in reliance on the "disturbing" advice of the Attorney General's Office.
6 Because of the Attorney General's misleading advice, the Campbells were effectively left without
7 any judicial remedy for challenging the Department's deficiency tax assessment. As the Court
8 explained:

9 Once paid, however, the only statutory means provided for demanding and
10 obtaining a refund of any excess taxes paid are set forth in NRS 372.630-720.
11 Therefore, the Campbells were left without means, under the Administrative
Procedure Act, to reclaim the taxes they believed to be improperly collected.

12 The Supreme Court, however, rejected this unjust result. Given the "unique circumstances
13 involved," the Court "converted" the Campbells' refund action to a petition for judicial review
14 because that was the completely distinct and exclusive judicial remedy that the Campbells were
15 originally entitled to after the Commission denied the appeal from the Department's decision
16 upholding the deficiency determination. Thus, *Campbell* does not stand for the proposition that a
17 properly filed refund action—brought after the Commission denies the taxpayer's refund
18 claim—may be "converted" into a petition for judicial review in order to prevent the evidentiary
19 hearing allowed in a tax refund action under NRS 372.680. To the contrary, NRS 372.680
20 expressly directs the taxpayer to "bring an action against the department" within 90 days after a
21 "decision upon a claim filed pursuant to [NRS Chapter 372] is rendered by the Nevada tax
22 commission."

23 Indeed, the Department conceded to this Court that *Campbell* is distinguishable from the
24 pending case precisely because it involved "a circumstance where the tax hadn't been paid[,]"
25 *i.e.*, a deficiency determination. (Tr. at 10.) This statement, which is based on what actually
26 happened in *Campbell*, completely contradicts the Department's unsupported contention that the
27 Nevada Supreme Court converted the Campbell's refund action because of a universal
28

1 principle—that does not exist—that a litigant is never entitled to a judicial evidentiary hearing
2 following an administrative proceeding. (Tr. 2-3.)

3 While the “unique circumstances” present in *Campbell* make its narrow holding
4 inapplicable here, *Campbell* supports the position, affirmatively decided by the Nevada Supreme
5 Court in *Obexer & Sons* and *Saveway*, that if a taxpayer properly brings a tax refund action in
6 district court following the Commission’s denial of its refund claim, it is entitled to a trial de novo
7 that includes an evidentiary hearing in the district court.

8 **C. NRS 360.245(5) Has No Application To A Refund Action**
9 **Under NRS 372.680**

10 During the hearing on the Department’s Motion to Dismiss, the Court expressed concern
11 that if it treated a taxpayer’s “action against the department on the grounds set forth in the claim”
12 provided by NRS 372.680 as authorizing a trial de novo, it would be “rendering NRS 360.245(5)
13 meaningless.” (Tr. at 17, ll. 23-24.) As explained below, NRS 360.245(5) affirms the
14 Commission’s authority over the Department in the context of tax cases at the administrative
15 level, and in no way conflicts with NRS 372.680.

16 **1. NRS 360.245(5) Does Not Provide a Judicial Remedy**
17 **for Any Party and Does Not Prescribe a Standard of**
Review

18 The Legislature enacted NRS 360.245(5) in 1997 to clarify that only decisions of the
19 Commission, as opposed to “decisions of the executive director or other officer of the
20 department,” (NRS 360.245(1)(a)), are subject to judicial review, and to expressly preclude the
21 Department from appealing decisions of the Commission that were adverse to the Department.
22 The plain language of the statute accomplishes the Legislature’s objectives. NRS 360.245(5)
23 states in full, as follows:

24 A decision of the Nevada tax commission is a final decision for the
25 purposes of judicial review. The executive director or any other
26 employee or representative of the department shall not seek judicial
review of such a decision.

27 The first sentence of NRS 360.245(5), which states that “[a] decision of the [Commission] is a
28 final decision for the purposes of judicial review,” must be read in connection with NRS

1 360.245(1)(a), which states that “[a]ll decisions of the executive director or other officer of the
2 department made pursuant to this Title are final unless appealed to the [Commission].”
3 (Emphases added.) These two provisions establish that a person aggrieved by an administrative
4 decision of the Department cannot appeal the Department’s decision to district court. Rather, the
5 aggrieved person must first appeal to the Commission.⁶ Furthermore, if the Department’s
6 decision becomes final because it is not appealed to the Commission pursuant to NRS
7 360.245(1)(a), all avenues for further appeal are closed. In sum, the first sentence of NRS
8 360.245(5) provides that only a decision of the Commission is subject to judicial review; and not
9 that a decision of the Commission is only subject to judicial review.

10 The second sentence of NRS 360.245(5) speaks for itself, and expressly prohibits the
11 Department from seeking judicial review of Commission decisions. Together, the two sentences
12 of NRS 360.245(5) do no more than establish the Commission’s decision as the final decision
13 within the agency. Importantly, NRS 360.245(5) neither authorizes any party to seek judicial
14 review nor states that a final decision of the Commission is only subject to judicial review.
15 Instead, one must consult other statutes to determine the specific judicial remedy that applies in a
16 particular set of circumstances.

17 For example, NRS 233B.130(1) authorizes “any party who is identified as a party of
18 record by an agency in an administrative proceeding and aggrieved by a final decision in a
19 contested case . . . to judicial review of the decision.” (Even this provision merely authorizes a
20 petition for judicial review and does not state that the aggrieved party is only entitled to judicial
21 review.) NRS 360.395 makes it clear that a taxpayer may file a petition for judicial review
22 following the Commission’s decision upholding a deficiency determination by the Department.
23 See Section III.A.1, *supra*. NRS 372.680 authorizes a taxpayer to bring an action against the
24 Department on the grounds set forth in its refund claims following the Commission’s denial of its
25 refund claims. NRS 360.245(7) authorizes a county or other local government that is a party to

26 ⁶ As discussed at length above and in Edison’s Opposition Brief, S.B. 362 amended NRS 372.680 and
27 other tax refund statutes to require denial of its refund claim from the Commission before a taxpayer can
28 bring an action in district court against the Department. This is consistent with the changes made by S.B.
375, ensuring that the Commission’s decision, not the Department’s, is the final decision within the
agency.

1 the proceeding before the Commission and aggrieved by the decision to petition for judicial
2 review. NRS 360.245(5), of course, prohibits the Department from filing a petition in that case.

3 **2. NRS 360.245(5) Was Enacted To Resolve a Dispute**
4 **Between the Commission and the Department**

5 NRS 360.245(5) codifies the District Court's holding in *Dep't of Tax'n v. Newmont Gold*
6 *Co.* (Nev. 1st Judicial Dist., Sept. 3, 1996), attached as **Exhibit E**. In that case, the taxpayer
7 (Newmont Gold) received a deficiency determination following a sales tax audit by the
8 Department. The taxpayer filed a petition for redetermination and the matter was heard before a
9 Department hearing officer. The hearing officer upheld the deficiency determination and the
10 taxpayer appealed to the Commission. The Commission voted unanimously to reverse.

11 The Department filed a petition for judicial review in district court. The taxpayer filed a
12 motion to dismiss, arguing that the Department had no standing to file a petition for judicial
13 review because the Commission is the statutory head of the Department. The Department argued
14 that, since "its members are not selected based upon their tax law expertise, . . . the Commission's
15 decisions should be appealable." The district court granted the taxpayer's motion to dismiss
16 because existing statutes "clearly established" the Commission as the head of the Department
17 and, thus, the "Department . . . can not be aggrieved by a decision of [the Commission]."

18 Following the decision in *Newmont Gold*, the Legislature passed Senate Bill 374 ("S.B.
19 374") and Senate Bill 375 ("S.B. 375") in 1997. S.B. 374 addressed the Commission's perceived
20 conflict of interest within the Attorney General's Office as a result of attorneys within the same
21 agency representing both the Department and the Commission, and authorized the Commission to
22 seek independent counsel in certain circumstances. S.B. 375 added NRS 360.245(5), prohibiting
23 the Department from seeking judicial review of Commission decisions, and NRS 360.245(7),
24 specifically authorizing local governments that were parties to the proceeding before the
25 Commission to seek judicial review if they are aggrieved by the decision.

26 In sum, S.B. 374 and S.B. 375 resolved a turf war between the Commission and the
27 Department, and NRS 360.245(5) has no bearing on the judicial remedy afforded to a taxpayer in
28 a refund action.

1 IV. CONCLUSION

2 For all the reasons stated above, Edison's action in this case brought pursuant to NRS
3 372.680 is a trial de novo, *i.e.*, a trial that includes an evidentiary hearing, governed by the NRCP
4 and without deference to the decision of the Commission.

5 Dated: August 28, 2009

6
7 By: 

8 NORMAN J. AZEVEDO
9 State Bar No. 3204
10 510 W. Fourth Street
11 Carson City, NV 89703
12 (775) 883-7000


13 Attorney for Plaintiff

14 CCI:812876.16

CERTIFICATE OF MAILING

I hereby further certify that on the 28th day of August, 2009, I hand-delivered a copy of
the foregoing addressed to:

Gina Session, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701



Johanna Maher

1 Case No. 09 OC 00016 1B
2 Department No. 1
3
4
5

6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR CARSON CITY**
8

9 Southern California Edison,)
10)
11 Plaintiff,)
12)
13 vs.)
14 STATE OF NEVADA ex rel. Department of)
15 Taxation,)
16 Defendants.)
17)
18)

17 **RESPONDENT'S BRIEF REGARDING NATURE OF THE PROCEEDINGS BEFORE THIS**
18 **COURT**

19 The Plaintiff Southern California SCE (hereinafter SCE) and Respondents State of
20 Nevada ex rel. Department of Taxation (hereinafter Department) entered into a stipulated
21 agreement to provide this court with points and authorities regarding the nature of the
22 proceedings before this court. Based upon the following memorandum of points and
23 authorities, and the other papers and pleadings on file with the court, Respondents ask that
24 the action filed by SCE be treated as a Petition for Judicial Review and that the court orders
25 this case to proceed pursuant to the procedures in NRS Chapter 233B.

26 **POINTS AND AUTHORITIES**

27 **I. FACTS**

28 SCE filed an Amended Complaint on March 27, 2009 to recover use taxes paid to the

1 Department on the use and consumption of out-of-state coal at a coal-fired power plant in
2 Nevada. See Amended Complaint, paragraphs 1-3. In the Amended Complaint, SCE admits
3 in its factual allegations that a series of hearings were held by the Nevada Tax Commission
4 (Commission) on November 1, 2004, February 7, 2005, April 5, 2005 and May 9, 2005. See
5 Amended Complaint, paragraph 27. SCE also admits that the Commission issued a decision
6 dated November 29, 2006 in a closed session that was subsequently voided by the Nevada
7 Supreme Court. See Amended Complaint, paragraphs 28-33. SCE includes the fact that
8 once the 2006 decision was voided the Commission held hearings on September 9, 2008 and
9 December 1, 2008 and that the Commission denied the refund in a decision dated February
10 27, 2009. See Amended Complaint, paragraphs 36 and 38.

11 Included in the original Complaint, but inexplicably left out of the Amended Complaint,
12 was the fact that the Commission first held a hearing on the case on December 8, 2003 and
13 remanded the case to a Hearing Officer. See Complaint, paragraph 17. Prior to being heard
14 by the Commission in 2004, this matter was heard by a Hearing Officer on December 22,
15 2003 and January 28, 2004 and the Hearing Officer issued a written decision on July 14,
16 2004. See Complaint, paragraph 18. There exists an administrative record of documents,
17 agendas and transcripts in this case well in excess of 3,000 pages.

18 In the Amended Complaint, SCE addresses three separate sets of claims for refund.
19 Claim Set 1 is the set of claims for refund that was the subject of the Decision by the
20 Commission. See Amended Complaint, Exhibit 2.¹ SCE alleges that Claim Set 2, also a
21 claim for refund, which is not included in the final Decision by the Commission, should have
22 been included in that decision. See Amended Complaint, paragraph 48-51. Finally, SCE
23 includes Claim Set 3, which includes claims for refunds for use taxes paid from October 2003
24 until SCE stopped paying use tax on the coal in March 2005. Claim Set 3 also includes a
25 claim for refund of use taxes that SCE paid in 2008 as part of the amnesty tax program on the
26 amount it owed for use taxes on coal consumed from March 2005 until December 2005. See
27 Amended Complaint, paragraph 42-43. Claim Set 3 has never been the subject of any action

28

¹ The exhibits attached to the Amended Complaint start with letters for Exhibit A-H, after Exhibit H the Exhibits are numbered 1-2. Exhibits 1-2 are followed by an Exhibit I.

1 by the Commission.

2 II. ARGUMENT

3 1. AFTER A FINAL DECISION BY AN ADMINISTRATIVE AGENCY THE
4 COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW.

5 In its Order of June 30th, 2009 this court wrote "[t]his Court reserves the right to treat
6 the Amended Complaint as a Petition for Judicial Review as to the February 27, 2009 final
7 decision of the Nevada Tax Commission. See, NRS 360.245(5), and *Campbell*, supra at
8 219." As the court recognizes, after a final decision by an administrative agency, a district
9 court's jurisdiction is limited to judicial review. NRS 233B.130(6).

10 NRS 233B.130(6) states: "The provisions of this chapter are the exclusive means of
11 judicial review of, or judicial action concerning a final decision in a contested case involving an
12 agency to which this chapter applies." NRS 360.245(5) states in pertinent part: "A decision of
13 the Nevada Tax Commission is a final decision for the purposes of judicial review." The
14 Nevada Supreme Court in *Campbell v. State of Nevada*, 108 Nev. 215, 827 P.2d 833 (1992),
15 rather than apply administrative res judicata to a complaint that was timely filed for purposes
16 of judicial review, ordered that the case be subject to judicial review. *Id.* at 219, 836. The
17 Court specifically found that "pursuant to *Britton*, the Campbells do not have a right to a
18 second evidentiary hearing." *Id.* SCE, likewise, has no right to a second evidentiary hearing.

19 The Court's decision in *Campbell* is based on sound and long-standing public policy
20 considerations. A July 1990 publication for the State Bar of Nevada, entitled "The Basics of
21 Nevada Administrative Law" sets forth the basis for applying judicial review to final
22 administrative decisions. It states:

23 Judicial review is designed to expedite the passage of an administrative case through
24 the judicial system. It is also meant to minimize the intrusion of courts into
25 administrative functions, such as fact-finding, while relieving district courts of the
26 burden and expense of trying an administrative case as if the case had been filed as an
original matter in district court.

27 55-JUL Inter Alia 19 p.8.

28 The article goes on to discuss the reasons why trial de novo is disfavored in administrative

1 cases and why cases involving trial de novo have been frequently reversed by the Nevada
2 Supreme Court:

3 Litigants who have successfully convinced a district court to dispense with a review of
4 the administrative record and hold a trial de novo have repeatedly had their original
5 efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary.
6 Trial de novo evades an administrative body's 'judgment based upon its specialized
7 experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-
8 finding function. Trial de novo further destroys the effectiveness of an administrative
9 body and the administrative process by relegating an administrative hearing to 'a
10 meaningless, formal, preliminary' which places 'upon the courts the full administrative
11 burden of factual determination.' The waste of administrative and judicial resources
12 inherent in a trial de novo is obvious. The only time a trial de novo should occur is in
13 the rare instances where it is specifically provided for by statute.

14 *Id.* (citations omitted).

15 The article cites NRS 607.215 as an example of a specific statute that provides for trial de
16 novo. NRS 607.215(3) states "Upon a petition for judicial review, the court may order trial de
17 novo." There is no applicable statute in the current case that specifically authorizes a trial de
18 novo. The language in the statute at issue, NRS 372.680, states a claimant "may bring an
19 action". There is no mention in NRS 372.680 to a right to trial de novo rather than judicial
20 review. The statute falls far short of granting jurisdiction to the courts to order a trial de novo.

21 One of the cases cited in the article *Nevada Tax Commission v. Hicks*, 73 Nev. 115,
22 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision.
23 The full quote from *Hicks*, parts of which were included in the citation above, is as follows:

24 It should be apparent that if trial de novo is permitted here it would completely destroy
25 the effectiveness of the tax commission as an expert investigative board. The most
26 perfunctory showing could be made before the board by a licensee with knowledge that
27 the matter would ultimately be decided by the courts upon full evidentiary
28 consideration. Trial de novo, in effect, could relegate the commission hearing to a
meaningless, formal, preliminary and place upon the courts the full administrative
burden of factual determination.

Id. at 123, 856. See also, *Las Vegas Valley Water District v. Curtis Park Manor Water Users
Association*, 98 Nev. 275, 646 P.2d 549 (1982).

While *Hicks* dealt with a gaming licensee, the reasoning applies equally to the case before this
Court. Permitting this action to go forward as a trial de novo would render meaningless the
expertise of the Commission as well as the extensive record that was before it.

1 *Hicks* and other cases recognize the value of having the administrative body with
2 expertise in an area responsible for weighing and considering the facts in fields where it has a
3 particular competence. *Id.*, see also, *Clark County Board of Commissioners v. Taggart*, 96
4 Nev. 732, 734-35, 615 P.2d 965, 967 (1980); *Spilotro v. State of Nevada*, 99 Nev. 187, 190,
5 661 P.2d 467, 469 (1983); *Sports Form, Inc. v. LeRoy's Horse and Sports Place*, 108 Nev. 37,
6 41, 823 P.2d 901, 903 (1992)(discussing the doctrine of primary jurisdiction); *Richardson*
7 *Construction v. Clark County School District*, 123 Nev. 61, 156 P.3d 21, 24 (2007)(discussing
8 the doctrine of primary jurisdiction).

9 2. CHANGES IN NRS 233B AND IN NRS 372.680 REFLECT LEGISLATIVE
10 INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TO JUDICIAL
11 REVIEW.

12 Prior to 1989 the NRS Chapter 233B specifically provided that a trial de novo was
13 available, if provided for by an agency's statutes outside of NRS Chapter 233B. At that time
14 NRS 233B.130(1) read in pertinent part:

15 Any party aggrieved by a final decision in a contested case is entitled to judicial review
16 thereof under this chapter. Where appeal is provided within an agency, only the
17 decision at the highest level is reviewable unless otherwise provided by statutes. This
18 chapter does not limit utilization of trial de novo to review a final decision where
19 provided by statute, but this chapter provides an alternative means of review in those
20 cases.

21 The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on*
22 *Government Affairs*, 1989 Nev. Stat. 3 removed this language and replaced it with the current
23 language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are the
24 exclusive means of judicial review or judicial action concerning a final decision in a contested
25 case involving an agency to which the chapter applies. The legislature specifically removed
26 the authorization to use a trial de novo and replaced it with language stating that the exclusive
27 means for a court to exercise jurisdiction over a final agency decision was by way of judicial
28 review.

29 In testimony before the Assembly, Mr. Richard Campbell, Chairman of the State Bar's
30 Administrative Law Committee, explained the reasoning for the changes made by AB 884.

31 ///

1 The minutes state:

2 He indicated one problem with administrative law is that each agency has its own
3 judicial review provision but it is incomplete and contains no provision for procedures
4 before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the
5 agency's law applies thereby creating general confusion among practitioners and the
6 courts. He indicated he spoke with several judges who urged the Administrative Law
7 Committee to clarify such procedures...

8 Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page
9 7, June 6, 1989.

10 Mr. Campbell explained the importance of allowing administrative agencies to exercise their
11 expertise in a given area without interference by the courts. The minutes further provide:

12 Mr. McGaughey referred to page 2, line 28, 'The court shall not substitute its judgment
13 for that of the agency as to the weight of evidence on a question of fact.' He asked Mr.
14 Campbell to explain that statement. Mr. Campbell replied the Administrative Law
15 Committee does not want the courts to substitute their expertise for the expertise of the
16 administrative agency. Mr. Sourwine mentioned that this language exists in present
17 law.

18 Mr. Campbell explained the court is not required to affirm the decision of an agency.
19 Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it
20 is clearly erroneous in view of reliable evidence on the whole record. Since the court
21 does not hear the testimony of witnesses, the court is not in a position to judge
22 credibility. Therefore, in reviewing records of an administrative agency, the court
23 merely looks for evidence in the record that supports the agency's decision. At that
24 point, the court defers to the agency's expertise in the particular area.

25 *Id.* at 8.

26 As was argued in the Motion to Dismiss, the legislature in 1999 made changes to NRS
27 372.680 to further clarify its relationship with NRS Chapter 233B. Standing alone, NRS
28 372.680 fits the description from the legislative history cited above of an agency provision that
is incomplete and does not specify the nature of the procedure in court. The statute was
changed to read that an action would follow a decision of the Commission, not a decision of
the Department. The change ensured that requests for refund would fall within the purview of
a contested case before an administrative body. The statutory change in 1999 denotes an
effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS
Chapter 233B.

1 A review of the legislative history from the 1999 changes to NRS 372.680 spells out
2 clearly that it was the intent of the legislature that an action filed pursuant to NRS 372.680
3 after a final decision by the Commission would follow the procedures in NRS Chapter 233B.
4 In a memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman,
5 Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General
6 regarding *Senate Bill (S.B.) 362* and the changes to NRS 372.680 it states:

7 With the exception of Section 13 of S.B. 362, the remaining
8 sections delineated above address the applicable procedures to
9 follow in a claim for refund. Prior to S.B. 362, refund claims had not
10 been subject to the requirements of chapter 233B of the Nevada
11 Revised Statutes. **Historically, if a taxpayer filed a claim for**
12 **refund with the Nevada Department of Taxation, which was**
13 **denied by the Nevada Department of Taxation, the taxpayer**
14 **was required to file an action in district court in order to**
15 **contest this denial. The language of S.B. 362 now changes**
16 **this procedural route. In the event that S.B. 362 becomes law,**
17 **a taxpayer whose claim for refund is denied by the Department**
18 **to (sic) Taxation will proceed initially to an administrative**
19 **hearing officer for an administrative trial. In the event the**
20 **taxpayer is aggrieved by the decision of the administrative**
21 **hearing officer, the taxpayer may appeal the hearing officer's**
22 **decision to the Nevada Tax Commission for an administrative**
23 **appellate review. In the event a taxpayer is still aggrieved after**
24 **a Tax Commission decision, the taxpayer may file a petition**
25 **with a district court in a judicial review proceeding. It is this**
26 **filing of a petition for judicial review which is the subject of the**
27 **venue provisions in S.B. 362. Thus, S.B. 362 contemplates a**
28 **change from past practice where refund claims upon passage of**
S.B. 362 will now be subject to the requirements of Chapter 233B
of the Nevada Revised Statutes.

Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly
Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis
added).

Mr. Azevedo's explanation is reiterated by other documents from the legislative record.
Mr. Azevedo provided testimony to the Senate Committee on Taxation on March 23, 1999,
which was recorded as follows:

[T]his particular provision was addressed in NRS chapter 232B (sic)
and he did not see a problem with it being brought to other courts in
the state. He explained the purpose of this bill and what it would
achieve. He said the amendments clarified the language with great
specificity so that in almost every instance the sequence would be
hearing officer, the tax commission, and, if it went to a court, it

1 would be pursuant to NRS chapter 233B in the form of a petition for
2 judicial review. He said NRS chapter 233B would address most
sales- and use-tax statutes that go to the commission.

3 Minutes, Senate Committee on Taxation, March 23, 1999.

4 Mr. Azevedo in his memorandum to Assemblyman Anderson succinctly stated the
5 procedure a taxpayer is required to follow pursuant to NRS 372.680. SCE was originally
6 heard by an administrative hearing officer. When SCE was aggrieved by the decision of the
7 administrative hearing officer, SCE appealed the hearing officer's decision to the Commission
8 for an administrative appellate review. After a final decision by the Commission, pursuant
9 NRS 372.680 and NRS 360.245(5), a judicial review action is filed. There is no statutory
10 language authorizing a court to hear this matter as a trial de novo.

11 3. THE COURT MUST HARMONIZE NRS 372.680 AND NRS CHAPTER 233B.

12 If the matter is treated as a trial de novo, the court would have to find that NRS 372.680
13 preempts NRS Chapter 233B. As the Court recognized, the proper course is to give meaning
14 to all statutes by harmonizing them. The Nevada Supreme Court was faced with this issue in
15 a case against the State Board of Equalization. The Supreme Court wrote:

16 Thus, even though NRS 361.410(1) and NRS 361.420(2) include specific provisions
17 concerning taxpayer protections, these statutes do not take precedence over the APA
18 under these circumstances, as they do not expressly govern the rights of a local
19 government such as Mineral County. Consequently, we conclude that the provisions of
20 NRS Chapter 361 supplement rather than preempt, the provisions of NRS Chapter
21 233B, particularly NRS 233B.130(1)'s provision that an aggrieved party may petition for
judicial review of an agency decision. This interpretation is optimal because it permits
harmonious construction of NRS Chapter 233B and NRS Chapter 361.

22 *Mineral County v. State Board of Equalization*, 121 Nev. 533, 536, 119 P.3d 706, 708 (2005).

23 Treating this matter as a trial de novo would render NRS 360.245(5) and NRS Chapter
24 233B and the hearing and records before the Commission meaningless. A harmonious
25 construction of the statutes in this case would be to find that the "action" referred to in NRS
26 372.680 is an action in judicial review as provided for in NRS 360.245(5). NRS 372.680 only
27 authorizes an action after a final decision by the Commission. A final decision by the
28 Commission is subject to judicial review pursuant to NRS 360.245(5). Finally, under NRS

1 233B.130(6) judicial review is the exclusive means for a court to exercise authority over a final
2 decision by an administrative agency. When all of the relevant statutes are read together it is
3 clear that this matter should proceed as a Petition for Judicial Review. The Nevada Supreme
4 Court endorsed this approach in the *Campbell* case.

5 4. IF THIS MATTER IS TREATED AS A TRIAL DE NOVO AND NOT AN
6 APPELLATE REVIEW PROCEDURE THE ADMINISTRATIVE DECISION IS
7 FINAL AND PRECLUSIVE.

8 The Court did not grant the Motion to Dismiss filed by the Department in this matter.
9 The Court specifically left open the possibility that the matter would be treated as a Petition for
10 Judicial Review. As argued above, this court may only exercise jurisdiction over this matter as
11 a reviewing court. NRS 233B.130(6). If this matter is not before this court in an appellate
12 posture, then, as previously argued, the decision of the Commission is final. If this case is
13 before this court for a trial de novo, and the decision by the Commission is final, then
14 administrative res judicata applies. *Campbell v. State of Nevada*, 108 Nev. 215, 827 P.2d 833
(1992).

15 5. SCE HAS FAILED TO INCLUDE NECESSARY PARTIES TO THIS ACTION.

16 NRS 233B.130(2)(a) requires that petitions for judicial review must name all of the
17 parties of record to the administrative proceeding. Clark County and the City of Henderson
18 were parties to the administrative proceedings below that have not been noticed of this action.
19 This matter should not go forward without their participation.
20

21 6. THE MATTER BEFORE THIS COURT PURSUANT TO BOTH NRS CHAPTER
22 233B AND NRS 372.680 IS LIMITED TO THE RECORD BEFORE THE
23 COMMISSION.

24 Both NRS 372.680 and NRS 233B.135(1)(b) limit a court's review to the record that
25 was before the Commission. In this case only Claim Set 1 was the subject of a final decision
26 by the Commission.

27 III. CONCLUSION

28 This nature of the proceeding before this court is an action for judicial review subject to
NRS Chapter 233B. There is no statute authorizing a trial de novo. NRS 372.680 requires a

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1 final decision by the Commission. Pursuant to NRS 360.245(5) a final decision by the
2 Commission is subject to judicial review. NRS 233B.130(6) provides that the procedures in
3 NRS Chapter 233B are the exclusive means of judicial action in relation to a final decision of
4 an administrative agency such as the Commission. In order to harmonize these statutory
5 provisions and comply with the Nevada Supreme Court's decision in *Campbell*, this matter
6 must go forward as a Petition for Judicial Review.

7 Respectfully submitted this _____ day of August, 2009.

8 CATHERINE CORTEZ MASTO
9 Attorney General

10
11 By: _____
12 GINA C. SESSION
13 Chief Deputy Attorney General
14 Nevada State Bar No. 5493
15 100 N. Carson Street
16 Carson City, Nevada 89701-4717
17 (775) 684-1207
18 Attorneys for State of Nevada
19 Department of Taxation
20
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28

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General,
and that on this _____ day of August, 2009, I served a copy of the foregoing

RESPONDENT'S BRIEF REGARDING NATURE OF THE PROCEEDINGS BEFORE THIS

COURT, by mailing a true copy to the following:

Norman J. Azevedo, Esq.
510 W. Fourth Street
Carson City, Nevada 89703

Employee of the Office of the Attorney General

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10 Attorneys for Plaintiff

11
12 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
13 **IN AND FOR CARSON CITY**

14 SOUTHERN CALIFORNIA EDISON,
15
16 Plaintiff,

17 v.

18 THE STATE OF NEVADA *ex rel.*
19 DEPARTMENT OF TAXATION
20 Defendant.

Case No. 09-0C-00016-1B

Dept. No. 1

**OPPOSITION TO DEPARTMENT'S
REQUEST TO TREAT EDISON'S TAX
REFUND ACTION AS A PETITION FOR
JUDICIAL REVIEW OF THE TAX
COMMISSION'S DECISION**

(ORAL ARGUMENT REQUESTED)

21
22 Plaintiff Southern California Edison ("Edison"), by and through its attorneys of record,
23 hereby opposes the request of Defendant, the Nevada Department of Taxation ("Department"), to
24 treat Edison's action against the Department under NRS 372.680 as a petition for judicial review
25 of the decision of the Nevada Tax Commission ("Commission") governed by the Administrative
26 Procedures Act in NRS Chapter 233B (the "APA"). (See Respondent's Brief Regarding Nature of
27 the Proceedings Before This Court, filed August 28, 2009, at 1 ("Department's Opening Brief").)
28

EDISON'S OPP. TO DEFENDANTS'S REQUEST TO TREAT ITS CIVIL ACTION AS A JUDICIAL REVIEW

1 **I. INTRODUCTION**

2 Edison is entitled to a trial de novo against the Department. There are Nevada statutes and
3 cases directly on point, and legislative history supporting this conclusion, all of which are
4 addressed in detail in Edison's August 28, 2009 brief. (See Motion for an Order That Plaintiff's
5 Refund Action Under NRS 372.680 Is a Trial De Novo ("Edison's Opening Brief").)¹ The
6 Department simply does not address any of these controlling legal authorities.

7 There is, in fact, no basis in the Nevada statutes to "treat" the civil action against the
8 Department pursuant to NRS 372.680 as a petition for judicial review of the Commission's
9 decision denying a claim for refund. Doing so would require this Court to supersede the
10 Legislature's intent and rewrite the statute. The Department previously acknowledged that an
11 action under NRS 372.680 is not limited by the APA's judicial review standards and that Edison
12 is entitled to an evidentiary hearing. (See Edison's Opening Brief, at 2, quoting the Department's
13 November 21, 2003 Brief to the Commission.) Edison respectfully requests that the Court reject
14 the Department's current position and allow this case to proceed as a trial de novo.

15 **II. ARGUMENT**

16 **A. There is No Statutory Authority for the Position That the APA Applies**
17 **to an Action Under NRS 372.680**

18 The Department's Opening Brief repeatedly asserts a legal proposition that it does not and
19 cannot support, *i.e.*, that "after a final decision by an administrative agency, a district court's
20 jurisdiction is limited to judicial review." (Department's Opening Brief, at 3.) Yet the Department
21 concedes that a trial de novo, and not judicial review, is appropriate "where it is specifically
22 provided for by statute." (*Id.*, at 4 quoting "The Basics of Nevada Administrative Law.") NRS
23 372.680 *is* such a statute, as the Department recognized in 2003. But the Department now
24 implausibly asserts:

25 "There is no applicable statute in the current case that specifically authorizes a
26 trial de novo. The language in the statute at issue, NRS 372.680, states a claimant

27 ¹ See also Edison's May 8, 2009 Opposition to Motion to Dismiss ("Opposition"), at 7-8 (demonstrating
28 that the *sole* judicial remedy for a taxpayer, like Edison, whose claims for refund have been denied by the
Commission is to file an action under NRS 372.680).

1 'may bring an action.' There is no mention in NRS 372.680 to a right to trial de
2 novo rather than judicial review." (*Id.*)

3 Of course, the complete statutory language provides that a taxpayer "may bring an action against
4 the department on the grounds set forth in the claim" and the Department does not explain how
5 this plain language, which calls for a taxpayer-plaintiff to sue the Department as defendant,
6 obligates this Court to conduct a "judicial review" of the Commission's decision pursuant to the
7 APA. The civil action against the Department includes an evidentiary hearing, and thus
8 constitutes a trial de novo, as shown by the extensive controlling legal authority discussed in
9 detail in Edison's Opening Brief.²

10 Instead, the Department claims that NRS 360.245(5) and NRS 233B.130(6) are
11 determinative here. Neither of these statutes, however, affects the nature of the judicial remedy
12 provided by NRS 372.680. First, as discussed in detail elsewhere, NRS 360.245(5) does not speak
13 to who is entitled to seek judicial review, or authorize any party to seek judicial review; nor does
14 it provide that a decision of the Commission is *only* subject to judicial review. (*See* Edison's
15 Opening Brief, at 17-19.)

16 Second, NRS 233B.130(6) simply provides that the APA is the "exclusive means of
17 judicial review of, or judicial action concerning, a final decision in a contested case involving an
18 agency to which this chapter applies." Since the plain language of NRS 372.680 does not
19 contemplate a judicial review of, or any judicial action concerning, the Commission's decision
20 (instead treating the Commission's denial of a taxpayer's refund claim as simply a prerequisite to
21 "bring[ing] an action against the department"), neither the APA nor its judicial review standards
22 have any application to a refund action under NRS 372.680.

23 Furthermore, the legislative history of NRS 233B.130(6) does not help the Department's
24 case. That provision was enacted in 1989 as part of Assembly Bill 884 ("A.B. 884").³ The

25
26 ² In addition, the Department has never responded to Edison's submission of the Nevada-related portion of
27 a treatise published by BNA entitled "State Tax Appeal Systems," authored by the Federation of Tax
28 Administrators (whose members include the tax departments of the 50 states), which indicates that in a
Nevada sales or use tax refund action, the taxpayer is entitled to a trial de novo in district court following
the Commission's denial of its claim for refund. (*See Exhibit A.*)

³ The purpose of provision was simply to set minimum standards applicable to the review of decisions of

1 Department argues that the Legislature “specifically removed the authorization to use a trial de
2 novo and replaced it with language stating that the exclusive means for a court to exercise
3 jurisdiction over a final agency decision was by way of judicial review.” (Department’s Opening
4 Brief, at 5.) However, A.B. 884 did not change NRS 233B.020(2), which provides that the APA
5 does not “abrogate or limit additional requirements” imposed by other statutes or otherwise
6 recognized by law. Accordingly, A.B. 884 provides no authority for the Department’s argument.

7 **B. The Department’s Construction of the Statutes Results In Discord, Not**
8 **Harmony**

9 In its Motion to Dismiss, the Department urged the Court to ignore NRS 372.680 entirely,
10 arguing that a taxpayer’s only remedy following the Commission’s denial of its claim for refund
11 was to file a petition for judicial review pursuant to NRS 233B.130. This Court rejected the
12 Department’s argument because it would “have this Court ignore and give no meaning to NRS
13 372.680. This violates the requirement that the Court must consider statutes in pari materia such
14 that legal effect is given to each statute.” (June 30, 2009 Order Denying Defendant’s Motion to
15 Dismiss, at ¶ 2.)

16 The Court should likewise reject the Department’s lofty claim that its approach gives
17 “meaning to all statutes by harmonizing them” (Department’s Opening Brief, at 8). Instead, the
18 Department’s statutory construction yet again reads NRS 372.680 out of Nevada’s tax statutes,
19 thus violating the fundamental rule of statutory construction that statutes must not be read in a
20 way that would render words or phrases superfluous or make a provision nugatory. *See Butler v.*
21 *State*, 120 Nev. 879, 892-93 (2004). In addition, the Department’s construction of the statutes
22 violates the rule that when there is a statute “dealing expressly and in detail with a particular
23 subject,” the specific statute controls over a “general provision relating only in general terms” to
24 the subject. *Western Realty Co. v. City of Reno*, 63 Nev. 330, 337 (1946).

25 The Department argues that the APA and NRS 360.245(5) are rendered meaningless if
26 this Court gives effect to the plain language of NRS 372.680. In fact, the former statutes deal with
27 administrative agencies that are subject to judicial review. *See Minutes, Assemb. Comm. on Gov’t Affairs*,
28 June 6, 1989 (stating that, under then-current law, “each agency has its own judicial review provision but
it is incomplete and contains no provision for procedures before the courts.”).

1 a different judicial remedy than the latter, and they do not apply in this case. (See Edison's
2 Opening Brief.) NRS 372.680 requires the taxpayer, as plaintiff, to bring an action against the
3 Department, as defendant, on the grounds set forth in the taxpayer's refund claim, while NRS
4 233B.130 requires an aggrieved party to petition for judicial review of the agency's decision,
5 naming the agency (in this case the Commission) as primary respondent.⁴ The Department's
6 interpretation renders the specific requirements of NRS 372.680 completely meaningless and
7 void, and substitutes requirements from an entirely different statute, contrary to established law.
8 See *Butler*, 120 Nev. at 892-93.

9 The Department's position also ignores directly conflicting language in the APA itself,
10 which states that the APA "supplement[s] statutes applicable to specific agencies" but
11 emphatically "*does not abrogate or limit* additional requirements" imposed by other statutes.
12 NRS 233B.020(2) (emphasis added). NRS 372.680 *is* such a specific statute; thus, by its own
13 terms the APA is not rendered meaningless if the statutory language in NRS 372.680 is given its
14 plain meaning.

15 The Department asserts that if NRS 372.680 is construed as authorizing a trial de novo,
16 NRS 360.245(5) would be rendered meaningless and that a "harmonious construction of the
17 statutes in this case would be to find that the 'action' referred to in NRS 372.680 is an action in
18 judicial review as provided for in NRS 360.245(5)." (Department's Opening Brief, at 8.) Since
19 NRS 360.245(5) does not authorize "an action in judicial review" by a taxpayer or any other
20 party, NRS 372.680 cannot render NRS 360.245(5) meaningless.

21 Finally, *Mineral County v. State Bd. of Equalization*, 121 Nev. 533 (2005), cited in the
22 Department's Opening Brief, does not support the Department's claim that its position achieves a
23 "harmonization" of the statutes. In *Mineral County*, the Nevada Supreme Court ruled that specific
24 provisions of NRS Chapter 361 (Property Tax) pertaining to taxpayer appeals of decisions of the
25 State Board of Equalization ("SBE") *may* take precedence over the APA, but NRS Chapter 361's
26 silence on the ability of county governments to appeal decisions of the SBE did not preclude such

27
28 ⁴ Thus, the Department is not a "respondent" in an action brought under NRS 372.680, as the Department
characterizes itself in its Opening Brief.

1 governments from seeking judicial review of SBE decisions pursuant to NRS 233B.130. *See*
2 *Mineral County*, 121 Nev. at 536 (“[T]hese statutes do not take precedence over the APA *under*
3 *these circumstances*, as they do not expressly govern the rights of a local government such as
4 *Mineral County*.”) (Emphasis added.) Since NRS 372.680 expressly governs the right of
5 taxpayers (and only taxpayers) to bring an action against the Department in district court
6 following a decision by the Commission, *Mineral County*’s holding is off-point and the
7 requirements of NRS 372.680 pertaining to taxpayers do take precedence over the APA.⁵

8 **C. The Department’s Policy Arguments Favoring Judicial Review Are**
9 **Irrelevant to Statutes Authorizing a Tax Refund Action**

10 The Department cites a 19-year old article, “The Basics of Nevada Administrative Law,”
11 to persuade this Court to “treat” Edison’s action under NRS 372.680 as a petition for judicial
12 review. Nothing in this article, or the Nevada case law it cites to, has any relevance to the issue
13 before this Court. The question here is whether the civil action authorized by NRS 372.680
14 entitles the taxpayer to a trial de novo in district court as opposed to the more limited remedy of
15 judicial review. Edison has shown that it does. The fact is, the policy reasons supporting
16 application of judicial review discussed in the Department’s Opening Brief are irrelevant to civil
17 actions brought under NRS 372.680, and other similar statutes authorizing tax refund actions.⁶

18 First, a trial de novo following the Commission’s denial of a refund claim does not cause
19 the administrative process to be a meaningless or formal preliminary. (*See* Department’s Opening
20 Brief, at 4.) Since the Department may not appeal a decision of the Commission (*see* NRS
21 360.245(5)), the involvement of the Commission in the refund claim administrative process
22

23 ⁵ The issue in dispute in *Mineral County* could not arise with respect to decisions of the Commission,
24 because Nevada’s statutory scheme expressly provides for the judicial remedy appropriate to each party
25 following a Commission decision. In particular, NRS 360.245(7) specifically grants local governments the
26 right to seek “judicial review” of a Commission decision, using those exact words.

27 ⁶ In allowing a trial de novo, Nevada’s laws are consistent with the practice of a significant number of
28 other states that grant the taxpayer a trial de novo following a final decision from the administrative body
in a tax case. (*See* Edison’s Opening Brief, at 11.) In addition, federal tax refund cases in the federal
district courts are conducted as trials de novo and not as judicial reviews of the Internal Revenue Service’s
decision. *See* Saltzman, IRS Practice and Procedure ¶ 1.05[2][a], at 1-44 (Rev. 2d ed. 2005) (“The action
involves a de novo determination of the correct tax and is not a review of the administrative processing of
the case.”).

1 operates to conserve judicial resources by limiting the number of cases that require resolution by
2 the courts, in addition to providing the Commission with the ability to ensure that decisions of the
3 Department are consistent with the tax policy directives set by the Commission. *See Atari, Inc. v.*
4 *State Bd. of Equalization*, 170 Cal. App. 3d 665, 673 (1985) ("Prior to seeking relief from the
5 superior court, a taxpayer must present matters of law and fact to the State Board of Equalization
6 so that the Board may be afforded the opportunity to rectify any mistake in tax collection. Such a
7 rule prevents having an overworked court consider issues and remedies available through
8 administrative channels.")

9 Second, allowing a trial de novo in this case would not "render meaningless the expertise
10 of the Commission," as the Department argues. (See Department's Opening Brief, at 4.) The
11 principal contested factual issue in this case — whether the coal that was delivered to Edison's
12 Nevada power plant was in fact coal or instead a manufactured coal byproduct — is not a matter
13 on which the Commission has any special expertise. In fact, it is a question the Commission has
14 answered twice in different and inconsistent ways based on the same evidence, during the
15 administrative proceedings below.

16 Finally, *Hicks v. Nevada Tax Comm'n*, 73 Nev. 115 (1957) does not support the
17 Department. In *Hicks*, the Nevada Supreme Court ruled that a district court's "review" of a
18 "suspension or revocation" of a gambling license by the Commission, as the applicable statute
19 then read, required the court to conduct an on-the-record review of the Commission's decision
20 and not a trial de novo. The statute at issue in *Hicks* expressly provided for "review" of the
21 Commission's decision, whereas, in tax refund actions, the Legislature has provided taxpayers
22 with the remedy of bringing "an action against the department" on the grounds set forth in its
23 refund claim, and not a "review of the Commission's decision" denying its claim. As Edison
24 showed in its Opening Brief, these two judicial remedies are separate and distinct.⁷

25 ⁷ Indeed, the current statutory scheme applicable to decisions of the Nevada Gaming Commission
26 ("Gaming Commission"), which is now the agency responsible for administering Nevada's gaming laws,
27 shows that the Legislature has made the same distinction between judicial review and a direct action
28 against the administrative agency. Consistent with *Hicks*, a person whose gaming license has been
suspended or revoked by the Gaming Commission may challenge the "order or decision" of the Gaming
Commission only in a "judicial review" proceeding. *See* NRS 463.310. Nevertheless, the Legislature has
expressly provided that not all decisions of the Gaming Commission are limited to judicial review. The

1 **D. The Intent of S.B. 362 Was Not to Subject Commission Decisions to**
2 **Judicial Review**

3 Since there is no statutory language supporting its argument, the Department argues that
4 by enacting Senate Bill 362 ("S.B. 362") in 1999, the Legislature intended to change a taxpayer's
5 judicial remedy following the completion of the administrative process in a sales or use tax refund
6 action. This position finds no support in the statutory amendments made by S.B. 362. Both
7 before and after S.B. 362, NRS 372.680 provided that a taxpayer "may bring action against the
8 department on the grounds set forth in the claim" following the completion of the administrative
9 process. "[W]hen a legislature uses a term of art in a statute, it does so with full knowledge of
10 how that term has been interpreted in the past, and it is presumed that the legislature intended it to
11 be interpreted in the same fashion." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120
12 Nev. 575, 587 (2004). It is indisputable that, prior to S.B. 362, NRS 372.680's action against the
13 Department authorized a trial de novo, even in circumstances where the taxpayer's refund claim
14 was denied by the Commission after an evidentiary hearing. (*See Edison's Opening Brief*, at 6-7
15 & 9-11.) The Legislature's conscious decision to retain the same language describing the
16 taxpayer's judicial remedy establishes beyond a doubt that the Legislature intended for taxpayers
17 to have the right to a trial de novo following completion of the administrative process.

18 The Legislature's intent in enacting S.B. 362 was to require the Commission's
19 involvement in the claim for refund administrative process. This change is a natural
20 accompaniment to the changes made by the Legislature two years earlier, in 1997, in Senate Bill
21 375 (S.B. 375), which clarified that, between the Department and the Commission, the
22 Commission has ultimate authority for determining how Nevada's tax laws are interpreted,
23 administered and enforced. (*See Edison's Opening Brief*, at 19.) Consistent with this Legislative
24 determination, S.B. 362 ensured that the Commission's decision, not the Department's, would
25 always be the final decision within the agency. In addition, this change promoted judicial

26 State Gaming Control Board ("Board") and the Gaming Commission partly administer Nevada's tax on
27 live entertainment (in addition to the Department and Commission). NRS 368A.290(1)(a), enacted in
28 2003, provides: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is
 rendered by . . . the [Gaming] Commission, the claimant may bring an action against the Board on the
 grounds set forth in the claim."

1 economy by *reducing* the number of refund cases that would proceed to district court, since a
2 taxpayer is only required to bring an action in district court if the Commission affirms the
3 Department's denial of its refund claim: "The change allowed the taxpayer to appeal to the Tax
4 Commission before the business and the state had incurred the legal expenses" of bringing (or
5 defending) an action in district court. See Minutes, Assemb. Comm. on Tax'n, May 6, 1999.
6 None of this has any bearing on the nature of the taxpayer's judicial remedy under NRS 372.680
7 once the administrative process has been completed.

8 The Department's citation to a memorandum authored by then-Deputy Attorney General
9 Norman J. Azevedo entitled "Venue Sections of S.B. 362" and of minutes of the March 23, 1999
10 meeting of the Senate Committee on Taxation, at which Mr. Azevedo was present to answer
11 questions regarding the venue provisions of S.B. 362, does nothing to establish that NRS 372.680
12 authorizes a judicial review proceeding governed by the APA. Edison has already fully responded
13 to, and refuted, the Department's arguments in this regard. (See Opposition, at 11-14.)⁸

14 **E. Administrative Res Judicata Does Not Apply**

15 Finally, the Department essentially repeats its argument that administrative res judicata
16 applies to preclude a trial de novo. Again, administrative res judicata cannot apply in this case
17 because, in the case of a refund action brought under NRS 372.680, only the "[f]ailure to bring an
18 action within the time specified" by NRS 372.680(1) "constitutes a waiver of any demand against
19 the State on account of alleged overpayments." NRS 372.680(2). Since Edison filed its Amended
20 Complaint pursuant to NRS 372.680 within 90 days after the Commission denied its claims for
21 refund, as required by NRS 372.680, there has been no final decision having preclusive effect.

22
23 ⁸ Contrary to the Department's repeated assertion, Edison's administrative appeal of the Department's
24 denial of its refund claims was not originally heard by a Department hearing officer. (See Motion to
25 Dismiss, at 6; Department's Opening Brief, at 8.) In addition, Edison did not "inexplicably" omit
26 information regarding the administrative processing of its case from its Amended Complaint. (See Motion
27 to Dismiss, at 2; Department's Opening Brief, at 2.) Edison informed the Department by letter on April 7,
28 2009, *before* the Department filed its Motion to Dismiss, that it had come to Edison's attention that its
Amended Complaint contained certain errors and omissions "that occurred in connection with the transfer
of electronic copies of the documents between two different word processing systems prior to filing."
Enclosed with its letter, Edison provided the Department with the corrected version of the Amended
Complaint, which included the information the Department states was "inexplicably" omitted, because
Edison "wanted to be sure the Department of Taxation had prompt notice of the corrected text as it
prepares its responsive pleadings." (See Exhibit B.)

1 The continued assertion of the Department that the Commission's decision is "final" (for
2 preclusive purposes) is plainly wrong.

3 Furthermore, as discussed in Edison's Opening Brief, *Campbell v. State of Nevada*, 108
4 Nev. 215 (1992) does not support the Department's contention that administrative res judicata
5 applies. (See Edison's Opening Brief, at 14-17.) In fact, *Campbell* supports Edison's position that
6 when a taxpayer properly brings an action under NRS 372.680 after its claim for refund has been
7 denied by the Commission, the action in district court is a trial de novo and is not governed by the
8 APA's judicial review standards. *Campbell*, 108 Nev. at 219 (stating that the "only statutory
9 means provided for demanding and obtaining a refund of any excess taxes paid are set forth in
10 NRS 372.630-720" and may not be sought "under the Administrative Procedure Act.").

11 In addition, the Department's argument proves too much because, if applicable, the
12 doctrine of administrative res judicata would *always* bar refund actions brought under NRS
13 372.680, and all other Nevada tax refund statutes, thus impermissibly rendering NRS 372.680 and
14 all similar statutes void and of no effect *ab initio*. This is the necessary consequence of the
15 Department's position, regardless of whether the refund action was treated as a trial de novo or a
16 judicial review proceeding since, if administrative res judicata applies to an agency's decision, the
17 district court simply has no jurisdiction to hear the case. The fact is, administrative res judicata has
18 nothing to do with the nature of the proceedings before the court and, in any event, has no
19 application here.

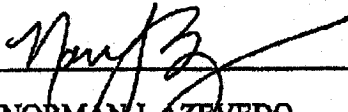
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1 **III. CONCLUSION**

2 The Department has not provided this Court with any legal authority or plausible reasons
3 for treating Edison's use tax refund action against the Department as a petition for judicial review
4 of the Commission's decision. For all the reasons stated above and in Edison's Opening Brief,
5 Edison respectfully requests that the Court treat this action as requiring a trial de novo.

6 Dated: September 17th, 2009

7 By: 
8 NORMAN J. AZEVEDO
9 State Bar No. 3204
10 405 North Nevada Street
11 Carson City, NV 89703
12 (775) 883-7000

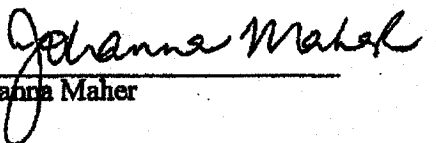
13 Attorney for Plaintiff

14 CCI:814122.8

1 CERTIFICATE OF MAILING

2 I hereby further certify that on the 11th day of September, 2009, I hand-delivered a copy
3 of the foregoing addressed to:

4 Gina Session, Esq.
5 Office of the Attorney General
6 100 N. Carson Street
7 Carson City, NV 89701

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9 Johanna Maher
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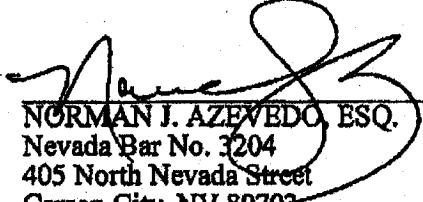
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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, OPPOSITION TO
DEPARTMENT'S REQUEST TO TREAT EDISON'S TAX REFUND ACTION AS A
PETITION FOR JUDICIAL REVIEW OF THE TAX COMMISSION'S DECISION (ORAL
ARGUMENT REQUESTED) filed in Case No. 09 OC 00016 1B DOES NOT CONTAIN THE
SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 11 day of September, 2009.


NORMAN J. AZEVEDO, ESQ.
Nevada Bar No. 3204
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Case No. 09 OC 00016 1B

Department No. 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

Southern California Edison,)
)
Plaintiff,)
)
vs.)
)
STATE OF NEVADA ex rel. Department of)
Taxation,)
)
Defendants.)
)
)

**OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER THAT PLAINTIFF'S REFUND
ACTION UNDER NRS 372.680 IS A TRIAL DE NOVO.**

Defendant State of Nevada ex rel. Department of Taxation (Department), by and through its attorney, Catherine Cortez Masto, Attorney General, by Gina C. Session, Chief Deputy Attorney General, hereby submits its Opposition To Plaintiff's Motion For an Order that Plaintiff's Refund Action Under NRS 372.680 is a Trial de Novo based upon the following memorandum of points and authorities, and the other papers and pleadings on file with the court in this matter.

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The following is a timeline of the relevant legislative changes to NRS Chapter 233B and NRS 372.680:

The legislature removes language authorizing original actions when a statute authorizes such an action and replaces it with the language in NRS Chapter 233B.130(6) “The provisions of this chapter are the exclusive means of judicial review of, or **judicial action** concerning, a **final decision** in a contested case involving an agency to which this chapter applies.” (emphasis added)

The legislature adds the language in NRS 360.245(5) that states “A decision of the Nevada Tax Commission is a **final decision** for the purposes of judicial review.” (emphasis added)

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after **a final decision** upon a claim filed pursuant to this chapter is rendered by the **Nevada Tax Commission**, the claimant may bring **an action** against the Department on the grounds set forth in the claim..." (emphasis added). "Thus, [the legislation] contemplates a change from past practice where **refund claims** upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis added)

When reviewing the Nevada case law regarding tax refund actions, it is important to keep these legislative changes in mind.

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1 Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy
2 Attorney General.

3 Edison argues that *Saveway* stands for the proposition that taxpayer's claims for refund
4 are not governed by NRS Chapter 233B. The problem with Edison's argument is that the
5 facts in *Saveway* are easily distinguishable from the facts in this case and the Nevada
6 Supreme Court came to a conclusion in *Saveway* that supports the application of NRS
7 Chapter 233B to instances where, as in the current case, there has been a full evidentiary
8 hearing before an administrative agency.

9 The statute analyzed in *Saveway* is NRS 365.460.¹ At the time of the decision NRS
10 365.460 read as follows:

11 After payment of any excise tax under protest duly verified, served
12 on the department, and setting forth the grounds of objection to the
13 legality of the excise tax, the dealer paying the excise tax may bring
14 an action against the state treasurer in the district court in and for
15 Carson City for the recovery of the excise tax so paid under protest.

16 *Saveway* at 404, 128.

17 There are notable differences between NRS 365.460 and NRS 372.680. Pursuant to
18 NRS 365.460 a taxpayer can bring an action after paying the tax under protest without any
19 further administrative proceeding. Additionally, the action the taxpayer can bring pursuant to
20 NRS 365.460 is not against an administrative body, but against the state treasurer in an
21 independent action for restitution for the return of money wrongfully held. *Id.*

22 There is no requirement to exhaust administrative remedies in NRS 365.460. This is in
23 contrast to NRS 372.680 which requires a taxpayer to obtain a final decision from the
24 Commission. Only after exhausting its appeals before the Commission can the taxpayer bring
25 an action under NRS 372.680. The Court in *Saveway* thought this was an important
26 distinction. The Court wrote:

27 We conclude that the district court erred in applying standards of
judicial review properly applied to **appeals** from administrative
decisions. NRS 365.460 states that the taxpayer may bring the
action to recover taxes illegally assessed.

¹ At the time of the Court's decision in 1988, the fuel tax at issue here was administered by the Department.
Today the fuel tax is administered by the Department of Motor Vehicles.

1 *Id.* (emphasis in the original).

2 NRS 372.680 does not indicate that a taxpayer can bring an action to recover taxes
3 illegally assessed. It specifically states that the action is to be filed after a final decision by the
4 Commission. The action is not against the state treasurer for holding money rightfully
5 belonging to the taxpayer.

6 The legislative change made to NRS 372.680 in 1999 ensured that there would be the
7 opportunity for an evidentiary hearing, findings of facts and conclusions of law and the
8 opportunity for review by the Commission prior to a decision becoming final. With the change,
9 the legislature limited the scope of NRS 372.680 and brought it within the umbrella of NRS
10 Chapter 233B. When the statute allowed an action against the Department after a decision by
11 the Department and not the Commission, it was more like the statute at issue in NRS 365.460
12 where there is no administrative proceeding.

13 The Court in *Saveway* indicated that "authority from other jurisdictions supports
14 *Saveway's* contention that the statute gives the taxpayer a right to bring an independent
15 action for restitution." *Id.* While that may have been the case in 1988, a review of recent
16 case law indicates that judicial review is the common standard in other states for resolving tax
17 refund cases coming to district court from an administrative body. A recent decision by the
18 Court of Appeals of North Carolina is particularly on point. *In the Matter of the Denial of NC*
19 *Idea's Refund of Sales and Use Tax*, 2009 WL 10458893 (N.C.App.)(April 21, 2009). The
20 Court of Appeals held that the Tax Review Board was not subject to pure de novo review.
21 The Court of Appeals wrote:

22 According to well-established law, it is the responsibility of the
23 administrative body, not the reviewing court, 'to determine the
24 weight and sufficiency of the evidence and the credibility of the
witnesses, to draw inferences from the facts, and to appraise
conflicting and circumstantial evidence.

25 *Id.* at 4. See also *Comptroller of the Treasury v. J/Port, Inc.*, 184 Md.App. 608, ___, 967 A.2d
26 253, 261 (2009); *Comptroller of the Treasury v. Science Applications International*, 405 Md.
27 185, 192-193, 950 A.2d 766, 770 (2008); *Posner v. Comptroller of the Treasury*, 180 Md.App.
28 379, 383-384, 951 A.2d 112, 115 (2008); *Briggs Tax Service, LLC v. Detroit Pub. Sch*, 282

1 Mich.App. 29, 33, 761 N.W.2d 816, 819 (2008); *Ins. Co. of the State of PA*, 269 S.W.3d 32,
2 34; *In the Matter of the Sales Tax Claim For Refund Of the Home Depot v. Oklahoma Tax*
3 *Comm'n*, 198 P.3d 902, 903 (2008); *Becton, Dickson and Co. v. Nebraska Dep't of Revenue*,
4 276 Neb. 640, 645, 756 N.W.2d 280,285 (2008); *The Goodyear Tire & Rubber Co. v. State of*
5 *Nebraska*, 275 Neb. 594, 598-599, 748 N.W.2d 42, 47 (2008); *TD Banknorth, N.A. v. Dep't of*
6 *Taxes*, 967 A.2d 1148, 1157-1158 (2008); *US Xpress Leasing, Inc. v. The Dep't of Revenue*,
7 385 Ill.App.3d 378, 380-381, 894 N.E.2d 890, 892, 323 Ill.Dec. 864, 866 (2008); *Sioux Falls*
8 *Shopping News, Inc. v. Dep't of Revenue and Regulation*, 749 N.W.2d 522, 524 (2008).

9 Judicial review is routinely applied to tax refund cases across the United States.
10 Saveway does not stand for the proposition that NRS 372.680 precludes application of NRS
11 Chapter 233B when there has been a full and fair administrative proceeding. As noted above,
12 the Saveway court indicated judicial review would be appropriate in an appeal from an
13 administrative decision. Saveway at 404, 128.

14 Since Saveway all of the steps taken by the legislature in regards to NRS 372.680
15 move it away from the type of procedure at issue in Saveway and ensure that a request for
16 refund is subject to an administrative proceeding. Had the legislature wanted the evidentiary
17 proceedings to occur before a district court, it would not have amended NRS 372.680 to
18 require a final decision by the NTC.

19 1. THE CAMPBELL CASES STAND FOR THE PROPOSITION THAT A TAXPAYER IS
20 NOT ENTITLED TO A SECOND EVIDENTIARY PROCEEDING.

21 SCE claims that the *Campbell* cases are distinguishable from the instant case and do
22 not stand for the proposition that a taxpayer is not entitled to more than one evidentiary
23 hearing on a claim for refund. Again, it must be remembered that both of the *Campbell* cases,
24 decided in 1992 and 1993 respectively, were made before the legislature made the changes
25 to NRS 360.245(5) in 1997 and to NRS 372.680 in 1999.

26 While it is true that the *Campbell* cases began as a deficiency determination as
27 opposed to a request for refund, for the purposes of the Nevada Supreme Court decisions it is
28 a difference without a distinction. In 1999 the Campbells had the option pursuant to NRS

1 372.680 to pay the tax, request a refund from the Department, and file an action in District
2 Court without having had an administrative proceeding before the NTC. The Campbells
3 instead chose not to pay the tax, and requested a redetermination of the deficiency finding.
4 This led to an evidentiary proceeding before the NTC. *Campbell v. Dep't of Taxation*, 108
5 Nev. 215, 217, 827 P.2d 833, 834-835 (1992). The initial letter from the Department did not
6 inform the Campbells of the two options. After the conclusion of the administrative
7 proceeding, another letter from the Department advised the Campbells to pay the tax. In
8 1992,

9 [o]nce paid, however, the only statutory means provided for demanding and obtaining a
10 refund of any excess taxes paid are set forth in NRS 372.630-720. Therefore, the
11 Campbells were left without means, under the Administrative Procedure Act, to reclaim
the taxes they believed to be improperly collected.

12 *Id.* at 219, 836.

13 Today, after the legislative change in 1999, whether for an action in refund or for
14 redetermination, the Campbells would have been subject to the Administrative Procedures
15 Act. The Court then concluded, "We agree that, pursuant to *Britton*, the Campbells do not
16 have a right to a second evidentiary hearing." *Id.* In 1993, when the case came back before
17 the Court, the Court stated, "We determined that, although the Campbells had no right to a
18 second evidentiary hearing, the Campbells' case merited judicial review." *Campbell v. Tax*
19 *Commission*, 109 Nev. 512, 515, 853 P.2d. 717, 719 (1993).

20 There is no reason to think that the Court would rule differently today. If the Court
21 believed that an NRS 372.680 action for refund was an action in equity, separate from and in
22 addition to the administrative procedures in NRS 233B, it would not have affirmed the doctrine
23 of administrative res judicata as it did and it would not, due to the unique circumstances, have
24 allowed the NRS 372.680 action to go forward subject to judicial review. The Court would
25 have permitted the Campbells to proceed with a trial de novo.

26 In the *Campbell* cases, the administrative proceeding was based on a request for
27 redetermination of a deficiency and not for an action for refund. Even though the
28 administrative hearing was not based on a request for refund the Court still found that they

1 were not entitled to a second evidentiary proceeding. SCE had an administrative proceeding
2 based on a request for refund. Unlike in the *Campbell* cases, SCE's has already had an
3 exhaustive evidentiary hearing based on their request for refund and they are not entitled to a
4 second one.

5 2. STATES THAT PERMIT TRIAL DE NOVO FOR TAX CLAIMS HAVE STATUTES
6 SPECIFICALLY AUTHORIZING TRIAL DE NOVO.

7 SCE cites several cases and state statutes for the proposition that it is common for
8 other states to allow for trial de novo for tax refund cases. A review of those cases and
9 statutes reveal that in all cases there is explicit language providing for a trial de novo and the
10 procedure to be followed. In some instances, the appeals are to tax courts.

11 Rhode Island's statute reads:

12 Each appeal of a final decision of the tax administrator concerning an assessment,
13 deficiency, or otherwise shall be an original, independent proceeding in the nature of a
14 suit in equity to set aside the final decision and shall be tried de novo and without a
15 jury. Every such matter shall have precedence over all other civil cases on the
calendar on the date to which it is assigned for trial and shall continue to have
precedence on the calendar on a day-to-day basis until it is heard.

16 R.I. Gen. Laws §8-8-24.

17 In Rhode Island the appeal is of an administrator's decision much like NRS 372.680 prior to
18 the change made by the legislature in 1999. Rhode Island's statute is notably more detailed
19 and explicit than NRS 372.680 from before or after the change in 1999.

20 Minnesota's statute states:

21 The Tax Court shall hear, consider, and determine without a jury every appeal de novo.
22 A Tax Court judge may empanel an advisory jury upon the judge's motion. The Tax
23 Court shall hold a public hearing in every case. All such parties shall have an
24 opportunity to offer evidence and arguments at the hearing; provided, that the order of
25 the commissioner or the appropriate unit of government in every case shall be prima
26 facie valid. When an appeal to the Tax Court has been taken from an order or
determination of the commissioner or from the appropriate unit of government, the
proceeding shall be an original proceeding in the nature of a suit to set aside or modify
the order or determination...

27 Minn. Stat. §271.06(6).

28 In Minnesota the Tax Court appears to function as the Tax Commission does, hearing appeals

1 from lower bodies in a public hearing. Oregon also uses a tax court to review decisions by the
2 Department of Revenue. Or. Rev. Stat. 305.425. In New Hampshire, a taxpayer can choose
3 to have its appeal from a tax department decision heard by an administrative body, the board
4 of tax and land appeals, or by the superior court in the county where the taxpayer resides.
5 N.H. Rev. Stat. Ann. §21-J:28-b(IV). Arizona permits a trial de novo in tax court by a taxpayer
6 aggrieved by the decision of the state board of tax appeals. Ariz. Rev. Stat. Ann. §42-
7 1254(D)(3).

8 SCE argues that because NRS 372.680 was allegedly modeled after California law,
9 that California law should be persuasive. There have been many changes in Nevada law in
10 the years since the law was enacted. The laws in Nevada and California have not evolved
11 along comparable lines. There is sufficient Nevada law including the statutory change made
12 by the Legislature, to decide this issue without resorting to California law.

13 Each of the fifty states has a unique approach to taxation, administrative procedure and
14 systems of government. A review of the state statutes cited by SCE reveals that in the states
15 that permit a trial de novo at some point in the process, the statutes spell out very clearly that
16 a trial de novo is available and the appropriate procedure to follow. There is no such explicit
17 language in NRS 372.680. If there are two schools of thought regarding actions for refund,
18 one being they are an administrative proceeding subject to judicial review and one being they
19 are an action in equity to correct a wrong, with the changes made by the legislature, Nevada
20 falls clearly in the first group.

21
22 **3. NRS CHAPTER 233B DOES NOT EXEMPT TAX COMMISSION CASES FROM
JUDICIAL REVIEW.**

23 The APA was enacted to "establish minimum procedural requirements
24 for...adjudication procedure of all agencies of the Executive Department of State Government
25 and for judicial review of both functions..." NRS 233B.020(1). NRS 233B.121 et. seq. sets
26 out the minimum procedure that the Department and the Commission are required to follow in
27 the adjudication of all cases brought before them. NRS 233B.125 sets out the specific
28 requirements for a final decision by the Commission. A final decision must include findings of

1 fact and conclusions of law and be supported by substantial evidence. NRS 233B.125. NRS
2 233B.130 sets out the procedure for filing a petition for judicial review. NRS 233B.131-140
3 provides very specific details regarding procedure before district court, transmittal of the
4 record, briefing schedule, standard of review. Of particular importance in this case, NRS
5 233B.135(1)(b) confines the judicial action to a review of the record before the agency.
6 Finally, 233B.150 provides a party aggrieved by the District Court decision the right to appeal
7 to the Nevada Supreme Court.

8 NRS Chapter 360 and the regulations in NRS Chapter 360 provide further detail
9 regarding adjudicatory proceedings before the Commission that are consistent with the
10 provisions of NRS Chapter 233B. Specifically NRS 360.245 describes the appeal process of
11 Department decisions before the Commission. It also includes the law that the decision of the
12 Commission is final for purposes of judicial review. NRS 360.245(5).

13 Both the Department and the Commission fall within the definition of "agency" provided
14 in NRS 233B.031. NRS 233B.039 sets out not only the agencies that are completely exempt
15 from the application of NRS Chapter 233B, but also more specifically agencies whose special
16 statutory provisions prevail over the more general provisions of NRS Chapter 233B. See NRS
17 233B.039(3). The carve-out does not include any statutory provisions applicable to the
18 Department or the Commission. The legislature could have easily included NRS 372.680 and
19 the Commission's decisions regarding tax refunds in the list specifically exempt from the
20 application of judicial review pursuant to NRS Chapter 233B, but the legislature did not do so.
21 The Commission is not exempt from NRS Chapter 233B therefore NRS Chapter 233B applies
22 to the Commission and all of its decisions in contested cases.

23 When Edison was the prevailing party in the Order of the Commission that was voided
24 by the Nevada Supreme Court and Clark County and City of Henderson were aggrieved by
25 the Commission decision, Clark County and City of Henderson appropriately filed a Petition
26 for Judicial Review which included Edison as a party to the proceeding. Yet Edison argues
27 that when they are an aggrieved party, NRS 233B no longer applies and they are allowed to
28 commence a civil action de novo and exclude Clark County and City of Henderson from the

1 suit.

2 Edison can not pick and choose when and how NRS Chapter 233B applies to
3 adjudicatory proceedings before the Commission. It either applies or it does not apply. There
4 is nothing on the face of NRS 372.680 that suggests that the final decision by the NTC is not
5 subject to NRS Chapter 233B or that taxpayers are entitled to a trial de novo. It does not
6 indicate that a NRS 372.680 is an action in equity. There is nothing to distinguish the final
7 decision by the NTC on a refund action, from any other final decision by the NTC. The NTC
8 and its final decisions are all subject to NRS Chapter 233B.

9 4. NRS 360.245(5) IS CLEAR ON ITS FACE AND DOES NOT DISTINGUISH
10 BETWEEN DEFICIENCY AND REFUND CASES.

11 NRS 360.245(5) states: "A decision of the Nevada Tax Commission is a final decision
12 for the purposes of judicial review. The Executive Director or any other employee or
13 representative of the Department shall not seek judicial review of such a decision." NRS
14 233B.130(6) states: "The provisions of this chapter are the exclusive means of judicial review
15 of, or judicial action concerning, a final decision in a contested case involving an agency to
16 which this chapter applies."

17 SCE tries to parse the meaning of NRS 360.245(5) and argues that it applies to
18 decisions regarding deficiency determinations, but not to decisions regarding requests for
19 refunds. NRS 360.245(5) is clear on its face and applies to all decisions by the NTC
20 regardless of the subject matter. When it is read together with NRS 233B.130(6) it is clear
21 that it was the intent of the legislature that final decisions by the NTC are subject exclusively
22 to the provisions of NRS Chapter 233B.

23 5. SAVEWAY, SPARKS NUGGET AND LOHSE ALL INVOLVE TAXPAYERS THAT
24 DID NOT HAVE AN EVIDENTIARY PROCEEDING.

25 As argued above, Saveway is easily distinguishable from the current case in that there
26 was no evidentiary proceeding before an administrative agency. In *Sparks Nugget* the case
27 went forward based on legal arguments, there were no facts in dispute. In the *Lohse* case,

28 ///

1 the District Court judge wrote in the Order (included as Exhibit B in SCE's Motion) the
2 following:

3 Furthermore, Plaintiffs point out no evidentiary hearings were held before the
4 Department of Taxation or the Nevada Tax Commission; rather, the Department and
5 Tax Commission simply denied Plaintiffs' claims without hearing any evidence on the
6 issue.

6 Order, p. 2, 17-20.

7 SCE also cites a brief filed in the current matter in 2003. While counsel at the time did
8 indicate there could be an evidentiary hearing at the District level, if appropriate, the brief was
9 written prior to the extensive evidentiary hearings and voluminous record was developed in
10 this case. The brief also did not take into account NRS Chapter 233B and its application to
11 Commission proceedings. Counsel concluded the brief by stating: "The two substantive
12 issues to be decided by the Commission are purely questions of law. Since the Department
13 has already verified Edison's figures on its amended returns, there is no need for an
14 evidentiary hearing or additional administrative proceedings in this case." Brief of the Nevada
15 Department of Taxation, p. 17, lines 4-6. As we now know, there were a number of factual
16 issues that were developed and argued over the course of several years.

17 The existence of an evidentiary hearing was a crucial factor for the Nevada Supreme
18 Court in the *Campbell* cases. It is the factor that distinguishes all of the Nevada cases cited
19 by SCE. SCE is not entitled to a second evidentiary proceeding.

20 6. PLAINTIFF'S COULD HAVE FILED A PETITION FOR JUDICIAL REVIEW AND
21 ACTION FOR REFUND TO PRESERVE RIGHTS UNDER NRS 372.680.

22 In response to concerns that have been voiced regarding the choice between filing a
23 petition for judicial review or an action for refund, there is no reason that SCE could not have
24 filed a petition for judicial review together with an action for refund at the same time. In the
25 unlikely event that the Department did not prevail on the petition for judicial review, a court
26 could then rule pursuant to NRS 372.680 that SCE was entitled to the refund.

27 ///

28 ///

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

CONCLUSION

When all of the relevant statutes are read together and harmonized it is clear that SCE is not entitled to a trial de novo and that this matter should proceed as a petition for judicial review. The provisions of NRS Chapter 233B are the exclusive means for judicial review or judicial action on a final decision in a contested case before an administrative body. There is no exemption in NRS Chapter 233B for request for refund actions. NRS 372.680 does not contain any express language granting a trial de novo, nor does it provide any procedure for a trial de novo. It makes no mention of the availability of relief in equity. The nature of the proceedings before this court should be in the form of judicial review pursuant to NRS Chapter 233B.

Respectfully submitted this _____ day of September, 2009.

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General,
and that on this _____ day of September, 2009, I served a copy of the foregoing
OPPOSITION TO PLAINTFF'S MOTION FOR AN ORDER THAT PLAINTIFF'S REFUND
ACTION UNDER NRS 372.680 IS A TRIAL DE NOVO, by mailing a true copy to the following:

Norman J. Azevedo, Esq.
510 W. Fourth Street
Carson City, Nevada 89703

Employee of the Office of the Attorney General

1 CASE NO. 09 OC 00016 1B

2 DEPT. NO. 1

3

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5

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR CARSON CITY

8

SOUTHERN CALIFORNIA EDISON, TRANSCRIPT OF PROCEEDINGS
Plaintiff,

9

Hearing

vs.

10

October 8, 2009

11

THE STATE OF NEVADA, EX REL
DEPARTMENT OF TAXATION,
Defendant.

12

13

THE HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE PRESIDING

14

APPEARANCES

15

16

ON BEHALF OF THE PLAINTIFF: CHARLES C. READ
Attorney at Law

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NORMAN J. AZEVEDO
Attorney at Law

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ON BEHALF OF THE DEFENDANT: GINA C. SESSION
Chief Deputy Attorney General

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REPORTED BY: Julietta Forbes, CCR #105, NV Reporting, LLC

1 CARSON CITY, NEVADA, THURSDAY, OCTOBER 8, 2009, 9:00 A.M.

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3
4 THE COURT: Please be seated.

5 For the record, this is Case No. 09 OC 00016 1B,
6 Southern California Edison versus State of Nevada Department
7 of Taxation.

8 Present for Southern -- Southern California Edison
9 is Mr. Norm Azevedo and Mr. Charles Read.

10 MR. READ: Good morning.

11 THE COURT: Present for the State of Nevada
12 Department of Taxation is Gina Sessions.

13 I would note for the record that on June 30th,
14 2009, the Court issued an order denying the defendant State
15 of Nevada's motion to dismiss, but at that time, as part of
16 that order, I directed the parties to meet and confer as to
17 how to proceed further in this particular case in regards to
18 the issue before us today.

19 Obviously, you weren't able to agree; I did note
20 from that, from your briefing schedule that you agreed to.
21 And motions have been filed for, primarily, for an order
22 that -- by Southern California Edison. That motion was
23 filed for an order that plaintiff's refund action be
24 considered as a trial de novo under NRS 372.680. And,
25 additionally, the State of Nevada also filed its brief in

1 regards to that.

2 So, at this time, are counsel ready to proceed?

3 MS. SESSION: Yes.

4 MR. READ: We are, Your Honor.

5 MR. AZEVEDO: Yes, sir.

6 THE COURT: Okay. Mr. Read, are you going to go
7 ahead and present it on behalf of Southern California
8 Edison?

9 MR. READ: Yes. And since we both had sort of
10 dueling motions and replies, we weren't sure how Your Honor,
11 or the Department, might wish to proceed.

12 We're perfectly happy to have Ms. Sessions start,
13 and then we'll -- we'll reply, or -- or vice versa.

14 MS. SESSION: I'd defer to the Court. If you'd
15 like them to start, that would be fine.

16 THE COURT: Well, you're the plaintiff in the
17 action, so I was going to go ahead and allow you to start
18 first.

19 MR. READ: Very good.

20 All right. Thank you very much, Your Honor. Good
21 morning.

22 I think that we wanted to start with, really, just
23 a couple of basic points in terms of our position, and then,
24 of course, reserve some opportunity for reply, depending
25 on -- on the Department's positions.

1 But I think that, you know, fundamentally, our view
2 is that the fact of a trial de novo being the appropriate
3 approach in this case, under 372.680, is really quite clear,
4 and that the language of 680, that Your Honor has confirmed
5 was appropriate for our filing, makes it very clear.

6 And, if I may, I'd just like to approach our poster
7 board.

8 THE COURT: You may.

9 MR. READ: And hope that everybody can see it. Get
10 out of the way here.

11 But it really is clear that in the sequence that we
12 have followed here, that the 372.680 provides a clear
13 indication of the procedure that a taxpayer should follow in
14 the case of a refund claim for sales and use taxes; that
15 the, the sequence begins with the filing of the claim; that
16 the taxpayer may not bring a -- an action in the District
17 Court until a claim for refund is filed with the Department.
18 The Department then must serve notice on the taxpayer before
19 a denial of that refund. There is an alternate procedure in
20 case the Department fails to act. And then the statute
21 provides that a taxpayer may then appeal the Department's
22 denial, which occurred in our case, to the Commission
23 itself, and that then it is the Commission that makes the
24 decision which is subject to a judicial remedy.

25 And, as the board indicates, the statute that has

1 been established and the scheme established by the
2 Legislature for sales and use tax refund claims and the
3 judicial remedies beyond the administrative process, which
4 is up here, is quite clear and comprehensive, that the --
5 the Executive Director, and nobody else from the Department,
6 is permitted to seek a judicial review of the Commission's
7 decision. If the -- if the decision is favorable to the
8 taxpayer, that is it. There is no judicial remedy available
9 to the Department.

10 In the case of the other potential parties to a
11 refund case, such as other local government, who are
12 interested and participate, they may, if they are aggrieved
13 by the decision of the Commission, they may proceed under
14 362.457. But it specifically says there that they may file
15 a petition for judicial review of the Commission's decision.

16 And to contrast that with the very clear, very
17 different language under which we are proceeding, 372.680,
18 that if the Commission denies the taxpayer's claim for
19 refund, which, of course, is what happened here, that the
20 taxpayer's sole judicial remedy -- not even an option --
21 sole judicial remedy, is to bring an action against the
22 Department in the District Court for the recovery of the
23 whole, or any portion of the amount of the claim that has
24 been disallowed.

25 Right here, you have the very clear distinction in

1 the statutory language between, in this case, the remedy
2 available to local government parties of a -- of a petition
3 for judicial review, which, of course, is what Ms. Session
4 says we should be proceeding under. Contrast that with the
5 very different language of the taxpayer.

6 THE COURT: Why should a taxpayer be treated any
7 different than a local government, when both of them have
8 the same interest in respect to the refund amounts and the
9 amounts in issue?

10 MR. READ: Well --

11 THE COURT: Why should there be any distinction?

12 MR. READ: I think that --

13 THE COURT: I mean, other than your point in
14 regards to the statutory arguments. But why should there be
15 any distinction?

16 MR. READ: Well, I think, Your Honor, that you --
17 of course, I mean, that's a fair question -- although I
18 submit it's a question that would need to be presented down
19 the street to the Legislature -- that the Legislature
20 clearly has indicated a difference between the position of
21 the local governments. And I think that the fundamental
22 distinction is that the Legislature has, not only for a
23 sales and use tax claims, but as our papers show -- we'll
24 briefly touch on in our argument -- a variety of other
25 claims for refunds for, in administrative actions, not all

1 of them tax matters, has provided an additional safeguard to
2 the taxpayer who is aggrieved by the administrative process,
3 that the taxpayer, in the Legislature's wisdom, has been
4 given an additional, a plenary relief in the form of
5 a de novo action in the District Court.

6 THE COURT: Does NRS 372.680 specifically indicate
7 there's a de novo proceeding? Doesn't it just indicate that
8 you can go file a complaint?

9 MR. READ: The --

10 THE COURT: There's no language that says it's
11 a de novo...

12 MR. READ: The words "de novo" do not appear in the
13 statute, that is certainly correct; although, I think, as
14 we'll show, that the way in which the courts have clearly
15 interpreted and consistently interpreted 372.680 is to
16 provide a de novo proceeding. That's what is meant by
17 "bringing an action."

18 So, if I may, I'll leave that for the moment and --
19 and go on to a couple other points, including the one Your
20 Honor has just -- has just asked about.

21 That the -- the indications that this language in
22 372.680 does mean a de novo proceeding is, is -- comes from
23 a variety of sources beyond the -- the specific language of
24 the statute.

25 I would start, for example, with the chart that we

1 provided in our submission to the Department's motion to
2 dismiss, which is a chart prepared by the federal --
3 Federation of Tax Administrators. And these are individuals
4 from the tax departments of the 50 states.

5 For Nevada, and its scheme, the chart clearly
6 indicates -- and this is the advice provided to
7 practitioners, and it's been in effect for -- for a number
8 of years, indicates that in the case of a -- a refund
9 proceeding, where we are, that the -- the chart indicates --
10 and this is on the detailed analysis, that after an action
11 is filed in -- this indicates Carson City District Court,
12 there can be filings in others, but that the District Court
13 conducts, quote, a de novo trial, limited to the issues
14 raised in the refund claim.

15 So, there is advice from the tax officials of the
16 State of Nevada that specifically indicates a de novo
17 proceeding.

18 Let me -- let me refer to the Nevada case law on
19 the de novo point that Your Honor's asked about, because I
20 think this is absolutely consistent, and an excellent guide
21 in our situation.

22 We have extensively researched these cases and
23 found that all of the tax refund cases brought under 372.680
24 have been conducted as trials de novo, and this has been
25 regardless of whether or not there has been a hearing in the

1 administrative process.

2 And, indeed, the Department itself took this very
3 position in its brief to -- in the opening -- in our opening
4 brief, we quoted from the brief of the Department filed in
5 this proceeding to the Nevada Tax Commission back in -- on
6 the 21st of November, 2003.

7 "NRS 372.680 in no way purports to limit the
8 District Court's review of the administrative
9 record on appeal. Consequently, Edison would have
10 an opportunity before the District Court to more
11 fully develop the facts, if appropriate."

12
13 So, the Department itself, previously, took exactly
14 the position we're taking, that in -- that if and when there
15 were to be a proceeding in this court, that we would have
16 the opportunity to, quote, develop the facts. I mean,
17 that's clearly not a judicial review of an underlying
18 administrative action.

19 THE COURT: What about Mr. Azevedo -- your
20 co-counsel's prior statement and testimony -- Azevedo, in
21 respect to, back when he was a deputy attorney general, in
22 respect to the changes in the law that took place in 1999,
23 clearly indicates that:

24 "In the event the taxpayer's aggrieved by the
25 decision of the administrative hearing officer,

1 the taxpayer may appeal the hearing officer's
2 decision to the Nevada Tax Commission for
3 administrative appellate review. In the event the
4 taxpayer is still aggrieved after the Tax
5 Commission's decision, the taxpayer may file a
6 petition with the District Court in a judicial
7 review proceeding."

8
9 Isn't that a, kind of a clear proceeding that --
10 telling the Legislature, at that point in time, that this is
11 the way it's going to be done, and this is the procedure
12 we're going to follow? And the reason we're doing it this
13 way is to kind of correct some procedures that were taken
14 place, and that we're really back trying to put everybody
15 under judicial review proceedings?

16 And don't take anything by my questions, either. I
17 just ask questions of both sides, trying to understand
18 something.

19 But it seems to me, like, that the legislative
20 history, if you'd look at it, and what transpired, this kind
21 of indicates that there was an intent that we are going to
22 move over to a judicial review of these particular
23 proceedings.

24 MR. READ: Well -- well, I think, first of all, of
25 course, Mr. Azevedo's comments are not, themselves,

1 legislative history. I mean, that is an important point:
2 One man's observations at one moment in time. I think
3 you've seen the affidavit that we submitted, but I'm going
4 to -- indeed, it would be highly inappropriate for me to
5 continue to kind of talk about what Mr. Azevedo may have
6 meant, because he --

7 THE COURT: It kind of puts you in a tough
8 position, I understand that.

9 MR. READ: But I would invite him to respond to
10 that particular question to Your Honor.

11 MR. AZEVEDO: If I may, Your Honor?

12 THE COURT: You may.

13 MR. AZEVEDO: The legislative changes, from my
14 perspective, in 1999, had their genesis because of the
15 desire of the Nevada Tax Commission to involve themselves in
16 the administrative process prior to the proceeding going to
17 court, okay. That was the intent of that legislative
18 change.

19 Prior to those 1999 changes, the Department would
20 simply deny a refund or approve a refund, and then if the
21 taxpayer felt aggrieved, they'd go straight to the District
22 Court. The legislative changes that occurred in 1999 really
23 were designed to interject the Commission at the
24 administrative level, and the reasoning behind that was, the
25 Commission didn't want policy determinations being made by

1 the Department without them having the opportunity to weigh
2 into it.

3 To the extent those words that you read are an
4 intent to re-construe or recast the judicial remedy under
5 372.680, that was incorrect on my part at that time. There
6 was never any intent in the Legislature, of that legislative
7 enactment, to alter the judicial process. And I would
8 submit the statements from the Department counsel before the
9 Nevada Tax Commission, Mr. Zunino, when he made those
10 representations in the pleadings to the Commission, were
11 accurate.

12 And so to the extent my words would suggest a
13 judicial review action, they're inaccurate. And, moreover,
14 what I would tell you, if that was the intent, if you looked
15 at the judicial remedy for deficiency determinations, where
16 it says you file a petition pursuant to 233B.130, I would
17 have suggested that.

18 THE COURT: Okay.

19 Mr. Read?

20 MR. READ: Let me just bring up another one of our
21 posters, but I think it -- it addresses the point
22 Mr. Azevedo just made, and the language that he was
23 discussing in his comments to the Legislature, and that is
24 the -- the bill that was being addressed at that time. And
25 what we've done here is to put up the language and the

1 changes that were made and the changes that were not made in
2 the legislation. And you can see here -- we'll come back to
3 the motor vehicle and aircraft fuel tax, but that's relevant
4 to the Saveway decision, which is a critical additional
5 piece of information.

6 But if you see here, that the changes that were
7 made here to add the -- the final decision made, not of the
8 Department now, but rendered by the Nevada Tax Commission --
9 that's the important change that Mr. Azevedo was just
10 describing -- that the language in red here was absolutely
11 unchanged, and that's the language that's critically
12 important here, regardless of any comment made by
13 Mr. Azevedo or anybody else. What the Legislature was not
14 changing was that "the claimant may bring an action against
15 the Department on the grounds set forth in the claim."

16 That language was not changed, and that is language
17 that clearly is inconsistent with the whole notion of a
18 petition for judicial review. It's a different time period.
19 You don't bring an action against the Department. In a
20 petition for judicial review, you bring the petition in the
21 court against the agency -- in this case, it would have been
22 the Tax Commission -- that rendered the decision that Your
23 Honor is to review. That's the essence of judicial review
24 in Nevada APA and in every other administrative act -- act
25 that I'm familiar with.

1 The language here is quite different, and it is not
2 a matter of -- of form only. You are to bring the action
3 against the Department; that's an original action in this
4 courtroom.

5 And let me go on to -- to talk about the cases that
6 I think provide very clear guidance of -- of the nature of
7 the proceeding that we are embarking upon in front of Your
8 Honor.

9 I would start with the *Saveway* decision.

10 THE COURT: Let me ask you one other question --

11 MR. READ: Certainly.

12 THE COURT: -- before you move on, in regards to
13 NRS 372.360. And, obviously, the captions are not
14 important, but it's characterized, to some extent, in the
15 statutes as being a venue action. And, basically, what
16 it -- I guess you -- one of the things that could be argued,
17 the claimant may bring an action against the Department on
18 the grounds set forth in the claim in a court of competent
19 jurisdiction in Carson City, the county of this -- of this
20 state, where the claimant resides or maintains principal
21 place of business.

22 Couldn't it be argued that that's just a venue
23 statute, indicating that if you're going to come in and
24 bring an action, you -- it's saying you -- typical, we see
25 in all administrative procedure actions -- we seem to get a

1 lot of administrative law cases, based upon the fact we are
2 in Carson City.

3 MR. READ: Right.

4 THE COURT: And under the statute, you can file an
5 administrative action in -- in different counties, where the
6 action took place, but you can also file any administrative
7 action in Carson City.

8 And couldn't that language or that statement or
9 that sentence still be implied, more than anything, it's
10 really a venue, saying if you're going to file anything,
11 we're just going to give you the right to file that action?

12 The action isn't a complaint. The action could be
13 administrative review, it could be judicial review, it could
14 be anything. It's not characterized as, quote, a formal
15 complaint. And couldn't it be characterized as a venue
16 statute?

17 MR. READ: Well, I -- it obviously is, in part, a
18 venue statute -- statute, there's no question about that.
19 But I would submit that it is more than a venue statute. It
20 is also a statute that directs and describes the nature of
21 the action to be filed, and then it goes on to tell you
22 where you may file it.

23 THE COURT: At the same time that NRS 372 -- excuse
24 me -- 680 was adopted, weren't there also some changes to
25 NRS 360.245, which added the language, "A decision of the

1 Nevada Tax Commission is a final decision for the purpose of
2 judicial review"?

3 Wasn't that done in the same legislative session,
4 or am I mistaken?

5 MR. READ: I believe that is -- those were
6 amendments done at a -- at a different time. Let me just
7 check.

8 THE COURT: That's...

9 MR. READ: The -- the 362.455 enactment was in
10 1997, Your Honor, and separate from the S.B. 362 action in
11 1999.

12 THE COURT: Thank you.

13 MR. READ: And we'll -- I know Your Honor has
14 inquired about that as well, and that's certainly an item
15 that we -- we want to cover.

16 But if -- if I may go back to the cases that we
17 want to direct your attention to, the Saveway case is, in
18 many respects, really a -- an outstanding guidance from the
19 Nevada Supreme Court on precisely this issue.

20 The -- this case did involve, and, of course, the
21 Department has emphasized this and suggested somehow it's
22 therefore really irrelevant to a -- a sales and use tax
23 situation -- it involved a motor vehicle and aircraft fuel
24 tax, and a claim for a refund under that tax, and that's,
25 indeed, why we also added that.

1 They were similarly amended in 1999 by 362,
2 primarily addressing the venue question that Your Honor
3 raised.

4 But I'll come back to that in a moment, because I'm
5 getting ahead of myself, since, of course, Saveway was a
6 1988 case, before this S.B. 362 came along.

7 This case, though, involved language that is --
8 was, at that time, in 1988, and -- and continued up through
9 the time period of S.B. 362, to be, as you, I think, can
10 see, essentially identical in terms of the issues that
11 present -- that we're concerned with here. It is that,
12 after paying the tax, the dealer in this case may file an
13 appeal with the Nevada Tax Commission. If the dealer is
14 aggrieved by the decision of the Commission -- then this
15 language was in existence in 1988, that's why it's in red --
16 "he may bring an action against the state treasurer." And
17 then there were the venue provisions, which, back in 1988,
18 were exclusive of, if I'm not mistaken, exclusive to Carson
19 City. That's how come Your Honor gets to see so many of
20 those cases. That was the only place you could file.

21 But you can see, quote, bring an action against the
22 state treasurer. Now, admittedly, that's not the Nevada Tax
23 Commission, it's the state treasurer, because that's the
24 nature of the particular scheme for fuel taxes.

25 But look at the difference. "The claimant may

1 bring an action between the Department on the grounds set
2 forth in the -- in the claim."

3 I submit that the analysis of 365.460 and the
4 nature of the action to be brought in the District Court
5 in -- as described by the Nevada Supreme Court in *Saveway*,
6 is directly applicable, because it's the same language that
7 we are looking at here.

8 Now, what did the Supreme Court say on that point?
9 The history here is -- is quite interesting and instructive.
10 The -- despite the language that we submit clearly means you
11 file a complaint for a potential de novo proceeding against,
12 in this case the state treasurer, what the taxpayer did in
13 that case was that the -- that the taxpayer filed a petition
14 for judicial review, citing 233B. In other words, the
15 taxpayer in *Saveway*, notwithstanding the language, did what
16 Ms. Sessions suggested in her earlier motion we should have
17 done, or we had to do and we didn't do, which was to file
18 the petition for judicial review under the APA.

19 The Supreme Court, in the first go-around in
20 *Saveway*, in 1985, dismissed, saying that this did not follow
21 the specific statutory remedy in -- provided by law; that it
22 must be a direct action and not a mere petition for judicial
23 review.

24 So, the Court's spoken on exactly this issue. It
25 has said that when you have a language that says you may

1 bring an action against a state agency, that means not --
2 not a petition for judicial review.

3 So, then the taxpayer, the second time around, with
4 guidance from the Supreme Court, did what the Court told
5 them to do. They brought an independent action under the
6 365.460. Then it was the District Court that got off the
7 track. The District Court then said, "Well, notwithstanding
8 the fact that you're here asserting an independent action,
9 we're going to review this case, applying the judicial
10 review standards of a -- for judicial review." And the
11 Supreme Court, the -- the taxpayer, took the matter again to
12 the Supreme Court, and the Supreme Court said, "No. That is
13 incorrect. It is not -- the trial court this time, not the
14 taxpayer -- the trial court made the error. The trial court
15 should have been approaching this as a de novo proceeding."
16 And -- and it sent it back to have that particular approach
17 taken.

18 So, I would submit that the *Saveway* decision, when
19 you really go through it carefully, it tells you all you
20 need to know about the question presented to the Court
21 today, where you have language like ours, "may bring an
22 action against the Department." The Supreme Court has said
23 that means an independent action. It does not mean a
24 petition for judicial review. It does not mean that
25 standard.

1 And, furthermore, come full circle, when the --
2 when S.B. 362 came along in 1999 and proposed these changes,
3 mostly, as Your Honor has indicated, really focused on
4 venue, at least in the case of the -- these statutes -- the
5 Saveway decision was out, and law, had been for the better
6 part of a decade, and the Legislature did not change this
7 language, "may bring an action against the state treasurer."

8 They did -- if the Legislature had thought that the
9 Supreme Court got it wrong, and that, as Your Honor has just
10 indicated, "Well, it may say an action, but that just means
11 as long as you had a proceeding down below in the
12 administrative segment of the case, you don't need another
13 hearing, you don't need -- this should be judicial review
14 of -- of the agency action," they didn't make that
15 correction. They didn't, the Legislature didn't clarify.
16 They kept that language, full knowing how the Court had
17 interpreted it in the Saveway decision. And that's why
18 we've added this citation, fairly standard, that's presumed:

19 "When the Legislature approves the Supreme Court's
20 interpretation of a statutory provision when that
21 Legislature -- when the Legislature has amended
22 the statute, but didn't change the provision's
23 language subsequent to the Court's
24 interpretation."

25 It's the *Silvera* case standard statutory

1 interpretation decision.

2 The Supreme Court had -- had given its opinion,
3 very clearly, in Saveway, about the meaning of this
4 language, and if the Legislature didn't like it, and if the
5 Legislature wanted to go the route that Ms. Sessions has
6 talked about, then they could have and should have and would
7 have changed that language, and they did not.

8 THE COURT: Couldn't it be argued that they did
9 change it in, I guess in 1997, when they put that language
10 in NRS 360.245, which indicated, as I've read to you, "A
11 decision of the Nevada Tax Commission is the final decision
12 for the purpose of judicial review"? Could that be argued?

13 MR. READ: Well --

14 THE COURT: I'm just --

15 MR. READ: Sure. Let's address it. You've
16 mentioned it a couple of times.

17 What I think is going on there in 362.455 is that
18 the Legislature is saying that the decision of the Tax
19 Commission is -- is final for purposes of judicial review,
20 where it is -- where judicial review is the appropriate
21 specified remedy. But that is not a statement, though
22 Ms. Sessions certainly tries to make it such --

23 THE COURT: Is --

24 MR. READ: It is not a statement that says that
25 every single decision of the Nevada Tax Commission is to be

1 examined as, or under the methodology of a petition for
2 judicial review. It is merely a statement that you need to
3 have a decision of the Nevada Tax Commission in order to
4 pursue judicial review, of whatever type.

5 And, of course, the purpose of that enactment was
6 that this -- this was enacted specifically to preclude the
7 Department from appealing decisions of the Commission.
8 There was a certain renegade aspect of life between the
9 Department and the Tax Commission in an earlier era, and
10 literally -- although I find this kind of interesting as
11 something of an outsider -- but there were occasions where
12 the Department was proceeding to take issue with the Tax
13 Commission. And the Legislature, quite correctly, said,
14 "Well, this isn't really a helpful situation. We need to
15 make it clear that you cannot proceed for judicial review,
16 unless you have -- unless and until you have a decision of
17 the Tax Commission." That's the final word from the
18 governmental administrative tax authorities. That's -- that
19 was the purpose of that 1997 change.

20 THE COURT: Would you agree, though, that the
21 provisions under Chapter 360, that are referred to as
22 general provisions, and I guess general provisions, from an
23 administrative law standpoint, say these are general
24 provisions; they apply, basically, to all cases, all matters
25 that are pending in regards to the issues of taxes, other

1 than those that have been specifically changed or altered
2 somewhere else in regards to any specific tax? Or do you
3 understand the question?

4 MR. READ: I -- I believe that I do. I think that
5 we have taken the position, and I believe it to be sound,
6 that the provisions of 360 are general in nature, but -- but
7 clearly can be and must be subject to any specific
8 alternative language and guidance.

9 And I would submit that the language that we have
10 pointed to of bringing an action against the Department on
11 grounds set forth in the claim is precisely that. That is a
12 very specific directive that would countermand any
13 generalized notion that you might derive from -- from
14 section 360.

15 And, you know, so I think that while it may be a
16 general indication that there will be judicial review of
17 Commission decisions, and there are, certainly, in many
18 other circumstances, most -- most appropriately a
19 redetermination approach, that the specific language is
20 quite different.

21 And, if I may, in that regard, let me put up this
22 board, which gives you a direct contrast, to show you the
23 differences between two important -- pardon me for being at
24 my back, Ms. Sessions -- in the sales, in the tax -- tax
25 appeals.

1 The Nevada deficiency determination procedure is
2 set forth here on the left. The Nevada claim for refund
3 procedure, where we are, is set forth on the right. And you
4 can see the very clear distinctions in a variety of
5 respects, of process, of timing, and so forth, as you
6 proceed through a determination -- a deficiency
7 determination, where the Department has said, "you owe more
8 tax," as opposed to situation, such as we have, where we are
9 seeking a refund and have already paid the tax.

10 And the language is just consistently different, if
11 there is such a thing as being consistently different. All
12 the way along, in terms of -- of what is going on here
13 versus what occurs in -- in a sales and use tax situation.
14 And, of course, it culminates in a -- the language we are
15 addressing here, 372.680, which we've been over.

16 But look at the language in -- of the -- of the
17 judicial remedy for somebody proceeding in a deficiency
18 determination, "That the taxpayer may file a petition for
19 judicial review of the decision of the Commission on the
20 petition for redetermination within 30 days," naming various
21 other parties as respondents.

22 I mean, there it's very clear. There is a specific
23 inclusion of the judicial review, the language of a
24 petition, that it names the Commission, in contrast to the
25 proceedings over here. They are not -- they are not similar

1 in any respect. And it is unfair for the Department to make
2 an argument that essentially rewrites the statute,
3 especially in the face of decisions like *Saveway*.

4 But let me go on, because *Saveway* isn't the last
5 word on this issue. You have the *Sparks Nugget* decision in
6 2008. That is after a hearing that occurred in the
7 administrative process, and the Tax Commission denied the
8 claims. The taxpayer filed a complaint -- not a petition
9 for judicial review -- a complaint in the District Court
10 before Judge Brent Adams, and they -- and the citation was
11 372.680. They filed that complaint against the Department,
12 and the Department answered. They didn't seek to make a
13 claim that *Sparks Nugget*, the taxpayer there, had -- was
14 proceeding under the wrong method of judicial remedy.

15 Now, that case was resolved, ultimately, I mean at
16 the trial level, on summary judgment. And the Department's
17 brief suggests, "Well, it was summary judgment. Obviously,
18 there was no trial de novo." Wrong. Wrong.

19 The parties agreed, in that case, that a summary
20 judgment, a way to try the case, was appropriate, efficient,
21 and sensible, because, as is true in many tax cases, there
22 is not a lot, or in many cases, not any factual dispute, so
23 you don't -- the trial de novo concept may not be, you know,
24 front and center, the attention of the parties.

25 But the fact is, as Your Honor, I'm sure, knows,

1 having once upon a time been a trial lawyer, that summary
2 judgment is a trial procedure. It is not a procedure that
3 you engage in when you file a petition for judicial review.
4 I've never seen it. I've never done it. If I did it, I
5 think I'd be tossed. It's -- it's a trial -- it's a trial
6 methodology, and it makes a lot of sense.

7 THE COURT: I think even there's a provision in the
8 statute, in Nevada Rules of Civil Procedure, I want to say
9 Rule 82 or 80, which indicates that, essentially -- I'm not
10 even sure they, those rules apply, technically, to
11 administrative law proceedings, absent any specific rights.
12 So, I sort of agree with you there, from that standpoint.

13 MR. READ: And -- and I think -- then look, let's
14 look at the *Lohse* case -- I hope I'm pronouncing that right,
15 L-O-H-S-E -- 2007, where the taxpayer filed a complaint,
16 again seeking a refund of sales tax under the statute we're
17 dealing with, 372.680.

18 There, the Washoe County District Court held a
19 bench trial, and unlike *Sparks Nugget*, there actually were
20 fact issues in this case. This is the one that involves the
21 dental remedies there, dental corrective devices, and
22 whether or not they are medical devices and, thus, deserving
23 a certain tax treatment or not. So, there were fact issues
24 in that case.

25 Several witnesses testified. Indeed, the Executive

1 Director of the Department of Taxation testified as a
2 witness in that case in the District Court.

3 And if I may, I would like to hand out -- we have
4 cited this before, the -- a copy, which we just recently
5 located, of the Lohse trial court decision.

6 Here, this is your copy.

7 MR. READ: You want to go ahead --

8 MR. AZEVEDO: Okay. If I may?

9 (Counsel approached the bench.)

10 MR. READ: Now, this case was ultimately, of
11 course --

12 THE COURT: Thank you.

13 MR. READ: -- affirmed without a reported decision
14 in the -- in the Nevada Supreme Court. But if you look at
15 the District Court's Findings of Fact, Conclusions of Law
16 and Judgment, there is -- I'm not sure what page -- but the
17 quote is, "An action brought" -- there it is. Pardon me.
18 It's in the conclusions of law. So it's on page 4, number
19 2:

20 "An action brought pursuant to NRS 372.680 is an
21 original proceeding, not an appeal from a final
22 decision by an administrative agency."

23
24 The citation is to the *Obexer* case, which was, in
25 turn, relied upon significantly in the *Saveway* case.

1 "This court is not limited to a review of the
2 record before the administrative agency. The
3 court is free to take new evidence on issues of
4 fact and owes no deference to findings by the
5 administrative agency on issues of fact or on
6 issues of law."
7

8 That is how the District Court, very clearly,
9 answered this question. And while the -- and the Nevada
10 Supreme Court did not -- did not pursue this particular
11 question, but it was really not in dispute. And there's
12 nothing in the ultimate disposition of this case that
13 suggests that anybody, including the Nevada Supreme Court,
14 took any issue with the statements I have just read to you.

15 So, I think that, I'd also like to just point out,
16 as we did in the earlier proceeding before you, that in
17 terms of the "de novo" language that Your Honor has noted is
18 not in the statute, that it is undisputed that 372.680, in
19 its exact language, was adopted in 1955 from a comparable,
20 nearly identical statute, in California. It also did not
21 have the words "de novo." It had "file an action." And
22 that's the language this Legislature adopted.

23 But by the time of the adoption in 1955, there was
24 a substantial history, which we have cited in our briefs, in
25 the California courts, that indicated clearly -- and this

1 has been continuously the case in California, it is today
2 the case in California -- that actions or refunds are direct
3 actions, and they are tried as de novo proceedings, under
4 the very same language that this state uses.

5 So, I think I'm going to reserve a little time to
6 see -- I've been going on a bit, and I apologize -- that I
7 would like to reserve a little time to respond to any
8 comments that Ms. Sessions has.

9 But before I sit down, any other questions that
10 immediately come to mind... I hope I've tried to address
11 your inquiries.

12 THE COURT: Thank you very much.

13 MR. READ: Thank you.

14 THE COURT: Are you fine?

15 THE REPORTER: Yes.

16 THE COURT: Okay. Ms. Sessions?

17 MS. SESSION: Good morning, Your Honor.

18 I think, really, the procedure for hearing this
19 case is definitively decided by 233B.130, sub (6). And that
20 statute reads that the -- that a final -- that the
21 provisions of 233B "are the exclusive means of judicial
22 review of, or judicial action, concerning a final decision
23 in a contested case involving an agency to which this
24 chapter applies."

25 THE COURT: When was that provision put in the

1 statute, though?

2 MS. SESSION: That provision was put into the
3 statute in 1989, and, interestingly enough, prior to that --

4 THE COURT: Why wasn't it raised by the Division,
5 or the Department, then, in the *Sparks Nugget* case or the
6 *Lohse* case?

7 MS. SESSION: Well, I like to think it was because
8 I wasn't arguing those cases, Your Honor. I -- I -- in the
9 *Sparks Nugget* case, they -- there wasn't an evidentiary
10 hearing below; it was heard on stipulated facts.

11 And I think, absolutely, those -- those issues
12 should have been raised, particularly in the *Lohse* case. I
13 think it was an error on the part of the Department not to
14 raise 233B, and the fact that this should have been -- that
15 it should have been a procedure in judicial review.

16 Of course, in this, in Southern Cal Edison, in this
17 case, when it went to the Supreme Court, a very similar
18 issue was raised about whether the Attorney General should
19 be estopped from arguing something if they had given some
20 earlier advice that was different. And the Court said no,
21 if the -- if the statute is appropriate, whatever advice was
22 given, or -- or procedure that was taken by the Department
23 earlier, doesn't change the facts of the statutes and how
24 they relate to this case. Even if we've -- if it's been
25 practiced differently today, I'm -- today, the issue is,

1 does 233B.130, sub (6), apply to this case? And it
2 absolutely does. There's no -- there's been no dispute that
3 this was a contested case in front of an agency that's
4 subject to Chapter 233B.

5 THE COURT: Can't an agency, or is there an ability
6 of an agency, or the Legislature, rather -- excuse me --
7 under another statutory provision, to override the
8 provisions of NRS 233B.130, sub (6); in other words, to
9 apply -- have a trial de novo in specific cases?

10 MS. SESSION: I think -- and, you know, I think
11 that's a very good question. I think that the language in
12 233B really has to do with the court's authority and what --
13 what authority a court has in a case that's brought before
14 them. And so if there's specific authority for the court to
15 act otherwise, I think the court absolutely would have that
16 authority. But it has to be -- there has to be some more
17 specific language -- language regarding a trial de novo.

18 I have, and I cited in my brief one statute that --
19 that -- that Edison brought up, NRS 607.215, and this is for
20 the Labor Commissioner. Sub (3) says, "Upon a petition for
21 judicial review, the court may order trial de novo."
22 That's very specific language.

23 And Edison also cited a number of other state
24 statutes that they claim allow a trial de novo. And when
25 you go and look at those statutes, it's very specific that

1 rather than judicial review, that the court has the
2 authority to order a trial de novo. And we just don't have
3 any kind of specific language like that in this case. We
4 have an action, and an action can be an action in judicial
5 review, it can be, you know -- and that -- and 233B.130,
6 sub (6), says it has to be an action in judicial review
7 because it's a final decision by the Nevada State Tax
8 Commission.

9 Had the Legislature -- there's been a lot of talk
10 about legislative intent -- had the Legislature wished that
11 refund actions be treated differently and not come under
12 NRS 233B, they could have included it. They've got a
13 section on the applicability of Chapter 233B that exempts a
14 number of different matters that come before different state
15 agencies, and it's very detailed. It -- you know, there's
16 some that say that -- that the complete -- the agencies are
17 completely exempted from the chapter, and then there's some
18 that say certain decisions are exempted from the chapter.
19 And it would have been an easy matter to add actions for tax
20 refunds under those exemptions.

21 But the Tax Commission's not exempt. Refund
22 actions are not exempt. They're all decisions, final
23 decisions by agencies that are subject to this chapter, and
24 so 130, sub (6), says that the exclusive means of judicial
25 action is pursuant to 233B.

1 One of the interesting things about Edison's
2 argument is they seem to be arguing, to me, that 233B
3 applies, up to a point, to the procedures before the Tax
4 Commission. The Tax Commission complied with 233B. As we
5 know, in the history of this case, there was a point where
6 Edison's claim was granted, and Clark County and the City of
7 Henderson filed petitions for judicial review pursuant to
8 233B.

9 So, their argument is that 233B applies up to the
10 point where there is a decision by the Tax Commission, and
11 they maintain that at that point, it no longer applies, and
12 they make some distinction between administrative procedure
13 and judicial action.

14 THE COURT: Well, isn't there a distinction,
15 though, between how a deficiency is handled versus a refund
16 action, under the statutes?

17 MS. SESSION: There -- there is -- there are
18 differences, but I don't think that -- there -- there are
19 differences, but they all culminate in a decision by the
20 Nevada Tax Commission, which is an agency subject to 233B.
21 And so I think there are differences without distinction in
22 terms of the issue that's before the Court.

23 THE COURT: Well, if an agency takes a specific
24 position and troops along in regards to taking a position
25 that, and I guess in this case, refund cases are, in fact,

1 subject to de novo, and then suddenly, now it's changed, and
2 taken a different course of position, what -- what's your
3 argument on that? I guess your argument is is that you
4 still have to follow the law, and the laws as I now see it,
5 not as my predecessor saw it; is that correct?

6 MS. SESSION: I don't think the law has changed.
7 You know, I -- I think the law has always been there, and
8 it's always -- you know, whether people have raised the
9 issues and argued them is something that's outside of my
10 control, but that doesn't change what the law is and what
11 the statutes say.

12 And so I think, you know, there is a statement made
13 in the brief in Southern Cal Edison -- of course, that was
14 long before -- that was before we had, you know, 3,000 pages
15 of administrative record and factual disputes and factual
16 findings, and then I think you get back to the *Campbell*
17 case. And the *Campbell* case clearly states you don't get a
18 second evidentiary proceeding. It's an interesting case.

19 I think their argument that Edison makes works
20 against them, because they say that, well, that was a
21 deficiency case; that that started out as a deficiency case,
22 as opposed to Edison, it has always been a refund case. But
23 if there's such a distinction in the way that the court can
24 handle a deficiency case as opposed to a refund case, then
25 the court would have granted the de novo, would have allowed

1 the de novo trial and not converted it to a petition for
2 judicial review.

3 THE COURT: Can a state agency have issue
4 preclusion? Now, that's the old term for collateral
5 estoppel, which the Supreme Court has now changed to --

6 MS. SESSION: Yes, issue preclusion, claim
7 preclusion.

8 THE COURT: Issue preclusion and claim preclusion
9 are now the new terms, so...

10 MS. SESSION: Yes. What was the question? I'm
11 sorry.

12 THE COURT: The question is, Can a state agency
13 have an issue preclusion against them, based upon their
14 prior course of conduct?

15 MS. SESSION: No. And I think that was the -- I
16 think that was the decision in Southern Cal Edison, at the
17 Supreme Court, that the law -- again, the law is the law.
18 However it, you know, it's argued, it doesn't -- an argument
19 can't change what the statutes state.

20 THE COURT: Let me ask you this. Depending on what
21 I rule in this particular case, obviously, it's going to
22 have a -- this is a question for both of you, to some
23 extent. However I rule in this particular case, it
24 obviously is going to have an impact how we go forward in
25 regards to hearing this case. One is, obviously, a trial

1 de novo, or the other way is a judicial review particular
2 method.

3 And I -- and I -- I always look at how the -- what
4 happens from a procedural standpoint. Let's say I take a
5 trial de novo approach, and the State of Nevada Department
6 of Taxation disagrees with that. How do we get a
7 determination by the Supreme Court on that, before we go
8 ahead and have six weeks of trial, or whatever we would have
9 on that, the general issue, and they come back and they say,
10 "Well, you were wrong. It should have been a judicial
11 review standard, based upon the statute in regards to that,"
12 or vice versa.

13 MS. SESSION: Right.

14 THE COURT: Let's take, flip it.

15 MS. SESSION: Right.

16 THE COURT: I say it's a judicial review case, I'm
17 going to treat it as a judicial review case, I handle it at
18 that, make the determination, it goes up to the Supreme
19 Court, and one of the parties, and the Supreme Court says,
20 "No, it should have been a trial de novo."

21 MS. SESSION: Right.

22 THE COURT: So, now where are we? So, I guess
23 there's a procedural issue, practicality here, because this,
24 obviously, is going to go to the Supreme Court, I mean,
25 based on the nature of the case. Certain cases are --

1 MS. SESSION: Right.

2 THE COURT: -- not passing through here, but -- but
3 there are cases that move right through, and we know it.

4 MS. SESSION: Yeah.

5 THE COURT: And realize it. And, you know, we make
6 comments, and we make determinations, but, I mean,
7 they're --

8 MS. SESSION: I suppose, and maybe this is a
9 self-serving observation, but that handling it as a petition
10 for judicial review would at least result in the economy of
11 not having gone through an unnecessary trial de novo, prior
12 to it getting to the court. And then if the court, you
13 know, should determine that it should have been a trial...

14 THE COURT: Well, I was wondering whether or not
15 there is a -- let's say the court makes a determination one
16 way or the other, and the court allows, or agrees that based
17 upon the nature of this issue and judicial economy, that the
18 court would somehow certify this as a determination to go up
19 to the Supreme Court, on that issue solely, before there's a
20 determination on -- on what transpires? And I don't even
21 know if there's a proceeding. I read --

22 MS. SESSION: A procedure for that, yeah.

23 THE COURT: I went and looked at Rule 54 to see if
24 there was some way to craft some ability to move on up and
25 that. I don't know, even, if the parties could stipulate to

1 that and then somehow do that, because I guess I'm looking
2 for the most economic way for there to be a determination.
3 And I'm more than happy to hear the case. I'm fascinated by
4 the case. You know, I tend to like the issues involved and
5 all that. But I also want to make sure we go forward on the
6 right procedure. And, obviously, what I view what the right
7 procedure is may -- the Supreme Court may disagree, and so
8 we've gone through a lot of effort in different areas for --
9 for nothing.

10 But I guess I was trying to pick both of your
11 brains, Mr. Read, as well as Ms. Sessions, on whether or not
12 there's some ability or some way that I can make a
13 determination on the procedural issue, and then have that on
14 some kind of -- the Supreme Court doesn't do anything on an
15 expedited basis or something, but they might based upon
16 something, based upon the nature of this and the amount of
17 monies involved in this case, and have them then go up on
18 some kind of stipulated expedited basis, where the
19 proceedings are stayed in the District Court, and then they
20 are, go to -- I mean, this is, we're going back a lot of
21 years, 2003 -- and it would go up to the Supreme Court on
22 some kind of stipulated basis that the decision of this
23 court could be reviewed on -- on that basis, and then we
24 would come back for whatever kind of hearing we have to
25 have.

1 Mr. Read? I don't know. I'm just trying to be
2 very -- I tend to sometimes look outside the box in order
3 to try to save people a lot of money, effort, and
4 proceedings, in order to -- because, obviously, whatever I
5 do is going to have a great impact on how we proceed.

6 So, Mr. Read, do you have any comment on that?

7 I'll come back to you, Ms. Session. I know you're
8 not technically done with your argument.

9 MS. SESSION: That's fine. Yeah.

10 MR. READ: That's a good question, Your Honor. And
11 I -- I think I'd want to give it a little more thought than
12 I'm going to get here standing up at this moment.

13 I think that there should be ways in which you
14 could proceed, this court could proceed, for example, if a
15 decision is made that it should be under a de novo standard,
16 that you could proceed to conduct the proceedings that would
17 be unique to a de novo standard, which presumably would be
18 some taking of additional evidence, and, perhaps, some --
19 some -- some testimony, and at the same time, be looking at
20 what your views would be if Your Honor were limited to a
21 review of the record below.

22 The reason I tend, as I stand up here right at this
23 moment, to think about that as an alternative to the
24 certification and stay and so forth, is that with all due
25 respect, as Your Honor just noted, even that method, you

1 know, will consume significant additional time, where we
2 will go nowhere. I mean, the best we'll do is have
3 guidance. Then we come back to either a judicial review or
4 a trial de novo. And I, on behalf of my client, who has
5 been looking for a refund for, you know, the better part of
6 a decade of a very large sum of money, I want to look very
7 hard at ways to move that process forward, with full respect
8 of the question you've asked, which is a good one.

9 It also does us no good to proceed, even if we win
10 at this level, have a great result, win here in front of
11 Your Honor, and then get, you know, reversed not just on the
12 merits, but on the fact that you conducted the wrong -- the
13 wrong proceeding. That isn't in our interest, either.

14 But I want to think about how to do that in a way,
15 and it is not clear to me that the certification and stay is
16 the -- is the way to achieve what I think we should all be
17 interested in, which is the fastest appropriate resolution
18 of this long-pending issue.

19 So, I'm punting a bit there, but...

20 THE COURT: No. That's all right. No, I -- and
21 you've raised an additional alternative, as well. The
22 additional alternative is to make a determination, but allow
23 kind of a hybrid proceeding whereby even though,
24 hypothetically, let's say I go trial de novo, and I -- but I
25 allow a trial de novo for purposes of taking any additional

1 information or any evidence, with the understanding that I
2 would still look at the review process that was done by the
3 Tax Commission, I would review all -- any and all those
4 documents, records or anything else, would allow limited
5 scope and additional testimony on any additional evidence
6 the parties want to bring in, and then make a determination.
7 So at least whatever the Supreme Court does, they at least
8 have a full, complete, all the --

9 MR. READ: That's correct.

10 THE COURT: -- evidence, information in front of
11 them, so that they technically could go one way or the
12 other.

13 Now, the reverse of that would be, again, I make a
14 determination that I'm going to have a -- a petition -- I
15 think the standard's a judicial review standard; however, I
16 am going to open up the hearing to allow all of the
17 additional testimony, evidence that would be brought in that
18 is felt to be appropriate, but I would still apply that
19 standard to this particular case. So, again, neither of the
20 parties have to come back and go through that type of
21 proceeding again.

22 And so that would work under either scenario and
23 that. And maybe this is a good discussion, from that
24 standpoint.

25 Ms. Sessions?

1 MS. SESSION: Well, I guess, you know, one of the
2 crucial differences for us is the deference given to the
3 fact-finding by the Tax Commission, so that would be a --

4 THE COURT: That's the standard I apply, obviously.

5 MS. SESSION: Right.

6 THE COURT: And that's why we're talking about this
7 particular proceeding and that, but...

8 MS. SESSION: Absolutely.

9 THE COURT: But, again, I'm just trying to --
10 again, let's say I say this is a judicial review standard
11 and take the other side, and we -- and we go through, review
12 the record under that standard and make a determination,
13 then we're -- we're three years back down the road before
14 you people ever see anything again in respect to that. And
15 I don't think that's fair to you, because I may be wrong, or
16 I may be -- may be right in granting a trial de novo, I
17 don't know.

18 I'm just, I'm exploring this from both standpoints,
19 because I want to have this case move along, from the
20 standpoint, but I also note that the Supreme Court has
21 indicated, and we keep -- I keep hearing this -- that, "We
22 want the full record. We want all the facts. We want a
23 full hearing. We want everything so that we can review and
24 make a determination on things." And I keep hearing that,
25 reading their advanced opinions in respect to that.

1 And so I'm sitting up here thinking what's best
2 for all the parties, from that standpoint. And I'm not
3 talking about my decision, whatever I make, I'm talking
4 about what's best for everybody to move forward in regards
5 to this. So...

6 MS. SESSION: Well, and, of course, another
7 complicating factor is Clark County and City of Henderson.

8 THE COURT: And Clark County is not a party at this
9 point in time, and I guess they have a significant impact in
10 regards to this case, in respect to where the monies went, I
11 guess. I -- you know, under that.

12 So, I don't know if there's an ability to bring
13 them in. Or do they want to plead into this matter? Or
14 where are they?

15 MS. SESSION: You know, I wouldn't presume to
16 respond on -- on their behalf, but certainly --

17 THE COURT: Why aren't they here today?

18 MR. READ: I don't know.

19 MS. SESSION: -- as a petition for judicial review,
20 they would have -- you know, under the statutes, they would
21 be included.

22 THE COURT: Well, they have the right to come in
23 and file a notice of intent to participate under the
24 Administrative Procedures Act, as well. So, again...

25 MS. SESSION: If we were in -- if we were in

1 judicial review, they would, but we're not; that's not where
2 we are. They haven't been served. They've never been
3 served. They -- you know.

4 THE COURT: I understand. Anyway --

5 MS. SESSION: So...

6 THE COURT: -- it's a fascinating issue, from, I
7 mean, from my standpoint, and all the different issues and
8 that.

9 So, why don't we just take a short ten-minute
10 break, and we'll come back and allow you to finish up.

11 MS. SESSION: Okay.

12 THE COURT: And, Mr. Read, we'll give you any
13 additional comments at that time.

14 MR. READ: Thank you.

15 THE COURT: Court will be in recess.

16 (Recess taken.)

17

18 THE COURT: Please be seated.

19 We're back on the record in respect to Case No. 09
20 OC 00016 1B.

21 Ms. Sessions, did you have any concluding remarks?

22 MS. SESSION: Yes, I do. Thank you, Your Honor.

23 The -- Edison relies a great deal on the Saveway
24 and the Obexer case, but those cases were prior to many of
25 the legislative changes that I've noted in my briefs.

1 And I want to bring specific attention to the
2 change in 372.680, where originally, it had been that you
3 could go to court after a decision by the Department, and
4 the change was made that -- that you could not go to court
5 until after there had been a decision by the Nevada Tax
6 Commission.

7 And I can't emphasize enough how -- the importance
8 of that change in terms of the Administrative Procedures
9 Act, because once there was a decision by the Nevada Tax
10 Commission, it comes back, under 233B, as a final decision
11 in a contested case before an administrative agency and
12 233B.130, sub (6), then applies.

13 In regards to *Sparks Nugget*, I would like to point
14 out, of course, that that case did go to the Supreme Court,
15 and there was no specific decision. This wasn't at issue in
16 that case, it wasn't brought up, and so there was no
17 specific decision by the Supreme Court one way or the
18 another whether it was appropriately handled through the
19 District Court.

20 And as far as the *Lohse* case, of course, the
21 decision by that court is not binding on this court.

22 You know, I think, really, the case that is most
23 akin to this case is the *Campbell* case. In the *Campbell*
24 case, there was an administrative hearing, a lengthy
25 administrative hearing. There was an attempt to, you know,

1 even though -- and so then there was a payment and the
2 request for refund, an action for refund, that the court
3 said once there's been an administrative hearing, that there
4 isn't a second, a right to a second administrative
5 hearing.

6 And Edison has tried to make a distinction there
7 that the action in *Campbell*, the administrative hearing was
8 in regards to a deficiency determination and a request for
9 redetermination, petition for redetermination. But I think
10 for the court, the important thing was that there had been
11 an administrative hearing on the issues, on the same issues
12 that were before the court in the refund.

13 And in this case, we've had an entire
14 administrative proceeding not on a petition for
15 redetermination, but on the exact matter that is before this
16 court on a request for refund. And so I think it's an even
17 stronger argument in this case to say that they had an
18 administrative hearing, we have a 3,000-page record, the Tax
19 Commission took a great deal of time and effort to come to a
20 decision, and that -- that it would not be appropriate under
21 233B to start again, to have a trial de novo and to begin
22 again and render those efforts by the Tax Commission
23 meaningless.

24 And I don't believe that there is language
25 specific -- you know, the language in 372.680 does not say

1 that you are entitled to a trial de novo. It does not say
2 it's not subject to 233B. It does not say -- it doesn't
3 even say a civil action, it just says an action, and -- and
4 so I think that pursuant to 233B.130, sub (6), that this
5 matter should proceed as a petition for judicial review.

6 Thank you.

7 THE COURT: Thank you.

8 Mr. Read?

9 MR. READ: Thank you, Your Honor. Just a couple of
10 points.

11 Let me -- let me start with the statute that
12 Ms. Sessions indicated was really at the heart of her
13 argument and position, which is that 233B.130(6), and it
14 states that:

15 "The provisions of this chapter are the exclusive
16 means of judicial review of, or judicial action
17 concerning, a final decision in a contested case
18 involving an agency to which this chapter
19 applies."

20
21 And if this is the heart of her support, then
22 there's not much there, because this case does not involve,
23 by the very clear language of -- of 372.680, it does not
24 involve a judicial review of a decision of an agency. I
25 mean, that -- that provision is not applicable to where

1 we are.

2 We are involved in an action against the
3 Department. And that, it is imperative to keep in mind that
4 all of the language of 233B, including 130(6), is -- is not
5 applicable where we're talking about a judicial remedy that
6 is specified elsewhere by other statutes -- in this case,
7 680.

8 And I would also note --

9 THE COURT: You're not taking the position at all
10 that 233B does not apply to the Tax Commission, are you?

11 MR. READ: Oh, certainly not.

12 THE COURT: Okay.

13 MR. READ: No, no. And I think Ms. Sessions
14 actually said it right, that for the administrative process
15 before the Tax Commission, the administrative portion, 233B
16 clearly, in many of its provisions, absolutely applies.

17 It is the point when you reach the end of the
18 administrative line and you begin to look at the judicial
19 remedies, that's where Ms. Sessions is right, there is a
20 distinction between the process of -- appropriate for a
21 review of a judicial decision by a District Court and a
22 direct action, an action filed in the District Court.
23 That's where the APA has -- is supplanted by the specific
24 alternative statutes that we're dealing with.

25 And I would add that that's recognized in the -- in

1 the APA itself, in 233B.020(2), which says that, "The
2 provisions of this chapter" -- meaning the entirety of the
3 chapter of the Nevada Administrative Procedure Act -- "are
4 intended to supplement statutes applicable to specific
5 agencies. This chapter does not abrogate or limit
6 additional requirements imposed on such agencies by statutes
7 or otherwise recognized by law."

8 I submit that that is a recognition by the APA that
9 if you have other statutes that impose additional
10 requirements on the agency -- in this case, the Tax
11 Commission -- those are to be -- those supersede where
12 there's any potential conflict.

13 And in our view, the reference of 372.680, which
14 requires the Department to respond to an action filed by the
15 taxpayer, that is exactly what's referred to in 233B.020(2).
16 It's a limitation that must be recognized.

17 And I would point out that in the Saveway decision,
18 the Nevada Supreme Court faced the same issue about an
19 argument that the APA ought to apply and provide for
20 a proceeding based on judicial review. And the court, in
21 that decision, said, "No." It said, "We conclude that the
22 District Court erred in applying standards of judicial
23 review properly applied to appeals from administrative
24 decisions," again, the language that Ms. Session relies
25 upon, but not what we're dealing with here.

1 The court went on to say, quote, NRS 365.460 --
2 which, of course, is the fuel tax that's comparable, that we
3 pointed out earlier -- states that, "The taxpayer may bring
4 the action to recover taxes illegally assessed. This
5 statute is not found within the Administrative Procedure
6 Act."

7 And, of course, the Nevada Supreme Court is
8 correct, the -- that the -- the judicial remedy of 365.460
9 is not a part of 233B, nor is 372.680. They are exactly in
10 the same position. That argument was made and rejected by
11 the Nevada Supreme Court.

12 Let me comment a little bit on *Campbell*, because I
13 think Ms. Sessions said that that's the case she is most
14 fond of. But I think that when you look at *Campbell* -- and
15 it is a unique set of circumstances -- it's important to
16 take a look at what happened in *Campbell* in the context of
17 the chart I put up here, with the two different proceedings,
18 procedures between a deficiency procedure and a refund
19 procedure, because both wind up being implicated in the
20 *Campbell* case.

21 As we have emphasized, and Ms. Sessions
22 acknowledged this, the Campbells' situation was one of a
23 deficiency determination. They were hauled in by the Tax
24 Department because they had failed to pay a significant
25 amount of tax on a 1990 Mercedes Benz -- I actually remember

1 that -- that they claimed they were going to take it and use
2 in Oregon. It turns out they never -- I don't think that
3 car ever got to Oregon. And the Department found out about
4 it.

5 It was a deficiency case. They were supposed to
6 proceed down this route on the left-hand side of the chart
7 with a hearing at the administrative level, and then
8 ultimately, if unhappy with that, to file a petition for
9 judicial review.

10 What happened was, they got derailed by this advice
11 from the Attorney General that suggested what they ought to
12 do is pay the tax and then proceed under the -- a refund
13 procedure. Wrong advice, everybody acknowledged that, but
14 they -- they went ahead, they paid the tax, and they were
15 proceeding, essentially, on both tracks for a period of
16 time. But that doesn't alter the fact this is what they
17 were entitled to in the deficiency determination.

18 And what occurred was, that they allowed the time
19 period upon which to seek judicial review, 360.395(1), to
20 expire, without proceeding to file that petition for
21 judicial review in the District Court.

22 At that point, they were still proceeding under,
23 falsely, or improperly, under the refund procedure, which --
24 and so when they appeared in -- when this was all brought to
25 the attention of the Nevada Supreme Court, the argument

1 about a second hearing, that the Court said it would not
2 permit, was, of course, because they were not entitled to a
3 second hearing. The second hearing entitlement, if you
4 will, would only have been if they had been legitimately
5 involved in a refund procedure, which they weren't.

6 So, of course, the court properly said for the
7 Campbells -- for the Campbells, there should be no second
8 hearing, of course, because under the deficiency approach,
9 there is no second hearing; there is only the approach of a
10 petition for judicial review. And the court, in its
11 graciousness -- which I never could quite understand,
12 because these people were, obviously, tax scams. I mean,
13 they -- they never intended to pay. But anyway, the Supreme
14 Court reached out to the Campbells and said, "You've been
15 misled. You need some form of judicial review. And what
16 you're entitled to is what you would have been entitled to
17 under the proper approach, which is a petition for judicial
18 review. We're going to overlook the fact that your time is
19 limited. You're out of time. We will give you that
20 petition, that review of judicial review," a very unique set
21 of circumstances.

22 But when you have really parsed through it, the
23 Campbells got exactly what they were originally entitled to,
24 not a second hearing, quite correct, but that's because it's
25 a deficiency case; not our case.

1 And, indeed, the Saveway decision, as far as second
2 hearings are concerned, and arguments about deficiencies and
3 so forth, again, in the Saveway case, to the Nevada Supreme
4 Court, the Department made the -- the argument that going
5 back over and allowing a second hearing, rather than just a
6 review for substantial evidence, would be wasteful.

7 And it says:

8 "Respondent's only argument for the application of
9 the substantial evidence test is the judicial
10 review, as opposed to a trial de novo, would
11 promote judicial economy."

12

13 That's the argument Ms. Sessions has raised. And
14 the Nevada Supreme Court said that's an interesting
15 argument, but that rule is best left, quote, in the hands of
16 the Legislature.

17 I -- we submit that's exactly the case here. The
18 legislation entitles us to a direct action to bring forth
19 additional evidence, and that is an entitlement that the
20 Department cannot take away.

21 May I add here, however, that when we speak of a
22 trial de novo and the opportunity to present evidence, I
23 think Your Honor suggested, well, maybe we'll have a
24 six-week trial, I can assure you, we, at least from our
25 viewpoint, we have no such intention. This case is, like

1 many tax cases, substantially one involving issues of law,
2 and those, of course, will be heard on -- you know, in the
3 same fashion to Your Honor.

4 There are some fact issues that are terribly
5 important, and important for Your Honor to hear. My view is
6 we are talking about a day and a half of trial, maybe two at
7 most.

8 We certainly agree, and I think we've said this in
9 our papers, that the vast proceeding below, most of which is
10 our record, that Ms. Sessions has referred to, is a -- is a
11 record that Your Honor should have access to; we're not
12 trying to suggest that that not occur, even under our
13 de novo standard.

14 So, it is, the de novo aspect here is very
15 manageable. We are quite prepared to work with the
16 Department to streamline the proceeding, get it done and
17 move forward to a -- to a conclusion.

18 And I think that the -- just to come back and
19 finish up with the question that Your Honor addressed about,
20 you know, Where do we go from here? How do we most
21 efficiently present this issue in terms of the likelihood of
22 a -- of an ultimate review by the Supreme Court? I would
23 say that, you know, we would continue to be open to issues
24 of -- of how to -- how to present this in a fashion that
25 allows us to go forward as efficiently as possible. But

1 fundamentally, you know, our -- our view is that this
2 question of whether we should be proceeding on a de novo
3 standard or not is not a close question.

4 Ultimately, of course, the Nevada Supreme Court may
5 be heard on it. We submit that the Nevada Supreme Court has
6 been heard on it quite clearly in *Saveway*, and in other
7 cases. And the fact that, as Your Honor indicated in
8 questioning Ms. Sessions, well, she -- she takes the
9 position that the law hasn't changed. Indeed, the law has
10 not changed. The text is the same. The position of the
11 court on the law has not changed; it's consistent.

12 What's changed here is, dramatically, the
13 Department has now come out of left field with a totally new
14 position that is -- it finds no support in the statutory
15 language, it finds no support in the cases that have gone to
16 the Supreme Court.

17 So, while they may ultimately continue to press
18 this issue, it should not be one that looks anything close
19 to a matter that deserves certification or any further
20 delay in our opportunity to present the case we're entitled
21 to.

22 Thank you very much.

23 THE COURT: Okay. Ms. Session, any final comment?
24 I gave -- I mean, you're both on a briefing schedule, so I
25 gave them two shots. I'm going to give you one last shot.

1 MS. SESSION: Certainly will. Thank you very much.

2 The law has changed. You know, I'm not -- the
3 statutes most certainly have changed. Certainly, since
4 Saveway, there have been a number of legislative changes.
5 And all of the changes that have been made are toward the
6 direction of -- of judicial review.

7 There is no specific language granting a trial de
8 novo in this case, and we're talking about a contested case
9 before an administrative agency that's subject to 233B.

10 And I, you know, I agree with counsel that it
11 applied at the administrative procedures before the Tax
12 Commission, and I don't think it's -- I don't think there's
13 anything in 233B that suggests that it can apply to one part
14 of a proceeding and then not apply to the proceeding before
15 this court.

16 Thank you.

17 THE COURT: Thank you.

18 First of all, I do want to thank you both for the
19 briefs, very excellent briefs. Not a lot of judges get
20 excited about administrative law issues. I tend to like
21 administrative law issues, only because I did some of this
22 work, and that.

23 And it's always interesting to me how 233B
24 interrelates with the other statutes in respect to the state
25 of Nevada. And there may be new ground that happens in

1 regards to different things in that regard.

2 One of the other thoughts I had -- and I don't
3 think there's a certification process. It's one of the
4 reasons I took a break. I wanted to go back and read, see
5 if there was any ability to do that; I don't think there is.

6 The only other aspect would be a writ. I think
7 that under the writ statutes -- and I'm not trying to give
8 you ideas -- depending on whatever way the Court goes, but
9 there could be a possibility of a writ under the writ
10 statutes, in regards to that. So, that's a thought out
11 there for you.

12 I do believe, however, and I'm going -- I always
13 tend to make my rulings when things are fresh in my mind and
14 I'm prepared to do it, and I've done it. I always kind of
15 do a little outline of where I think I am in regards to
16 different things. I do believe that NRS 233B.130, sub (6),
17 is controlling. I believe that is the law in the state of
18 Nevada. I believe it applies to all administrative
19 agencies. I believe it applies to the Department of
20 Taxation and the Nevada Tax Commission. I believe it's the
21 law that clearly indicates, in respect to that, and I'm
22 looking at, again, at 233B.130, sub (6), which indicates
23 that:

24 "The provisions of this chapter are the exclusive
25 means of judicial review of judicial actions

1 concerning a final decision in a contested case
2 involving an agency to which the chapter applies."

3
4 The chapter does apply, as indicated. That law
5 does apply, only if -- doesn't apply if there's only a --
6 specific detailed exceptions.

7 I don't believe that NRS 372.680 allows for a
8 specific trial de novo. There's no specific language in
9 there. I tried to review it and make a determination that
10 it -- that it would apply, but I don't believe it does.

11 I think, to some extent, it is a venue statute, to
12 some extent, although it's been used for other purposes in
13 respect to that. But I believe the controlling aspect in
14 this particular case is the Administrative Procedures Act;
15 and, therefore, I believe that the standard that I intend to
16 use in respect to this is the standard under petition for
17 judicial review.

18 I also find it interesting that a local government
19 is required to proceed under judicial review, where a
20 taxpayer would have the right, under the argument, to go
21 file a separate action. I think based upon uniformity, and
22 given the rights to all parties, both local government
23 agencies and to taxpayers, there has to be a uniform
24 standard and a uniform application of the law in regards to
25 both of them, and I think that that supports the fact that

1 we're under the judicial review aspect in regards to this
2 matter.

3 And I do think the *Campbell* case does indicate --
4 although I understand the distinctions made by Mr. Read -- I
5 do feel there's an indication by the Supreme Court that
6 there's been an evidentiary hearing in regards to this
7 matter, and that's the standard that's going to be applied.
8 And I think that's for both judicial economy and the
9 efficient process and application of the Administrative
10 Procedures Act in the state of Nevada.

11 So, Ms. Sessions, you'll prepare the decision --

12 MS. SESSION: Yes.

13 THE COURT: -- for the Court.

14 And, again, I think it's a -- it's a great issue,
15 and I'm just giving you my best shot. I know I'm sort of a
16 pass-through in regards to this particular case, in regards
17 to that, but I do believe that there's an intent, at least
18 it appears to me from the legislative standpoint, in regards
19 to this matter and that, that we are under 233B in respect
20 to agencies' decisions in the state of Nevada, and they're
21 the ones that we review under our -- the standards in
22 respect to that.

23 So, thank you, again, both of you.

24 Court will be in recess.

25 (Proceedings concluded.)

1 STATE OF NEVADA)
 : ss.
2 WASHOE COUNTY)

3

4 I, JULIETTA FORBES, Certified Court Reporter, do
5 hereby certify:

6 That I was present in court and took stenotype
7 notes of the proceedings had in the matter entitled herein,
8 and that I thereafter reduced the same into typewriting
9 through the use of computer-aided transcription;

10 That the foregoing transcript, consisting of pages
11 1 through 60, is a full, true and accurate transcription of
12 said proceedings had.

13 Dated this 11th day of October, 2009.

14

15

16

17

JULIETTA FORBES, CCR #105
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455 W. PECKHAM LANE, STE. A
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15 Attorneys for Plaintiff

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17
18 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
19 **IN AND FOR CARSON CITY**

20 SOUTHERN CALIFORNIA EDISON,

21 Plaintiff,

22 v.

23 THE STATE OF NEVADA *ex rel.*
24 DEPARTMENT OF TAXATION

25 Defendant.

Case No. 09-0C-00016-1B

Dept. No. 1

**PLAINTIFF'S REQUEST TO STAY
PROCEEDINGS PENDING RESOLUTION
OF A PETITION TO THE NEVADA
SUPREME COURT FOR A WRIT OF
MANDAMUS**

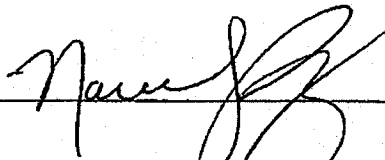
(ORAL ARGUMENT REQUESTED)

26 Plaintiff Southern California Edison ("Edison"), by and through its attorneys of record,
27 respectfully requests the Court to stay this action pending resolution of a petition Edison will file
28 on or before December 23, 2009 with the Nevada Supreme Court for a writ of mandamus
ordering that Edison's refund action filed pursuant to NRS 372.680 proceed as a trial de novo.

This request is based on NRAP 8(a)(1)(A), the following Memorandum of Points and
Authorities, and any other evidence this Court may wish to consider.

REC'D & FILED
2009 NOV 30 PM 4:16
ALAN CLOVER
BY C. COOPER
DEPUTY CLERK

1 Dated: November 30th, 2009.

2 By: 

3 NORMAN J. AZEVEDO
4 State Bar No. 3204
5 405 North Nevada Street
6 Carson City, NV 89703
7 (775) 883-7000

8 Attorney for Plaintiff

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Background**

3 Following the Court's denial of the Department's motion to dismiss Edison's Amended
4 Complaint brought pursuant to NRS 372.680, the Court asked the parties to meet and confer on
5 the nature of the proceedings that are to take place before this Court. Edison and the Department
6 were not able to reach an agreement on that subject and, instead, filed cross-motions and replies
7 followed by oral argument before the Court on October 8, 2009. Edison argued that the action in
8 this Court must proceed as a trial de novo; the Department urged the Court to handle Edison's
9 complaint as a judicial review of the decision of the Nevada Tax Commission ("Commission")
10 applying the standard of review in NRS 233B.135.

11 Although the Court has now granted the relief requested by the Department, it
12 acknowledged during oral argument that the proper nature of the proceedings was a difficult
13 question and one that was likely to be decided ultimately not by this Court but by the Nevada
14 Supreme Court. Also during oral argument, the Court recognized that if its decision on this
15 question — whether it agreed with Edison or with the Department — were reversed on appeal,
16 the matter would have to be returned to this Court for a new proceeding, resulting in substantial
17 delay and additional costs for both parties. In fact, after a recess in the argument, the Court
18 advised the parties that it had looked into whether it could certify its decision for early review by
19 the Supreme Court but concluded that the Nevada Rules of Civil Procedure would not allow
20 certification of this single albeit important issue. The Court suggested, however, that the non-
21 prevailing party — be it Edison or the Department — could file a writ petition.

22 Not surprisingly, Edison plans to file a petition with the Nevada Supreme Court for a writ
23 of mandamus and is committed to doing so on or before December 23, 2009.¹ Granting the
24 present request to stay the proceedings in this Court while the writ is pending will achieve the

25

¹ Neither NRS Chapter 34 nor the Nevada Rules of Civil Procedure impose a specific deadline within which such
26 writ petitions must be filed, but Edison is committed to as early a resolution as possible of this critical issue.
27 Although the Court's order is dated November 19, 2009, the undersigned counsel did not receive his service copy
28 until November 30, 2009 because the order was served on November 24, 2009 to the wrong mailing address. (Edison
learned of the order's existence on November 24, 2009 only because its undersigned counsel called the Clerk's office
to inquire about the status of the order, and was provided with a copy at that time.) Nevertheless, Edison has
committed to a filing date that is just 29 days after learning of the signed order.

1 equivalent of the objectives identified by the Court during oral argument when it reviewed the
2 availability of certification. Specifically, granting a stay will avoid or minimize unnecessary
3 costs to both parties; it will minimize time required to reach a final result in this case; and it will
4 provide procedural certainty for the Court and the parties *at the start* of the proceedings rather
5 than at the end.

6 II. Argument

7 A request to stay a district court's proceedings pending resolution of a petition to the
8 Nevada Supreme Court for an extraordinary writ should first be made to the district court. *See*
9 NRAP 8(a)(1)(A). In deciding whether to issue a stay, a court considers the following factors:

- 10 (1) Whether the object of the writ petition will be defeated if the
11 stay is denied;
- 12 (2) Whether petitioner will suffer irreparable or serious injury if
13 the stay is denied;
- 14 (3) Whether respondent will suffer irreparable or serious injury if
15 the stay is granted; and
- 16 (4) Whether petitioner is likely to prevail on the merits in the writ
17 petition.

18 *See* NRAP 8(c). As discussed below, individually and collectively these factors strongly favor
19 granting a stay. Accordingly, the action in this Court should be stayed pending resolution of the
20 writ petition by the Nevada Supreme Court.

21 1. The Object Of The Writ Petition Will Be Defeated If A Stay Is Denied

22 The primary object of the writ petition is to obtain a ruling from the Nevada Supreme
23 Court that definitively resolves how this tax refund action should be conducted to avoid costly
24 proceedings that may be unnecessary or erroneous. As indicated, the writ petition will urge the
25 Nevada Supreme Court to reject this Court's decision to treat Edison's action under NRS
26 372.680 as a petition for judicial review and instead to find that this tax refund action must
27 proceed as a trial de novo, *i.e.*, a civil action by Edison as the plaintiff against the Department as
28 the defendant as provided by NRS 372.680. For the reasons discussed below, these "objects" of
the writ petition certainly will be defeated if, before the Nevada Supreme Court makes a final

1 disposition of the writ (either by denying it, or by granting it and issuing a decision on the
2 merits), this Court conducts any further proceedings in this case that assume the applicability of
3 NRS 233B.135's judicial review standard.

4 While it is imperative that this case move forward under the correct procedure prescribed
5 by law and only the Nevada Supreme Court can definitively resolve the exact nature of the
6 procedure prescribed by NRS 372.680, it is equally important that this case move forward
7 expeditiously and efficiently. The Court said as much at the October 8 hearing when it
8 expressed concern that "we go forward on the right procedure. And, obviously, what I view
9 what the right procedure is . . . the Supreme Court may disagree, and so we've gone through a lot
10 of effort in different areas for . . . nothing." Tr. at 38, ll. 5-9. Accordingly, the Court considered
11 "whether or not there's some ability or some way that I can make a determination on the
12 procedural issue . . . and have them go up [to the Supreme Court] on some kind of stipulated
13 expedited basis, where the proceedings are stayed in the District Court . . . and then we would
14 come back for whatever kind of hearing we have to have." Tr. at 38, ll. 11-25. Absent a stay,
15 this Court could reach a final decision on Edison's claims for refund, or at least take substantive
16 steps in resolving that claim, prior to any action by the Nevada Supreme Court, which might very
17 well result in costly, time-consuming additional proceedings, thereby completely defeating the
18 possibility of obtaining determinative guidance through the writ process.

19 If this Court does not grant Edison's request to stay the proceedings and then affirms the
20 Commission's decision on the merits, Edison would appeal the Court's decisions on the
21 procedural issue and on the merits to the Nevada Supreme Court. The Nevada Supreme Court
22 could reverse on the procedural issue, in which case it would remand the case for a trial de novo
23 and, as this Court put it, "we're three years back down the road" Tr. at 42, ln. 13.
24 Accordingly, the Court's decision on the merits affirming the Commission's decision, Edison's
25 appeal of that decision and all related proceedings would have achieved nothing but a substantial
26 loss of time, money and judicial resources, all of which could have been avoided had the stay
27 been granted pending prospective guidance from the Nevada Supreme Court.

28 If the Court does not grant Edison's request to stay the proceedings and then reverses the

1 Commission's decision on the merits (on a factual issue, a legal issue or both), the Department
2 would presumably appeal this Court's decision to the Nevada Supreme Court. Even though
3 Edison would have prevailed on the merits, Edison would still be compelled to cross-appeal the
4 Court's decision on the procedural issue in order to protect its rights in the event that the Nevada
5 Supreme Court disagreed with this Court's determination under a judicial review standard. If the
6 Nevada Supreme Court reversed on the procedural issue, it would remand for a trial de novo. In
7 that event, the proceedings on the merits before this Court and its reversal of the Commission's
8 decision would represent nothing more than a waste of time, money and judicial resources that
9 could have been saved had a stay been granted.

10 Moreover, absent a stay, it appears certain that the parties and the Court will
11 immediately be faced with a number of disputed procedural issues before ever getting to the
12 merits. For example, the Department has never filed an Answer to Edison's Amended
13 Complaint, which is now overdue, and has instead file an Intent to Participate on November 24,
14 2009. In addition, the nature of the participation of the local governments certainly will be
15 disputed. See Letter from Edison to the Court dated October 28, 2009. None of these issues is
16 resolved or even addressed in the Court's November 19 order, yet all of these procedural
17 questions will be answered by the Nevada Supreme Court if the writ petition is granted. Thus,
18 granting the stay likely will prevent a series of unnecessary proceedings before this Court and
19 additional writ petitions related to those proceedings.

20 **2. Edison Faces Actual Irreparable Harm If The Stay Is Denied And**
21 **There Is No Harm To The Department If The Stay Is Granted**

22 In determining whether to issue a stay, the Nevada Supreme Court has made it clear that
23 factors two and three "will not generally play a significant role in the decision whether to issue a
24 stay." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253 (2004). In order for the factors
25 related to "irreparable or serious harm" to play a significant role in the decision whether to issue a
26 stay, a party must "face actual irreparable harm" and not merely the expense of additional
27 litigation (in the case of the petitioner) or delay in litigation (in the case of the respondent)
28 inherent in most stay requests. *Id.* Accordingly, where the object of a writ petition will be

1 defeated if a stay is denied (as it would in this case), a stay is generally warranted unless the party
2 opposing the stay can make a strong showing that it will suffer actual irreparable harm if the stay
3 is granted or, as discussed below, that petitioner is not likely to succeed on the merits of the writ
4 petition.

5 In this case, the Department cannot make a showing that it will suffer any actual
6 irreparable harm if this Court grants a stay. The only ostensible harm to the Department if the
7 stay is granted is some delay in the start of proceedings in this Court, which is not a legally
8 sufficient reason to deny the stay², especially since there is a substantial possibility that the
9 Nevada Supreme Court will disagree with the Court's decision on the procedural issue, as
10 discussed immediately below, and require a trial de novo given this Court's own observation
11 about the closeness of the issue. The costs to each party of litigating the writ petition itself do not
12 affect the analysis since these costs will be incurred in any event, either currently through the writ
13 petition or on appeal from the Court's final judgment on the merits.

14 3. The Merits Of The Procedural Issue Favor Edison

15 In determining whether petitioner is likely to prevail on the merits, the Nevada Supreme
16 Court looks to whether the moving party "present[s] a substantial case on the merits when a
17 serious legal question is involved and show[s] that the balance of equities weighs heavily in favor
18 of granting the stay." *Fritz Hansen*, 116 Nev. at 659 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565
19 (5th Cir. 1981)).

20 Without a doubt, the parties' dispute over the nature of the judicial remedy available in an
21 action filed under NRS 372.680 involves a "serious legal question." The resolution of this issue
22 determines, among other things, whether this Court may independently review the administrative
23 record, take new evidence and render its independent judgment in Edison's case, or whether the
24 Court is limited to reviewing the Commission's decision pursuant to NRS 233B.135. Each
25 outcome has significantly different consequences for all parties going forward — a fact this Court
26 acknowledged more than once at the October 8 hearing. *See, e.g.*, Tr. at 39, ll. 4-5 ("[O]bviously,
27 whatever I do is going to have a great impact on how we proceed."); Tr. at 35, ll. 23-25 (same).

28 ² See *Mikohn Gaming*, 120 Nev. at 253; *Fritz Hansen*, 116 Nev. at 658.

1 Furthermore, in its motions and briefs to this Court on the nature of the proceedings in
2 this action, Edison presented a substantial case on the merits supporting its position that NRS
3 372.680 authorizes a trial de novo. In particular, Edison established that every cited case properly
4 brought under NRS 372.680 has been conducted as a trial de novo regardless of whether the
5 taxpayer had participated in hearings on its refund claim before the Commission. *See* Edison's
6 August 28, 2009 Motion, Section II.A. Moreover, during the administrative process, the
7 Department itself took the position that NRS 372.680 authorized a trial de novo, including an
8 evidentiary hearing, on Edison's claims for refund. *See id.*, Introduction. Given that the
9 Department itself has asserted the very position that Edison advocates (a position supported by
10 substantial legal authority, as Edison showed in its motions and briefs), the Department cannot in
11 good faith argue that Edison's writ petition will not present a substantial case for mandamus
12 relief. Finally, the balance of the equities weighs heavily in favor of granting the stay. *See*
13 Section II.1-2, *supra*.

14 **III. Conclusion**

15 Obtaining procedural certainty at this stage of this case will, in the words of the Court,
16 "save people a lot of money, effort and proceedings." Tr. at 39, ll. 3-4. For these reasons and
17 those set forth above, the proceedings before the Court should be stayed until the Nevada
18 Supreme Court makes a final disposition of Edison's writ petition.

19
20 Dated: November 3rd, 2009

21 By: 

22 NORMAN J. AZEVEDO
23 State Bar No. 3294
24 405 North Nevada Street
25 Carson City, NV 89703
26 (775) 883-7000

27 Attorney for Plaintiff

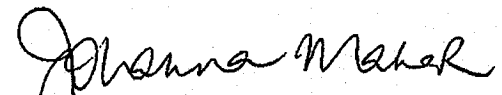
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CERTIFICATE OF MAILING

I hereby certify that on the 30th day of November, 2009, I placed a copy of the foregoing in the U.S. Mail, postage pre-paid, addressed as follows:

Gina Session, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701



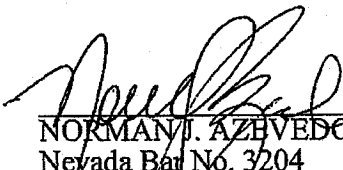
Johanna Maher

1
2
3 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
4 IN AND FOR CARSON CITY
5

6 **AFFIRMATION**
7 **Pursuant to NRS 239B.030**
8

9 The undersigned does hereby affirm that the preceding document, PLAINTIFF'S
10 REQUEST TO STAY PROCEEDINGS PENDING RESOLUTION OF A PETITION TO THE
11 NEVADA SUPREME COURT FOR A WRIT OF MANDAMUS (ORAL ARGUMENT
12 REQUESTED) filed in Case No. 09 0C 00016 1B DOES NOT CONTAIN THE SOCIAL
13 SECURITY NUMBER OF ANY PERSON.

14 DATED this 30th day of November, 2009.

15
16 
17 NORMAN J. AZEVEDO, ESQ.
18 Nevada Bar No. 3204
19 405 North Nevada Street
20 Carson City, NV 89703
21 775.883.7000
22 Attorney for Plaintiff
23
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RECEIVED

DEC 21 2009

Arman J. Azevedo
Attorney at Law

1 CATHERINE CORTEZ MASTO
Nevada Attorney General
2 GINA C. SESSION
Nevada Bar No. 5493
3 100 N. Carson St.
4 Carson City, Nevada 89710-4717
775 684-1207
5 Attorneys for Defendant
6 Nevada Dept. of Taxation

7
8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10 Southern California Edison,)

11 Plaintiff,)

12 vs.)

13)
14 STATE OF NEVADA ex rel. Department of
Taxation,)

15 Defendants.)
16)
17)

Case No. 09 OC 00016 1B

Department No. 1

18 **NON OPPOSITION TO PLAINTIFF'S REQUEST TO STAY**
19 **PROCEEDINGS PENDING WRIT OF MANDAMUS**

20 Defendant State of Nevada ex rel. Department of Taxation (Department), by and
21 through its attorney, Catherine Cortez Masto, Attorney General, by Gina C. Session, Chief
22 Deputy Attorney General, hereby submits its Non Opposition to Plaintiff's Request to Stay
23 Proceedings Pending Writ of Mandamus to be filed by Plaintiff's on or before January 8, 2010,

24 ///

25 ///

26 ///

27 ///

28 ///

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

1 in the Supreme Court of the State of Nevada.

2 Dated this 18th day of December, 2009.

3 CATHERINE CORTEZ MASTO
4 Attorney General

5 By: DC. Session
6 GINA C. SESSION
7 Chief Deputy Attorney General
8 Nevada State Bar No. 5493
9 100 N. Carson Street
10 Carson City, Nevada 89701-4717
11 Attorneys for Defendants

12
13
14 **CERTIFICATE OF SERVICE**

15 I certify that I am an employee of the State of Nevada, Office of the Attorney General,
16 and that on this 18th day of December, 2009, I served a copy of the foregoing by mailing a
17 true copy to the following:

18 Norman J. Azevedo, Esq.
19 405 N. Nevada St.
20 Carson City, Nevada 89703

21 Juan M. Kwan
22 Employee of the Office of the Attorney General
23
24
25
26
27
28

1 Case No.: 09 0C 00016 1B

2 Dept. No. : I

REC'D & FILED

2009 DEC 24 PM 2:38

3 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

4 IN AND FOR CARSON CITY

CLERK
C. FRANZ
DEPUTY

5 SOUTHERN CALIFORNIA EDISON,

6

Plaintiff,

7

8 vs.

9

10 THE STATE OF NEVADA, EX REL.
DEPARTMENT OF TAXATION,

11

Defendant.

12

13 On November 30, 2009, Plaintiff Southern California Edison ("Edison") filed a Motion
14 pursuant to NRAP 8(a)(1)(A) to stay the above-captioned proceedings in this Court pending final
15 resolution of a Petition for a Writ of Mandamus which Edison indicated they would file on or
16 before January 8, 2010. On December 18, 2009, the Nevada Department of Taxation filed in
17 response to Edison's request a Non Opposition to Stay the Proceedings Pending Writ of
Mandamus.

18

Based on the foregoing, and good cause appearing,

19

20 IT IS HEREBY ORDERED that these proceedings shall be stayed until the Nevada
Supreme Court makes a final disposition of Edison's Writ Petition.

21

IT IS SO ORDERED.

22

Dated this 23 day of December, 2009.

23

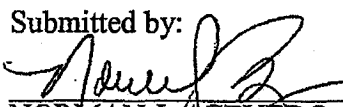

JAMES T. RUSSELL
District Court Judge

24

Submitted by:

25

26


NORMAN J. AZEVEDO, ESQ.
Nevada Bar No. 3204
405 North Nevada Street
Carson City, NV 89703
775.883.7000

27

28

1 CODE 4085

2 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
3 IN AND FOR WASHOE COUNTY

4 SIERRA PACIFIC POWER COMPANY,
5 INC. and NEVADA POWER COMPANY,
6 INC., jointly doing business as NV ENERGY,

7 Plaintiffs,

8 vs.

9 STATE OF NEVADA, ex rel.
DEPARTMENT OF TAXATION,

10 Defendant.

Case No.: 1169-0355-1
Dept. No.: 1

11
12
13 **SUMMONS**

14 **TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE**
15 **AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN**
16 **WRITING WITHIN 45 DAYS. READ THE INFORMATION BELOW VERY**
17 **CAREFULLY**

18 A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that
19 document (see complaint or petition). When service is by publication, add a brief statement of the object of the
20 action. See Nevada Rules of Civil Procedure 4(b).

21 The object of this action is: _____

22 1. If you intend to defend this lawsuit, you must do the following within 45 days after service of this
23 summons, exclusive of the day of service:

24 a. File with the Clerk of the Court, whose address is shown below, a formal written answer to
25 the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the
26 Court, and;

27 b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown
28 below.

2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may
enter a judgment against you for the relief demanded in the complaint or petition.

Dated this 1st day of June, 2009.

Issued on behalf of Plaintiff(s):

John S. Bartlett, Esq.
1201 Stewart St., Ste. 130
Carson City, NV 89706

HOWARD W CONYERS

CLERK OF THE COURT

By: _____
Deputy Clerk
Second Judicial District Court
75 Court St., Reno, NV 89501

CODE \$1425

John S. Bartlett, #143
1201 Stewart St., Ste. 130
Carson City, NV 89706-6000
(775) 841-6444
(775) 841-2172 [fax]

Attorney for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR WASHOE COUNTY

SIERRA PACIFIC POWER COMPANY,
INC. and NEVADA POWER COMPANY,
INC., jointly doing business as NV ENERGY,

Plaintiffs.

vs.

STATE OF NEVADA, ex rel.
DEPARTMENT OF TAXATION,

Defendant.

Case No.: CV09-03554

Dept. No.: 1

COMPLAINT FOR RECOVERY OF A REFUND OF USE TAXES PURSUANT TO NRS
372.680 [EXEMPT FROM ARBITRATION PER NAR 3(A)]

Plaintiffs SIERRA PACIFIC POWER COMPANY, INC. and NEVADA POWER
COMPANY, jointly doing business as NV Energy (herein collectively referred to as NV
Energy), as and for complaint against defendant State of Nevada ex rel. Department of Taxation
(herein the State of Nevada), alleges as follows:

1. Plaintiff Sierra Pacific Power Company, Inc. (Sierra Pacific) is a Nevada corporation
operating in the State of Nevada as a public energy utility with its principal place of business in
Washoe County, Nevada.

2. Plaintiff Nevada Power Company, Inc. (Nevada Power) is a Nevada corporation operating in the State of Nevada as a public energy utility with its principal office in Clark County, Nevada.

3. Plaintiffs Sierra Pacific and Nevada Power are affiliated corporations collectively doing business in the State of Nevada as NV Energy. Both corporations operate power generating facilities in the State of Nevada that burn coal to generate electricity.

4. Defendant State of Nevada ex rel. Department of Taxation is an agency of the executive branch of the government of the State of Nevada that is charged with the administration and enforcement of the tax laws set forth in Title 32 of the Nevada Revised Statutes, including the laws set forth in chapters 372 and 374 of the Nevada Revised Statutes governing the sales and use tax.

COMMON ALLEGATIONS

5. Nevada Power owns 100% of power generating units 1, 2 and 3, and 32.2% of unit 4 at the Reid Gardner Electric Plant in Clark County, Nevada. The California Department of Water Resources has a 67.8% interest in Reid Gardner unit 4. Nevada Power is the operating agent for the entire Reid Gardner Plant.

6. Sierra Pacific owns a 50% undivided interest in the Valmy Electric Generating Plant located in Humboldt County, Nevada. Idaho Power Company owns the remaining 50% interest in the Valmy Plant. Sierra Pacific is the operating agent for the entire Valmy Plant.

7. Both the Reid Gardner Plant and the Valmy Plant burn coal to generate electricity. The coal used in both plants is purchased from coal mining operations located in central Utah, western Colorado, and southern Wyoming. None of the coal purchased for use in these plants comes from mines in Nevada.

8. Nevada Power executed various coal supply agreements to supply the Reid Gardner Plant. All the coal purchased under these agreements was shipped from out of state mines to the Reid Gardner Plant and consumed in power generation.

1 9. Sierra Pacific executed various coal supply agreements to supply the Valmy Plant.
2 All the coal purchased under these agreements was shipped from out of state mines to the Valmy
3 Plant and consumed in power generation.

4 10. Prior to transportation of the coal to the plants the coal extracted from the earth was
5 crushed to a size of two inches or less, then weighed and sampled. The coal was then loaded into
6 rail cars and transported by rail to the Reid Gardner and Valmy Plants.

7 11. After the coal was delivered to the plants it is again weighed and sampled and then
8 stored in silos until it is consumed in the generation of electricity.

9 12. Coal is considered a mineral for purposes of the net proceeds of mines tax, the
10 provisions of which are found in Chapter 362 of Nevada Revised Statutes. Accordingly, coal
11 also constitutes "proceeds of mines which are subject to taxes levied pursuant to chapter 362 of
12 NRS" for purposes of the exemption from sales and use tax found in NRS 372.270 and NRS
13 374.275.

14 13. At all times material to this action Nevada Power accrued and remitted Nevada use
15 tax on all of the coal it purchased for use at the Reid Gardner Plant. At all times material to this
16 action Sierra Pacific accrued and remitted Nevada use tax on all of the coal it purchased for use
17 at the Valmy Plant.

18 14. Nevada Power and Sierra Pacific compete in the business of power generation and
19 sales with other power generators in the State of Nevada. Some of these competing power
20 generators enjoy the exemption from sales and use tax found in NRS 372.270 and NRS 374.275
21 when they purchase fuel to power their power generation facilities. There is no domestic
22 commercial source of coal available currently to supply Nevada Power or Sierra Pacific with the
23 coal they need to operate their power generation facilities.

24 15. Nevada Power filed timely claims with the Department of Taxation seeking a refund
25 of \$14,430,504.68 in use taxes it accrued and remitted on the coal it purchased for consumption
26 in power generation at the Reid Gardner Plant over the period of April 1, 2002 through October
27 31, 2006. Timely claims for refund have also been filed, and will continue to be filed, with the
28 Department of Taxation for periods subsequent to October 31, 2006.

1 16. Sierra Pacific filed timely claims with the Department of Taxation seeking a refund
2 of \$11,502,231.14 in use taxes it accrued and remitted on the coal it purchased for consumption
3 in power generation at the Valmy Plant over the period of April 1, 2002 through October 31,
4 2006. Timely claims for refund have also been filed, and will continue to be filed, with the
5 Department of Taxation for periods subsequent to October 31, 2006.

6 17. The Department of Taxation initially denied the refund claims of Nevada Power and
7 Sierra Pacific, and the matter was referred to an Administrative Law Judge. After a hearing held
8 on March 14, 2008, the Administrative Law Judge issued Findings of Fact, Conclusions of Law
9 and a Decision ruling that Nevada Power and Sierra Pacific were not entitled to a refund of use
10 taxes accrued and remitted on their purchase of coal.

11 18. Nevada Power and Sierra Pacific timely appealed the Administrative Law Judge's
12 decision to the Nevada Tax Commission. After a hearing held on September 15, 2009, the
13 Nevada Tax Commission ruled 5-2 to affirm the decision of the Administrative Law Judge.

14 19. Pursuant to NRS 372.680(1), "[W]ithin 90 days after a final decision upon a claim
15 [for refund] filed pursuant to this chapter is rendered by the Nevada tax commission, the
16 claimant may bring an action against the department on the grounds set forth in the claim in a
17 court of competent jurisdiction in Carson City, the county of this state where the claimant resides
18 or maintains his principal place of business or a county in which any relevant proceedings were
19 conducted by the department, for the recovery of the whole or any part of the amount with
20 respect to which the claim has been disallowed." This Complaint has been timely filed under the
21 provisions of NRS 372.680(1), and Washoe County is a proper venue for this action.

22 FIRST CLAIM FOR RELIEF

23 (Violation of Commerce Clause – Facial Discrimination)

24 20. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1
25 through 19.

26 21. The provisions of NRS 372.270 and NRS 374.275 provide "[T]here are exempted
27 from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or
28

1 other consumption in this [State/county] of, the proceeds of mines which are subject to taxes
2 levied pursuant to chapter 362 of NRS."

3 22. According to NRS 362.010(1) a "mine" is defined as "an excavation in the earth
4 from which ores, coal or other mineral substances are extracted, or a subterranean natural deposit
5 of minerals located and identified as such by the staking of a claim or other method recognized
6 by law. According to NRS 362.010(2) a "mineral" is defined to include "oil, gas and other
7 hydrocarbons, but does not include sand, gravel or water, except hot water or steam in an
8 operation extracting geothermal resources for profit." NRS 362.100(2) specifies that "net
9 proceeds of all minerals extracted" includes the proceeds of all: (a) operating mines; (b)
10 operating oil and gas wells; (c) operations extracting geothermal resources for profit, except an
11 operation which uses natural hot water to enhance the growth of animal or plant life; and (d)
12 operations extracting minerals from natural solutions."

13 23. Because the plaintiffs acquire the coal they use to generate power at the Reid
14 Gardner and Valmy power plants from mines located outside Nevada, thus not subjecting the
15 coal to Nevada's net proceeds of mines tax pursuant to the provisions of NRS Chapter 362, the
16 Department has refused to recognize the application of the statutory exemption from sales and
17 use tax in NRS 372.270 and NRS 374.275 to the coal purchased by plaintiffs. It is on this basis
18 that the defendant denied plaintiffs' claims for a refund of the use tax plaintiffs' remitted on their
19 purchase of coal for use in generating power at their power plants in Nevada, and continues to
20 require plaintiffs to accrue and remit use tax on their cost to purchase this coal.

21 24. The Commerce Clause of the United States Constitution [art. 1, §8, cl. 3] provides
22 exclusive authority to Congress to regulate interstate commerce. This clause has been construed
23 by the United States Supreme Court to prohibit States from discriminating against interstate
24 commerce in enacting their tax statutes and regulations.

25 25. By its terms, NRS 372.270 and NRS 374.275 limit the application of the exemption
26 from sales and use tax to the sale, storage, use or other consumption of minerals produced only
27 from mines, wells, geothermal resources and other extractive operations located in the
28 geographic territorial boundaries of the State of Nevada. It follows that all minerals produced

1 and purchased outside Nevada and subsequently imported in interstate commerce into Nevada
2 for storage, use or other consumption in this State are subject to Nevada use tax.

3 26. As a result, the provisions of NRS 372.270 and NRS 374.275 facially discriminate
4 against interstate commerce and so are unconstitutional under the Commerce Clause of the
5 United States Constitution.

6 27. NV Energy has been damaged by the State of Nevada's unconstitutional
7 discrimination against interstate commerce in an amount equal to the use tax it has accrued and
8 remitted on the purchase of coal used to generate power at the Reid Gardner and Valmy power
9 plants since April, 2002. Plaintiffs are entitled to a full refund of these use taxes, plus interest at
10 the statutory rate set forth in NRS 372.695.

11 WHEREFORE, plaintiffs request the Court enter judgment in its favor as set forth below.

12 SECOND CLAIM FOR RELIEF

13 (Violation of Commerce Clause - Discrimination in Effect and Application)

14 28. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1
15 through 27.

16 29. The State of Nevada, through its Department of Taxation, has interpreted and applied
17 the provisions of NRS 372.270 and NRS 374.275 to deny to Sierra Pacific and Nevada Power the
18 benefits of the exemption found in these statutes on the coal they purchase from out of state coal
19 mines.

20 30. The State of Nevada's interpretation and application of the exemption in NRS
21 372.270 and NRS 374.275 results in an application of the law that is discriminatory in effect on
22 Sierra Pacific and Nevada Power because they must pay a use tax on the coal they purchase for
23 power generation, but their competitors who utilize domestically produced energy sources do not
24 have to pay a sales or use tax on their fuel.

25 31. As a result, the provisions of NRS 372.270 and NRS 374.275 have the effect of
26 discriminating against interstate commerce and so are unconstitutional under the Commerce
27 Clause of the United States Constitution.
28

1 32. NV Energy has been damaged by the State of Nevada's unconstitutional
2 discrimination against interstate commerce in an amount equal to the use tax it has accrued and
3 remitted on the purchase of coal used to generate power at the Reid Gardner and Valmy power
4 plants since April, 2002. Plaintiffs are entitled to a full refund of these use taxes, plus interest at
5 the statutory rate set forth in NRS 372.695.

6 WHEREFORE, plaintiffs request the Court enter judgment in its favor as set forth below.

7 THIRD CLAIM FOR RELIEF

8 (Violation of Nevada Constitution)

9 33. Plaintiffs reallege and incorporate herein by reference the allegations in paragraphs 1
10 through 32.

11 34. According to Article X, §5(1) of the Nevada Constitution, "[t]he legislature shall
12 provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other
13 hydrocarbons, extracted in this state, at a rate not to exceed 5 percent of the net proceeds. No
14 other tax may be imposed upon a mineral or its proceeds until the identity of the proceeds as
15 such is lost."

16 35. This constitutional provision was intended by the Nevada Legislature to apply to
17 limit taxation of all minerals or their proceeds, regardless of whether the minerals were extracted
18 in Nevada or outside Nevada.

19 36. The State of Nevada has wrongfully refused to recognize the application of the
20 second sentence of this provision of the Nevada Constitution to minerals or their net proceeds
21 extracted outside Nevada but brought to this state for storage, use or other consumption.

22 37. Article X, §5(1) of the Nevada Constitution applies to bar the State of Nevada from
23 imposing the use tax on plaintiffs' purchase of coal extracted from mines located outside the
24 territorial boundaries of the State of Nevada and subsequently transported to their Reid Gardner
25 and Valmy power plants in Nevada. Furthermore, NRS 372.265 and NRS 374.270 provide
26 "[t]here are exempted from the taxes imposed by this chapter the gross receipts from the sale of,
27 and the storage, use or other consumption in this State of, tangible personal property the gross
28 receipts of which, or the storage, use or other consumption of which, this State is prohibited from

1 taxing under the Constitution or laws of the United States or under the Constitution of this
2 State." The use taxes accrued and remitted by plaintiffs on the coal they purchase and consume
3 in Nevada are prohibited by the Nevada Constitution, and so plaintiffs purchase and use of this
4 coal is exempt from use tax.

5 38. As a result, plaintiffs are entitled to a full refund of all use taxes they accrued and
6 remitted on their purchase of coal since April 2002, plus interest in accordance with NRS
7 372.695.

8 WHEREFORE, plaintiffs request that judgment be entered in their favor as follows:

9 1. For a judicial declaration that the provisions of NRS 372.270 and NRS 374.275
10 facially discriminate, and/or are discriminatory in effect, against interstate commerce in violation
11 of the Commerce Clause of the United States Constitution.

12 2. For a judicial declaration that the provisions of Article X, §5(1) of the Nevada
13 Constitution apply to bar the application of Nevada sales or use tax to plaintiffs' purchase of coal
14 from coal producers located outside the State of Nevada subsequently transported to plaintiffs'
15 Reid Gardner and Valmy power plants located in Nevada.

16 3. For an award of a full refund of use taxes that have been accrued and remitted by
17 plaintiff Nevada Power Company between April 1, 2002 and October 31, 2006 in the amount of
18 \$14,430,504.68, plus interest thereon accrued in accordance with NRS 372.695.

19 4. For an award of a full refund of use taxes that have been accrued and remitted by
20 plaintiff Sierra Pacific Power Company between April 1, 2002 and October 31, 2006 in the
21 amount of \$11,502,231.14, plus interest thereon accrued in accordance with NRS 372.695.

22 5. For an award of a full refund of use taxes that have been accrued and remitted by
23 plaintiffs since November 1, 2006, plus interest thereon accrued in accordance with NRS
24 372.695.

25 ///

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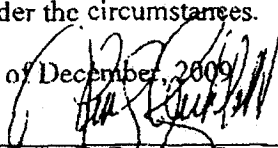
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6. For costs of suit.

7. For such other relief as this Court deems appropriate under the circumstances.

Dated this 3rd day of December, 2009



John S. Barnett, Esq.
State Bar No. 143
1201 Stewart St., Ste. 130
Carson City, NV 89706-
6000
Attorney for plaintiffs

ORIGINAL

16

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FILED

JAN 9 12 39 PM '08

CR. [Signature]
CLERK COURT

BRADLEY J. SHAFER*, MI Bar No. P36604
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* Pending Admission Pro Hac Vice

DISTRICT COURT
CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino*
Gentlemen's Club; OLYMPUS GARDEN,
INC., d/b/a *Olympic Garden*; SHAC, LLC,
d/b/a *Sapphire*; THE POWER COMPANY,
INC., d/b/a *Crazy Horse Too Gentlemen's Club*;
D. WESTWOOD, INC., d/b/a *Treasures*; and
D.I. FOOD & BEVERAGE OF LAS VEGAS,
LLC, d/b/a *Scores*;

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION;
NEVADA TAX COMMISSION; and
NEVADA STATE BOARD OF EXAMINERS,
Defendants.

Case No.:
Dept. No.:

A554970
IX

COMPLAINT FOR REFUND,
PURSUANT TO N.R.S. 368A.290(1)(b)
AND N.R.S. 368A.300(3)(b).
DECLARATORY RELIEF,
INJUNCTIVE RELIEF AND DAMAGES

CLERK OF THE COURT

RECEIVED
JAN 09 2008

NOW COME Plaintiffs K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club*,
Olympus Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a *Sapphire*, The Power
Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc., d/b/a

1 *Treasures*, and D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred
2 to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint
3 pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(b) against Defendant Nevada
4 Department of Taxation, Defendant Nevada Tax Commission, and Defendant Nevada State
5 Board of Examiners (collectively referred to herein as the "Defendants"), as follows:

7 INTRODUCTION

8 1. This is a civil action brought pursuant to N.R.S. 368A.290(1)(b) and N.R.S.
9 368A.300(3)(b), wherein Plaintiffs pray for a refund of the Live Entertainment Tax
10 paid for the tax periods of January, February, March, and April, 2004, as well as for
11 declaratory judgment, injunctive relief, and damages. Specifically, Plaintiffs seek to
12 have this Court declare as unconstitutional on its face, and enjoin, the Nevada Tax on
13 Live Entertainment (referred to herein as the "Live Entertainment Tax," or simply the
14 "Tax") as established by Title 32, Chapter 368A, of the Nevada Revised Statutes
15 ("Chapter 368A"), and the regulations promulgated in furtherance thereof, as being an
16 impermissible tax on constitutionally protected expression. A copy of the statute as
17 originally enacted is attached hereto as Exhibit 1, and a copy of the current codified
18 version of Chapter 368A is attached hereto as Exhibit 2, and both are incorporated
19 herein by reference. A copy of the administrative regulations promulgated in
20 furtherance of Chapter 368A is attached hereto as Exhibit 3, and is incorporated herein
21 by reference.

25 JURISDICTION AND VENUE

26 2. This Court has jurisdiction and power to grant the refund requested pursuant to N.R.S.
27 368A.290, as well as jurisdiction and authority to grant the declaratory judgment
28

1 prayed for here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and
2 N.R.S. 33.040. Additionally, this Court has jurisdiction and power to grant the
3 injunctive relief requested pursuant to Rule 65 of the Nevada Rules of Civil Procedure
4 and N.R.S. § 33.010.

5 3. This suit is authorized by law to redress deprivations under color of state law of the
6 rights, privileges, and immunities secured by Article I, §§ 9 and 10, and Article 10, §1,
7 of the Nevada Constitution, as well as the First and Fourteenth Amendments to the
8 United States Constitution, and for declaratory and injunctive relief.

9 4. Venue resides in this Court and is proper and appropriate as relevant proceeds were
10 conducted, and the Plaintiffs maintain their principal place of business, within Clark
11 County in the State of Nevada, pursuant to N.R.S. 368A.290(2).

12
13
14 **PARTIES**

15 5. Plaintiffs incorporate herein by reference each and every paragraph above as though
16 fully set forth herein.

17 6. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*")
18 is a corporation duly organized under the laws of the State of Nevada, and is
19 authorized and qualified to do business in the State of Nevada.

20 7. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*") is a corporation
21 duly organized under the laws of the State of Nevada, and is authorized and qualified
22 to do business in the State of Nevada.

23 8. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a limited liability company
24 duly organized under the laws of the State of Nevada, and is authorized and qualified
25 to do business in the State of Nevada.
26
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1 9. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*
2 (*"Crazy Horse"*) is a corporation duly organized under the laws of the State of
3 Nevada, and is authorized and qualified to do business in the State of Nevada.

4 10. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* (*"Treasures"*) is a corporation duly
5 organized under the laws of the State of Nevada, and is authorized and qualified to do
6 business in the State of Nevada.

7
8 11. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (*"Scores"*) is a
9 corporation duly organized under the laws of the State of Nevada, and is authorized
10 and qualified to do business in the State of Nevada.

11
12 12. None of the Plaintiffs operate their facilities as licensed gaming establishments under
13 the laws of the State of Nevada.

14 13. Defendant Nevada Department of Taxation (hereinafter sometimes referred to simply
15 as the "Department") is a governmental entity created under the laws of the State of
16 Nevada, which administers and enforces the statutory provisions challenged herein,
17 and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers. It is a
18 required Defendant in this action pursuant to N.R.S. 368A.290(1)(b) and N.R.S.
19 368A.300(3)(b).
20

21 14. Defendant Nevada Tax Commission (hereinafter sometimes referred to simply as the
22 "Commission") is a governmental entity created under the laws of the State of Nevada,
23 which administers and enforces some of the statutory provisions challenged herein,
24 and is authorized to consider and rule upon, among other things, appeals of claims
25 under Chapter 368A. It is named as a Defendant herein as it rendered the decision
26 which the Plaintiffs challenge by way of this action.
27
28

1 15. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to
2 simply as the "Board of Examiners") is a governmental entity created under the laws
3 of the State of Nevada, and consists of the governor, the secretary of state, and the
4 attorney general. Pursuant to N.R.S. § 368A.250, the Board of Examiners is
5 authorized to approve, among other things, refunds with regard to any erroneously or
6 illegally collected or computed tax under Chapter 368A, which the Plaintiffs seek here.

8 **STATEMENT OF FACTS**

9 16. Plaintiffs incorporate herein by reference each and every paragraph above as though
10 fully set forth herein.

11 17. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of
12 Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous
13 exceptions, an excise tax on admission to any facility within the State of Nevada that
14 provides defined "live entertainment."

15 18. Shortly after the enactment of Chapter 368A, numerous and various administrative
16 regulations were promulgated regarding the administration and enforcement of
17 Chapter 368A. These regulations, which set forth definitions, applicability and
18 methods of calculating the Live Entertainment Tax, and procedures, can be found at
19 NAC 368A.010 through NAC 368.540, and are attached hereto as Exhibit 3. As
20 utilized herein, the phrase "Chapter 368A" encompasses both the statute and these
21 regulations promulgated in furtherance thereof attached as Exhibit 3.

22 19. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is
23 obligated to collect the tax imposed by Chapter 368A from taxpayers who/which are
24 not licensed gaming establishments, and is also obligated to adopt such regulations as
25
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1 are necessary to carry out those functions.

2 20. Upon information and belief, one of the primary purposes for the enactment of
3 Chapter 368A was to impose an excise tax upon those establishments in the State of
4 Nevada that provide live so-called "adult" entertainment in the form of exotic dancing,
5 "topless" dancing, and fully nude performance dance entertainment.

6
7 21. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the
8 terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a
9 licensed gaming establishment if the facility in which the live entertainment is
10 provided had a maximum occupancy of less than 300 persons.

11
12 22. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which --
13 among other things -- reduced the scope of the exception as contained in N.R.S.
14 § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Upon
15 information and belief, the purpose of the July 17, 2005, amendments to
16 Chapter 368A, and in particular those to N.R.S. § 368A.200(5)(d), was to specifically
17 extend the tax obligation as contained in Chapter 368A to "adult" entertainment
18 establishments which were not then subject to the Live Entertainment Tax, including a
19 number of the Plaintiffs in this action. The same amendments changed the language of
20 some provisions of Chapter 368A. Unless stated otherwise, all references herein to the
21 statutory provisions of Chapter 368A are to the current codified version attached
22 hereto as Exhibit 2.

23
24
25 23. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue,
26 Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is
27 presented to the consenting adult public. The Defendants have taken the position that
28

- 1 *Spearmint Rhino* is subject to Chapter 368A, as amended, and have required *Spearmint*
2 *Rhino* to pay the Live Entertainment Tax as mandated therein.
- 3 24. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas
4 Boulevard, Las Vegas, Nevada, 89104, whereupon live performance dance
5 entertainment is presented to the consenting adult public. The Defendants have taken
6 the position that *Olympic Garden* is subject to Chapter 368A, as amended, and have
7 required *Olympic Garden* to pay the Live Entertainment Tax as mandated therein.
- 9 25. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas,
10 Nevada, 89109, whereupon live performance dance entertainment is presented to the
11 consenting adult public. The Defendants have taken the position that *Sapphire* is
12 subject to Chapter 368A, as amended, and have required *Sapphire* to pay the Live
13 Entertainment Tax as mandated therein.
- 15 26. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas,
16 Nevada, 89102, whereupon live performance dance entertainment is presented to the
17 consenting adult public. The Defendants have taken the position that *Crazy Horse* is
18 subject to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live
19 Entertainment Tax as mandated therein.
- 21 27. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas,
22 Nevada, 89109, whereupon live performance dance entertainment is presented to the
23 consenting adult public. The Defendants have taken the position that *Treasures* is
24 subject to Chapter 368A, as amended, and have required *Treasures* to pay the Live
25 Entertainment Tax as mandated therein.
- 27 28. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las
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- 1 Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented
2 to the consenting adult public. The Defendants have taken the position that *Scores* is
3 subject to Chapter 368A, as amended, and have required *Scores* to pay the Live
4 Entertainment Tax as mandated therein.
- 5 29. All of the facilities operated by the Plaintiffs have maximum occupancies of less than
6 7,500 persons.
- 7 30. The Plaintiffs all present upon their business premises some form of live "exotic"
8 performance dance entertainment. Some of the Plaintiffs present live clothed and
9 "topless" female performance dance entertainment, and others of the Plaintiffs present
10 live clothed, "topless" and fully nude female performance dance entertainment; all of
11 which is non-obscene. The non-obscene performance dance entertainment presented
12 on the establishments operated by the Plaintiffs constitutes speech and expression, as
13 well as a form of assembly, protected by not only Article I, §§ 9 and 10, of the Nevada
14 Constitution, but by the First and Fourteenth Amendments to the United States
15 Constitution as well.
- 16 31. Chapter 368A is a lengthy and complex statute containing numerous and various
17 provisions affecting the constitutionally protected conduct of the Plaintiffs, their
18 agents, representatives, entertainers and employees, as well as those individuals from
19 the consenting adult audience who would seek to view the entertainment provided by
20 the Plaintiffs. Plaintiffs assert the constitutional rights of their patrons as well in this
21 action.
- 22 32. The Defendants take the position that pursuant to the definitions set forth in Chapter
23 368A, Plaintiffs are obligated to pay the Live Entertainment Tax since their
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establishments fall within the definition of "live entertainment" found in N.R.S. 368A.090, and since they are not otherwise exempted from having to pay that tax.

33. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both illegal and unconstitutional, and for those reasons they do not desire to pay those taxes. Nevertheless, under threat of criminal prosecution and/or the imposition of fines and other penalties against them, Plaintiffs have, beginning at various times, paid the Live Entertainment Tax mandated by Chapter 368A.

34. Pursuant to N.R.S. § 368A.260, Plaintiffs each filed timely requests for refunds of the Live Entertainment Tax they had paid, together with claims for the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310.

35. To date, each request for refund has been denied by the Defendant Nevada Department of Taxation, pursuant to a one page letter. Each letter informed the Plaintiffs that the denial may be appealed to Defendant Nevada Tax Commission pursuant to N.R.S. § 360.245 by filing a written notice of appeal with the Defendant Department within thirty days of the service of the denial letter.

36. Each Plaintiff has filed a timely written notice of appeal with the Defendant Department of Taxation. After the Plaintiffs and the Defendant Department had an opportunity to submit briefing to the Defendant Nevada Tax Commission, a hearing was scheduled on July 9, 2007, before the Defendant Commission to hear the appeal of the denials of the requests for refunds of the Live Entertainment Tax paid by the Plaintiffs for the tax periods of January, February, March, and April, 2004.

37. After the hearing commenced on July 9, 2007, the Defendant Commission voted to continue the hearing until August 6, 2007, in order to give the parties an opportunity to

1 submit supplemental materials and information.

2 38. The Defendant Commission, after considering the testimony, argument, and materials
3 submitted on July 9, 2007, and on August 6, 2007, issued a written decision denying
4 Plaintiffs' appeals on October 12, 2007. That ruling is attached hereto as Exhibit 4.

5 39. Pursuant to N.R.S. § 368A.290, "[w]ithin 90 days after a final decision upon a claim
6 filed pursuant to this chapter is rendered" by the Commission, "the claimant may bring
7 an action against the Department on the grounds set forth in the claim." It is pursuant
8 to this provision that Plaintiffs have filed this action.

9
10 40. Pursuant to N.R.S. 368A.300(3)(b), if the claimant is aggrieved by the decision of the
11 "Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after
12 the decision is rendered, bring an action against the Board on the grounds set forth in
13 the claim for the recovery of the whole or any part of the amount claimed as an
14 overpayment."

15
16 41. Plaintiffs further filed this action in order to protect their fundamental constitutional
17 rights from infringement by the enforcement of Chapter 368A, which they contend is
18 unconstitutional on its face as it: 1) imposes a tax directly on "live entertainment;" an
19 activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well
20 as the First and Fourteenth to the United States Constitution, therefore constituting a
21 direct tax on "First Amendment" freedoms and in particular on live exotic
22 performance dance entertainment; 2) applies only to a small number and category of
23 speakers; 3) it is in violation of Article 10, §1 of the Nevada Constitution; and 4) it is
24 an impermissible discriminatory tax which discriminates based upon the content of
25 speech and expression. In addition, N.R.S. 368A.200(5)(a) precludes the taxation of
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1 live entertainment that "the State is prohibited from taxing under the Constitution,
2 laws or treaties of the United States or the Nevada Constitution." Because the
3 Plaintiffs cannot be so taxed under either the United States or Nevada Constitutions,
4 Plaintiffs are exempt from having to pay the Live Entertainment tax pursuant to this
5 exemption. These are the grounds which Plaintiffs set forth in their requests for
6 refunds.
7

8 **EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE**

9 42. Plaintiffs incorporate herein by reference each and every paragraph above as though
10 fully set forth herein.

11 43. Chapter 368A states, at N.R.S. 368A.200(1), that "[e]xcept as otherwise provided in
12 this section, there is hereby imposed an excise tax on admission to any facility in this
13 State where live entertainment is provided." If the live entertainment is provided at a
14 facility with a maximum occupancy of less than 7,500, the rate of tax is 10% of the
15 admission charge to the facility plus 10% of any amounts paid for food, refreshments
16 and merchandise purchased at the facility. If the live entertainment is provided at a
17 facility with a maximum occupancy of at least 7,500, the rate of the tax is 5% of the
18 admission charged to the facility.
19

20 44. Chapter 368A defines an "[a]dmission charge" in N.R.S. 368A.020 as:
21

22 [T]he total amount, expressed in terms of money, of consideration paid
23 for the right or privilege to have access to a facility where live
24 entertainment is provided. The term includes, without limitation, an
25 entertainment fee, a cover charge, a table reservation fee, or a required
minimum purchase of food, refreshments or merchandise.

26 45. Chapter 368A defines a "facility" in N.R.S. 368A.060 as:

27 "(a) Any area or premises where live entertainment is provided and for
28 which consideration is collected for the right or privilege of entering that
area or those premises if the live entertainment is provided at:

- 1 (1) An establishment that is not a licensed gaming establishment; or
2 (2) A licensed gaming establishment that is licensed for less than
3 51 slot machines, less than six games, or any combination of slot
4 machines and games within those respective limits.

5 (b) Any area or premises where live entertainment is provided if the live
6 entertainment is provided at any other licensed gaming establishment."

7 46. "[L]ive entertainment" is defined in N.R.S. § 368A.090 as:

8 "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation,
9 diversion or other similar purpose by a person or persons who are
10 physically present when providing that activity to a patron or group of
11 patrons who are physically present."

12 This definition includes, among other activities, "[d]ancing performed by one or more
13 professional or amateur dancers."

14 47. Chapter 368A states, at N.R.S. § 368A.140(2), that the Defendant Department shall
15 collect the Live Entertainment Tax from non-gaming licensed taxpayers, such as is the
16 case of the Plaintiffs here, and is empowered to "adopt such regulations are necessary
17 to carry out" that collection.

18 48. N.R.S. § 368A.090(b) specifically excludes certain types of entertainment from the
19 definition of "live entertainment," such as: instrumental or vocal music if it "does not
20 routinely rise to the volume that interferes with casual conversation" and would not
21 "generally cause patrons to watch as well as listen"; occasional performances by
22 employees who have primary job functions other than performing; performances in
23 certain licensed gaming establishments "as long as performers stroll continuously
24 throughout the facility" or if they "enhance the theme of the establishment or attract
25 patrons to the areas of the performances"; entertainment that is provided by patrons;
26 animal behaviors for the purpose of education and scientific research; and occasional
27 dancing which, among other things, "primarily serves to provide ambience to the
28

1 facility."

2 49. Pursuant to N.R.S. 368A.200(5), the tax imposed by Chapter 368 is not applicable to a
3 variety of circumstances. Some of the exemptions include live entertainment that the
4 State is prohibited from taxing under the Constitution, laws or treaties of the United
5 States or Nevada Constitution; live entertainment that is not provided at a licensed
6 gaming establishment if the facility has a maximum seating capacity of less than 200;
7 live entertainment that is provided at a licensed gaming establishment that is licensed
8 for less than 51 slot machines, less than six games, or any combination of slot
9 machines and games within those limits, if the facility has a maximum seating capacity
10 of less than 200; merchandise sold outside the facility in which the live entertainment
11 is provided, unless the purchase of the merchandise entitles the purchaser to admission
12 to the entertainment; and music performed by musicians who move constantly through
13 the audience if no other form of live entertainment is afforded to the patrons.
14

15
16 50. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S.
17 368A.250, which provides that if the Defendant Department determines that any tax has
18 been "erroneously or illegally collected or computed," the Defendant Department must
19 record the fact and certify the amount owed and from whom it was collected to
20 Defendant Board of Examiners. If the amount is approved by the Defendant Board of
21 Examiners, it is then credited on any amount that is due from that person under Chapter
22 368A, with the balance refunded to that person.
23

24
25 51. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Defendant Nevada Tax
26 Commission is authorized to render a final decision upon claims for refunds under that
27 chapter. Further, at N.R.S. § 368A.300(2), Chapter 368A provides that a claim there
28

1 under that is disallowed by the Defendant Department may be appealed to the
2 Defendant Commission.

3 **COUNT I - DECLARATORY RELIEF**

4 52. Plaintiffs incorporate herein by reference each and every paragraph above as though
5 fully set forth herein.

6
7 53. Chapter 368A is unconstitutional on its face under Article I, §§ 9 and 10, and Article
8 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to
9 the United States Constitution, for numerous and various reasons, including, but not
10 limited to, the fact that:

- 11 a. It effectuates an impermissible prior restraint on speech and expression;
12
13 b. It fails to further any important, substantial or compelling governmental
14 interest;
15
16 c. It permits restrictions on speech and expression that are greater than are
17 essential to further any asserted governmental interests;
18
19 d. It permits restrictions on speech and expression that are not the least restrictive
20 means available;
21
22 e. It contains criteria that are both arbitrary and capricious and which are not
23 supported by any legislative record;
24
25 f. It contains numerous and various terms and phrases which are impermissibly
26 vague, and ambiguous, and the applicable definitions as contained therein are
27 impermissibly and substantially overbroad judged in relation to their plainly
28 legitimate sweep;
g. It imbues the Defendants with unbridled discretion;
h. It impermissibly singles out constitutionally protected businesses for certain
regulations;
i. It violates the procedural and substantive due process rights of the Plaintiffs
and others, including but not limited to the customers and patrons who frequent
Plaintiffs' establishments;
j. It violates the privacy rights of the customers and patrons who frequent

1 Plaintiffs' establishments;

2 k. It violates Plaintiffs' equal protection rights in that it unconstitutionally
3 discriminates against expressive businesses based upon the content of speech,
4 and it further creates and permits uneven treatment in the exercise of
constitutionally protected rights in the State of Nevada, and therefore permits
differing treatment amongst individuals who desire to engage in
constitutionally protected speech;

5 l. It is an impermissible direct tax on constitutionally protected freedoms;

6 m. It is a discriminatory tax that only impacts upon a small number and category
7 of speakers;

8 n. It is an impermissible discriminatory tax that discriminates based upon the
9 content of speech and expression;

10 o. It impermissibly requires a person or business to pay for the right to exercise a
right guaranteed by the Nevada and United States Constitutions;

11 p. It was enacted upon an insufficient record and is not justified on any factual or
12 legal ground; and

13 q. It violates the separation of powers doctrine.

14 54. Because the Live Entertainment Tax is an impermissible and/or unconstitutional tax
15 upon in violation of Article I, §§ 9 and 10, and Article 10, §1, of the Nevada
16 Constitution as well as the First and Fourteenth Amendments to the United States
17 Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax
18 pursuant to the provisions of N.R.S. § 368A.200(5)(a).
19

20 55. This Court has the authority to declare the rights and other relations of the Plaintiffs and
21 of the Defendants, and should do so here.
22

23 56. Because of the questioned constitutionality of the Live Entertainment Tax as required
24 by

25 Chapter 368A, and because of the potential application of the exemption as contained
26 in N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to
27 these Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the
28

1 constitutionality of Chapter 368A as well as the applicability of the exemption as
2 contained in N.R.S. § 368A.200(5)(a).

3 57. For the reasons as set forth above, this Court should declare that the Live Entertainment
4 Tax as mandated by Chapter 368A is unconstitutional on its face. Also for the reasons
5 as set forth above, this Court should declare that Plaintiffs need not pay the Live
6 Entertainment Tax as required by Chapter 368A both as a result of the constitutional
7 violations as enumerated above as well as the specific exemption as set forth in N.R.S.
8 § 368A.200(5)(a). In addition, this Court should declare that the Defendants have
9 violated the constitutional rights of the Plaintiffs by requiring them to have paid the
10 Live Entertainment Tax for the tax period of January 2004 through April 2004, which
11 are at issue in this action.
12

13
14 **WHEREFORE**, Plaintiffs respectfully request that this Honorable Court declare the
15 Live Entertainment Tax under Chapter 368A unconstitutional on its face; that Plaintiffs need
16 not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates
17 Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and
18 Fourteenth Amendments to the United States Constitution, and because Plaintiffs are exempt
19 from paying the Live Entertainment Tax pursuant to the provisions of N.R.S.
20 § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by
21 having required them to have paid the Live Entertainment Tax for the tax period of January
22 2004 through April 2004, which are at issue in this action. .
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COUNT II - REQUEST FOR REFUND

58. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

59. Plaintiffs should not have been required to pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

60. Both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission erred in not granting Plaintiffs' requests for refunds.

61. This Court has the power to grant Plaintiffs' requests for refunds pursuant to N.R.S. § 368A.290 and N.R.S. § 368A.300, and should do so here.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court vacate the decisions of both the Defendant Nevada Department of Taxation and the Defendant Nevada Tax Commission, and enter an order directing Defendant Nevada Department of Taxation to refund the Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January, February, March and April, 2004, and to pay the statutory interest provided for by N.R.S. § 368A.270 and § 368A.310. Further, Plaintiffs respectfully request that this Honorable Court enter an order requiring Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs during those periods and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs during

1 those periods under Chapter 368A, together with interest as required by N.R.S. § 368A.270
2 and § 368A.310.

3 **COUNT III - INJUNCTIVE RELIEF**

4 62. Plaintiffs incorporate herein by reference each and every paragraph above as though
5 fully set forth herein.

6
7 63. Any action taken or to be taken by the Defendants to enforce any portion of Chapter
8 368A against Plaintiffs has been taken and will be taken under color of law, and has
9 deprived and will deprive Plaintiffs of their constitutional rights as set forth herein, and
10 will cause them irreparable harm for which compensatory damages are an inadequate
11 remedy as a matter of law.

12
13 64. The threat of enforcement of Chapter 368A is both great and immediate. In addition,
14 Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional
15 rights. There is no other remedy at law which would suffice to protect Plaintiffs'
16 interests for the reasons above enumerated.

17
18 65. The public interest weighs in favor of preventing deprivation of constitutional rights,
19 and is always served by enjoining an unconstitutional law.

20 66. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional
21 claims against Chapter 368A, in that it is blatantly and patently unconstitutional. The
22 Defendants will suffer no harm by the entry of such an injunction, as there can be no
23 legitimate governmental interest in enforcing an unconstitutional law. In addition, the
24 "balancing" of the equities tips in favor of the Plaintiffs and in the entry of a
25 preliminary injunction, due to the paramount position of rights afforded under the First
26 Amendment in comparison to the lack of harm occasioned to the Defendants if such an
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1 injunction is granted.

2 **WHEREFORE**, Plaintiffs respectfully request that this Honorable Court enter both a
3 preliminary and permanent enjoining the Defendants, as well as their officers, agents,
4 employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from
5 collecting the Live Entertainment Tax against the Plaintiffs. Further, Plaintiffs respectfully
6 request that this Honorable Court enter a permanent injunction ordering Defendant Nevada Tax
7 Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs for
8 the tax periods of January, February, March and April 2004, and to certify those amounts to the
9 Defendant State Board of Examiners, and further ordering the Defendant State Board of
10 Examiners to approve and authorize the refund from the State Treasury of all such Live
11 Entertainment Tax payments
12 that have been involuntarily made by the Plaintiffs under Chapter 368A during those periods,
13 together with interest as required by N.R.S. § 368A.270 and § 368A.310.

14
15
16 **PRAYER FOR RELIEF**

17 **WHEREFORE**, Plaintiffs pray that this Honorable Court enter judgment against
18 Defendants, which would include:
19

- 20 A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional
21 on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by
22 Chapter 368A both because it violates Article I, §§ 9 and 10, and Article 10, §1, of
23 the Nevada Constitution as well as the First and Fourteenth Amendments to the United
24 States Constitution, and because Plaintiffs are exempt from paying the Live
25 Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the
26 Defendants have violated the Plaintiffs' constitutional rights by having required them
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1 to have paid the Live Entertainment Tax in the past;

2 B. A preliminary and permanent injunction restraining the Defendants, as well as their
3 officers, agents, employees and representatives, from enforcing Chapter 368A against
4 the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs;

5 C. Entry of an order vacating the determinations of the Nevada Department of Taxation
6 and the Defendant Nevada Tax Commission denying Plaintiffs' requests for refunds;

7 D. Entry of an order directing Defendant Nevada Department of Taxation to refund the
8 Live Entertainment Taxes paid by the Plaintiffs for the tax periods of January,
9 February, March and April 2004, together with the statutory interest provided for by
10 N.R.S. § 368A.270 and § 368A.310;

11 E. A permanent injunction requiring Defendant Nevada Tax Commission to record the
12 payments of the Live Entertainment Tax made by the Plaintiffs during those tax
13 periods and to certify those amounts to the Defendant State Board of Examiners, and
14 further ordering the Defendant State Board of Examiners to approve and authorize the
15 refund from the State Treasury of all such Live Entertainment Tax payments that have
16 been involuntarily made by the Plaintiffs under Chapter 368A during those tax
17 periods, together with interest as required by N.R.S. § 368A.270 and § 368A.310; and
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1 F. Entry of such other and further relief as the Court deems just and proper.

2 DATED this 9th day of January, 2008.

3 GHANEM & SULLIVAN, LLP

4
5
6 By

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DISTRICT COURT

CLARK COUNTY NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino*
Gentlemen's Club; OLYMPUS GARDEN,
INC., d/b/a *Olympic Garden*; SHAC, LLC,
d/b/a *Sapphire*; THE POWER COMPANY,
INC., d/b/a *Crazy Horse Too Gentlemen's*
Club; D. WESTWOOD, INC., d/b/a
Treasures; and D.I. FOOD & BEVERAGE
OF LAS VEGAS, LLC, d/b/a *Scores*;

Case No. A554970

Dept. No. IX

ANSWER

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION;
NEVADA TAX COMMISSION; and
NEVADA STATE BOARD OF EXAMINERS,

Defendants.

COME NOW, Defendants Nevada Department of Taxation, Nevada Tax Commission,
and Nevada State Board of Examiners, by and through their attorneys, Catherine Cortez
Masto, Attorney General, David J. Pope, Senior Deputy Attorney General, and Suzanne M.
Warren, Deputy Attorney General, and hereby submit their Answer to Plaintiffs' Complaint.

JURISDICTION AND VENUE

1. Answering paragraph 2, Answering Defendants are without sufficient knowledge or
information upon which to form a belief as to the truth or falsity of the allegations

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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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1 contained therein, and upon said basis, deny each and every allegation contained
2 therein.

3 2. Answering paragraph 3, Answering Defendants are without sufficient knowledge or
4 information upon which to form a belief as to the truth or falsity of the allegations
5 contained therein, and upon said basis, deny each and every allegation contained
6 therein.

7 3. Answering paragraphs 4, Answering Defendants are without sufficient knowledge or
8 information upon which to form a belief as to the truth or falsity of the allegations
9 contained therein, and upon said basis, deny each and every allegation contained
10 therein.

11 **PARTIES**

12 4. Answering paragraph 5, Answering Defendants incorporate by reference each and
13 every paragraph above as if fully set forth herein.

14 5. Answering paragraph 6, 7, 8, 9, 10, 11 and 12, Answering Defendants are without
15 sufficient knowledge or information upon which to form a belief as to the truth or falsity
16 of the allegations contained therein, and upon said basis, deny each and every
17 allegation contained therein.

18 6. Answering paragraph 13, Answering Defendant Nevada Department of Taxation admits
19 that it is a governmental entity created under the laws of the State of Nevada and that it
20 administers and enforces the statutory provisions of Chapter 368A of the Nevada
21 Revised Statutes, and collects the Live Entertainment Tax, for all non-gaming licensed
22 taxpayers in Nevada. Nevada Department of Taxation further answers that it is without
23 sufficient knowledge or information upon which to form a belief as to the truth or falsity
24 of any remaining allegations contained in paragraph 13, and upon said basis, denies
25 each and every remaining allegation contained therein. Other Answering Defendants
26 answer that they are without sufficient knowledge or information upon which to form a
27 belief as to the truth or falsity of the allegations contained therein, and upon said basis,
28 deny each and every allegation contained therein.

1 7. Answering paragraph 14, Answering Defendant Nevada Tax Commission admits that it
2 is a governmental entity created by the laws of the State of Nevada and that it is the
3 head of the Department of Taxation which administers and enforces the statutory
4 provisions of Chapter 368A of the Nevada Revised Statutes with regard to non-gaming
5 licensed taxpayers and that it is statutorily authorized to consider and rule upon
6 appeals of refund claims. Defendant Nevada Tax Commission also admits that it
7 rendered the decision which Plaintiffs challenge by way of this action and further
8 answers that it is without sufficient knowledge or information as to the remaining
9 allegations and therefore denies the same. Other Answering Defendants answer that
10 they are without sufficient knowledge or information upon which to form a belief as to
11 the truth or falsity of the allegations contained therein, and upon said basis, deny each
12 and every allegation contained therein.

13 8. Answering paragraph 15, Answering Defendant State Board of Examiners admits that
14 it is a governmental entity created under the laws of the State of Nevada, consisting of
15 the governor, the secretary of state, and the attorney general. Answering Defendant
16 Nevada State Board of Examiners further admits that pursuant to NRS 368A.250, it is
17 authorized to approve refunds of amounts collected by the Nevada Department of
18 Taxation in excess of the amount legally due. State Board of Examiners further
19 answers that it is without sufficient knowledge or information as to any remaining
20 allegations and therefore denies the same. Other Answering Defendants answer that
21 they are without sufficient knowledge or information upon which to form a belief as to
22 the truth or falsity of the allegations contained therein, and upon said basis, deny each
23 and every allegation contained therein.

24 STATEMENT OF FACTS

25 9. Answering paragraph 16, Answering Defendants incorporate by reference each and
26 every paragraph above as if fully set forth herein.
27 10. Answering paragraph 17, Answering Defendants admit the allegations contained
28 therein.

- 1 11. Answering paragraph 18, Answering Defendants admit that at some time following the
2 enactment of Chapter 368A of the Nevada Revised Statutes administrative regulations,
3 otherwise known as Chapter 368A of the Nevada Administrative Code, were
4 promulgated regarding the administration and enforcement of Chapter 368A of the
5 Nevada Revised Statutes. Answering Defendants further answer that they are without
6 sufficient knowledge or information upon which to form a belief as to the truth or falsity
7 of any remaining allegations contained in paragraph 18 and, upon said basis, deny
8 each and every remaining allegation contained therein.
- 9 12. Answering paragraph 19, Answering Defendant Nevada Department of Taxation admits
10 that it collects the tax imposed by Chapter 368A from taxpayers who/which are not
11 licensed gaming establishments. Answering Defendant Nevada Department of
12 Taxation further admits that pursuant to NRS 368A.140 it shall adopt such regulations
13 as are necessary to carry out this function. Other Answering Defendants further
14 answer that they are without sufficient knowledge or information upon which to form a
15 belief as to the truth or falsity of the allegations contained therein, and upon said basis,
16 deny each and every allegation contained therein.
- 17 13. Answering paragraph 20, Answering Defendants are without sufficient knowledge or
18 information upon which to form a belief as to the truth or falsity of the allegations
19 contained therein and, upon said ground, deny each and every allegation contained
20 therein.
- 21 14. Answering paragraph 21, Answering Defendants admit that the statutory sections cited
22 therein, as they existed when enacted, speak for themselves.
- 23 15. Answering paragraph 22, Answering Defendants admit that Chapter 368A was
24 amended by Assembly Bill No. 554 which reduced the scope of the exception as
25 contained in NRS 368A.200(5)(d) from a maximum seating capacity limitation of 300 to
26 200. Answering Defendants further answer that they are without sufficient knowledge
27 or information upon which to form a belief as to the truth or falsity of the remaining
28

1 allegations contained therein and, upon said ground, deny each and every remaining
2 allegation contained therein.

3 16. Answering paragraph 23, 24, 25, 26, 27, 28, and 29, Answering Defendants admit that
4 the Plaintiffs mentioned therein are subject to Chapter 368A of the NRS and have been
5 and are required to pay the Live Entertainment Tax found in Chapter 368A of the NRS.
6 Answering Defendants further answer that they are without sufficient knowledge or
7 information upon which to form a belief as to the truth or falsity of the remaining
8 allegations contained therein, and upon said basis, deny each and every other
9 allegation contained therein.

10 17. Answering paragraph 30, Answering Defendants admit that live entertainment occurs at
11 Plaintiffs' business premises. Answering Defendants further answer they are without
12 sufficient knowledge or information upon which to form a belief as to the truth or falsity
13 of any remaining allegations contained therein and, upon said ground, deny each and
14 every other allegation contained therein.

15 18. Answering paragraph 31, Answering Defendants answer that they are without sufficient
16 knowledge or information upon which to form a belief as to the truth or falsity of the
17 allegations contained therein and, upon said ground, deny each and every other
18 allegation contained therein.

19 19. Answering paragraph 32, Answering Defendants admit the allegations contained
20 therein.

21 20. Answering paragraph 33, Answering Defendants are without sufficient knowledge or
22 information upon which to form a belief as to the truth or falsity of the allegations
23 contained therein and, upon said ground, deny each and every allegation contained
24 therein.

25 21. Answering paragraph 34, Answering Defendants admit that Plaintiffs have filed
26 requests for refunds. Answering Defendants further answer that they are without
27 sufficient knowledge or information upon which to form a belief as to the truth or falsity
28

1 of any remaining allegations contained therein and, upon said ground, deny each and
2 every other allegation contained therein.

3 22. Answering paragraph 35, Answering Defendant Nevada Department of Taxation admits
4 that it has denied the requests for refund. Answering Defendants further answer that
5 they are without sufficient knowledge or information upon which to form a belief as to
6 the truth or falsity of any remaining allegations contained therein and, upon said
7 ground, deny each and every remaining allegation contained therein.

8 23. Answering paragraph 36, Answering Defendants admit that a hearing was scheduled
9 before Defendant Nevada Tax Commission at which would be heard the appeals of
10 denials of requests for refunds of the Live Entertainment Tax for tax periods January,
11 February, March and April, 2004. Answering Defendants further answer that they are
12 without sufficient knowledge or information upon which to form a belief as to the truth or
13 falsity of the remaining allegations contained therein, and upon said basis, deny each
14 and every other allegation contained therein.

15 24. Answering paragraph 37, Answering Defendants admit that the hearing was continued.
16 Answering Defendants further answer that they are without sufficient knowledge or
17 information upon which to form a belief as to the truth or falsity of the remaining
18 allegations contained therein, and upon said basis, deny each and every other
19 allegation contained therein.

20 25. Answering paragraph 38, Answering Defendants admit that the Nevada Tax
21 Commission, after considering the argument and materials submitted, issued a written
22 decision, dated October 12, 2007, denying Plaintiffs' appeals. Answering Defendants
23 deny that any witness testimony was offered at the hearing before the Nevada Tax
24 Commission.

25 26. Answering paragraph 39, Answering Defendants admit that any statutory sections cited
26 therein speak for themselves. Answering Defendants further answer that they are
27 without sufficient knowledge or information upon which to form a belief as to the truth or
28

1 falsity of the remaining allegations contained therein, and upon said basis, deny each
2 and every other allegation contained therein.

3 27. In answering paragraph 40, Answering Defendants admit that any statutory sections
4 cited therein speak for themselves.

5 28. In answering paragraph 41, Answering Defendants are without sufficient knowledge or
6 information upon which to form a belief as to the truth or falsity of the allegations
7 contained therein and, upon said ground, deny each and every allegation contained
8 therein.

9 **EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE**

10 29. In Answering paragraph 42, Answering Defendants incorporate by reference each and
11 every paragraph above as if fully set forth herein.

12 30. Answering paragraph 43, Answering Defendants admit that the excerpts from the
13 statute appear to be the same language found in the statutes cited therein and that the
14 statutory sections cited therein speak for themselves.

15 31. Answering paragraphs 44, 45 and 46, Answering Defendants admit that the statutory
16 sections cited therein speak for themselves.

17 32. Answering paragraph 47, Answering Defendants admit that pursuant to NRS
18 368A.140(2)(a) the Nevada Department of Taxation is statutorily required to collect the
19 Live Entertainment Tax from non-gaming licensed taxpayers and pursuant to NRS
20 368A.140(2)(b) is empowered to adopt such regulations as are necessary to carry out
21 the provisions of paragraph (a).

22 33. Answering paragraph 48, Answering Defendants admit that the statutory sections cited
23 therein speak for themselves.

24 34. Answering paragraph 49, Answering Defendants admit that pursuant to NRS
25 368A.200(5) the tax imposed by Chapter 368A is not applicable to a variety of
26 circumstances and further admit that any statutory sections cited therein speak for
27 themselves.
28

1 35. Answering paragraphs 50 and 51, Answering Defendants admit that the statutory
2 sections cited therein speak for themselves.

3 **COUNT I - DECLARATORY RELIEF**

4 36. Answering paragraph 52, Answering Defendants incorporate by reference each and
5 every paragraph above as if fully set forth herein.

6 37. Answering paragraph 53, Answering Defendants deny each and every allegation
7 contained therein.

8 38. Answering paragraph 54, Answering Defendants deny each and every allegation
9 contained therein.

10 39. Answering paragraph 55, Answering Defendants are without sufficient knowledge or
11 information upon which to form a belief as to the truth or falsity of the allegations
12 contained therein and, upon said ground, deny each and every allegation contained
13 therein.

14 40. Answering paragraph 56, Answering Defendants deny each and every allegation
15 contained therein.

16 41. Answering paragraph 57, Answering Defendants deny each and every allegation
17 contained therein.

18 **COUNT II - REQUEST FOR REFUND**

19 42. Answering paragraph 58, Answering Defendants incorporate by reference each and
20 every paragraph above as if fully set forth herein.

21 43. Answering paragraph 59, Answering Defendants deny each and every allegation
22 contained therein.

23 44. Answering paragraph 60, Answering Defendants deny each and every allegation
24 contained therein.

25 45. Answering paragraph 61, Answering Defendants admit that the statutory sections cited
26 therein speak for themselves and deny each and every remaining allegation contained
27 therein.
28

COUNT III - INJUNCTIVE RELIEF

46. Answering paragraph 62, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.
47. Answering paragraph 63, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.
48. Answering paragraph 64, Answering Defendants admit only that they intend to enforce and carry out the provisions of Chapter 368A. Answering Defendants deny each and every remaining allegation contained therein.
49. Answering paragraph 65, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.
50. Answering paragraph 66, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.
2. Answering Defendants claim all immunities, defenses, exemptions, and limitations on liability pursuant to the provisions of Chapter 41 of the Nevada Revised Statutes.
3. Answering Defendants are entitled to qualified immunity as a matter of law.
4. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of monetary damages is available under that statute.
5. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of injunctive relief is available under that statute.

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

- 1 6. Pursuant to Chapter 368A of the Nevada Revised Statutes, Plaintiffs are not entitled to
- 2 an injunction, writ of mandate, or any other legal or equitable process to prevent or
- 3 enjoin the collection of the tax, penalty or interest imposed by Chapter 368A.
- 4 7. The Nevada Department of Taxation properly assessed tax as authorized and required
- 5 by, and in accordance with, Chapter 368A of the Nevada Revised Statutes and the
- 6 applicable Nevada Administrative Code provisions.
- 7 8. Answering Defendants are entitled to sovereign immunity.
- 8 9. This action is barred by Nevada Revised Statutes 41.031 and 41.0337, due to Plaintiffs'
- 9 failure to name the State of Nevada as a defendant.
- 10 10. Answering Defendants allege that at the time of filing of this Answer, all possible
- 11 affirmative defenses may have not been alleged pending the development of sufficient
- 12 facts after reasonable inquiry; therefore, Answering Defendants reserve the right to
- 13 amend this Answer to allege additional affirmative defenses if warranted by subsequent
- 14 investigation.


15 **WHEREFORE**, Defendants pray that this Court enter judgment in their favor and that
16 Plaintiffs take nothing by way of their Complaint.

17
18 Respectfully submitted:

19 Dated: March 3, 2008

CATHERINE CORTEZ MASTO
Attorney General

20
21 By:

22 
23 David J. Pope
24 Sr. Deputy Attorney General
25 Nevada State Bar #8617
26 Suzanne M. Warren
27 Deputy Attorney General
28 Nevada State Bar #9002
555 E. Washington Ave., #3900
Las Vegas, NV 89101

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on March 4, 2008, I deposited in the U.S. mail, postage prepaid, via First Class Mail, a true and correct copy of the foregoing Answer, addressed as follows:

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite 2
Lansing, MI 48906-2110

DATED this 4th day of March, 2008

By:


An employee of the State of Nevada,
Office of the Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

Logout Search Menu New District Civil Search Back

Location : District Court Civil Help

REGISTER OF ACTIONS

CASE No. 08A554970

K-Kel Inc vs Nevada Dept Of Taxation, Olympus Garden Inc, et al §

Case Type: Other Civil Filing

Subtype: Other Civil Matters

Date Filed: 01/09/2008

Location: Department 9

Conversion Case Number: A554970

PARTY INFORMATION

Conversion ENo Convert Value @ 08A554970
 Removed: 04/24/2009
 Converted From Blackstone

Lead Attorneys

Defendant D I Food And Beverage Of Las Vegas
 LLC

Defendant D Westwood Inc

Defendant Nevada Dept Of Taxation

Pope, David J.

Retained

Defendant Nevada State Board Of Examiners

Pope, David J.

Retained

Defendant Nevada Tax Commission

Pope, David J.

Retained

Defendant Olympus Garden Inc

Defendant Power Co Inc

Defendant SHAC LLC

Doing BusineCrazy Horse Too Gentlemen's Club

Doing BusineOlympic Garden

Doing BusineSapphire

Doing BusineScores

Doing BusineSpearmint Rhino Gentlemen's Club

Doing BusineTreasures

Plaintiff K-Kel Inc

Brown, William H.

Retained

EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

01/09/2008 **Complaint**
COMPLAINT FILED Fee \$298.00
08A5549700001.tif pages

01/09/2008 **Initial Appearance Fee Disclosure**
INITIAL APPEARANCE FEE DISCLOSURE
08A5549700002.tif pages

01/29/2008 **Summons**
SUMMONS -NEVADA DEPARTMENT OF TAXATION
08A5549700003.tif pages

01/29/2008 **Summons**
SUMMONS -NEVADA STATE BOARD OF EXAMINERS
08A5549700004.tif pages

01/29/2008 **Summons**
SUMMONS -NEVADA TAX COMMISSION
08A5549700005.tif pages

01/29/2008 **Summons**
SUMMONS - NV DEPT OF TAXATION
08A5549700006.tif pages

03/03/2008 **Answer**
ANSWER
08A5549700007.tif pages

03/03/2008 **Answer**
ANSWER
08A5549700008.tif pages

03/03/2008 **Answer**
ANSWER
08A5549700009.tif pages

03/13/2008 **Motion**
PLTFS' MTN TO ASSOCIATE COUNSEL BRADLEY J SHAFER/1
08A5549700010.tif pages

04/11/2008 **Affidavit**
AMENDED AFFIDAVIT OF SERVICE FOR THE NEVADA TAX COMMISSION
08A5549700011.tif pages

04/11/2008 **Affidavit**
AMENDED AFFIDAVIT OF SERVICE FOR THE NEVADA DEPARTMENT OF TAXATION
08A5549700012.tif pages

04/11/2008 **Affidavit of Service**
AFFIDAVIT OF SERVICE - NEVADA DEPT OF TAXATION
08A5549700013.tif pages

04/11/2008 **Affidavit**
AFFIDAVIT AMENDED AFFIDAVIT OF SERVICE FOR THE NEVADA BOARD OF EXAMINERS
08A5549700014.tif pages

04/17/2008 **Motion to Associate Counsel (3:00 AM)** (Judicial Officer Togliatti, Jennifer)
PLTFS' MTN TO ASSOCIATE COUNSEL BRADLEY J SHAFER/1 Court Clerk: Alan Castle Heard By: Jennifer Togliatti
Minutes
Result: Motion Granted

04/23/2008 **Order**
ORDER ADMITTING TO PRATICE
08A5549700015.tif pages

04/29/2008 **Notice of Entry of Order**
NOTICE OF ENTRY OF ORDER
08A5549700016.tif pages

05/09/2008 **Commissioner's Decision On Request For Exemption**
COMMISSIONERS DECISION ON REQUEST FOR EXEMPTION
08A5549700017.tif pages

10/20/2008 **Joint Case Conference Report**
JOINT CASE CONFERENCE REPORT
08A5549700018.tif pages

12/02/2008 **Discovery Scheduling Order**
DISCOVERY/SCHEDULING ORDER
08A5549700021.tif pages

12/10/2008 **Motion**
SULLIVAN'S MTN TO WITHDRAW AS COUNSEL /2
08A5549700019.tif pages

12/11/2008 **Motion to Withdraw as Counsel (3:00 AM)** (Judicial Officer Togliatti, Jennifer)
SULLIVAN'S MTN TO WITHDRAW AS COUNSEL /2 Court Clerk: Alan Paul Castle Reporter/Recorder: Yvette Lester Heard
By: James Brennan
Result: Continuance Granted

12/16/2008 **Conversion Case Event Type**

STATUS CHECK: APPEARANCE OF LOCAL COUNSEL
 08A5549700020.tif pages
 12/16/2008 **Motion to Withdraw as Counsel** (9:00 AM) (Judicial Officer User, Conversion)
 SULLIVAN'S MTN TO WITHDRAW AS COUNSEL /2 Court Clerk: Alan Paul Castle Reporter/Recorder: Yvette Lester Heard
 By: James Brennan
Parties Present
Minutes
 Result: Motion Granted
 12/19/2008 **Order Granting**
 ORDER GRANTING MOTION TO WITHDRAW AS LOCAL COUNSEL OF RECORD FOR PLAINTIFFS
 08A5549700023.tif pages
 12/22/2008 **Notice of Entry of Order**
 NOTICE OF ENTRY OF ORDER
 08A5549700022.tif pages
 02/03/2009 **Notice**
 NOTICE OF APPEARANCE
 08A5549700024.tif pages
 02/03/2009 **Status Check** (9:00 AM) (Judicial Officer Togliatti, Jennifer)
 STATUS CHECK: APPEARANCE OF LOCAL COUNSEL Court Clerk: Alan Paul Castle Reporter/Recorder: Yvette Lester
 Heard By: Jennifer Togliatti
Parties Present
Minutes
 Result: Motion Granted
 02/27/2009 **Designation of Witness**
 PLTFS INITIAL EXPERT DISCLOSURE
 08A5549700027.tif pages
 03/04/2009 **Order Setting Jury Trial**
 ORDER SETTING CIVIL JURY TRIAL
 08A5549700028.tif pages
 03/13/2009 **Errata**
 ERRATA REGARDING MTN FOR LEAVE TO AMEND COMPLAINT
 08A5549700031.tif pages
 03/17/2009 **Order Setting Civil Non-Jury Trial**
 AMENDED ORDER SETTING CIVIL NON-JURY TRIAL
 08A5549700033.tif pages
 03/25/2009 **Motion**
 PLTFS' MOTION TO AMEND COMPLAINT /8
 08A5549700032.tif pages
 04/02/2009 **Receipt of Copy**
 RECEIPT OF COPY
 08A5549700034.tif pages
 04/02/2009 **Motion to Amend Complaint** (3:00 AM) (Judicial Officer Togliatti, Jennifer)
 PLTFS' MOTION TO AMEND COMPLAINT /8 Heard By: Jennifer Togliatti
Minutes
 Result: Motion Granted
 05/11/2009 **Order Granting**
 Order Granting Plaintiffs Motion for Leave to Amend Complaint
 05/15/2009 **Notice of Entry of Order**
 Notice of Entry of Order Granting Plaintiffs Motion for Leave to Amend Complaint
 06/01/2009 **Notice to Appear for Discovery Conference**
 06/17/2009 **Discovery Conference** (9:00 AM) (Judicial Officer Bulla, Bonnie)
Parties Present
Minutes
 Result: Matter Heard
 07/20/2009 **Amended Scheduling Order**
 07/23/2009 **CANCELED Calendar Call** (9:15 AM) (Judicial Officer Togliatti, Jennifer)
 Vacated
 07/23/2009 **CANCELED Calendar Call** (9:15 AM) (Judicial Officer Togliatti, Jennifer)
 Vacated Per Commissioner
 ASO will issue
 07/23/2009 Reset by Court to 07/23/2009
 08/03/2009 **CANCELED Jury Trial** (10:30 AM) (Judicial Officer Togliatti, Jennifer)
 Vacated
 08/03/2009 **CANCELED Bench Trial** (10:30 AM) (Judicial Officer Togliatti, Jennifer)
 Vacated Per Commissioner
 ASO will issue
 08/04/2009 **Order Setting Civil Non-Jury Trial**
 Amended Order Setting Civil Non-Jury Civil Trial
 09/28/2009 **Stipulation and Order**
 Stipulation and Order For Extension of Time to Complete Discovery and To Continue Trial (Second Request)
 12/01/2009 **Order Setting Civil Non-Jury Trial**

12/17/2009 *Second Amended Order Setting Civil Non-Jury Trial*
 CANCELED Calendar Call (9:15 AM) (Judicial Officer Togliatti, Jennifer)
 Vacated - per Order
 01/04/2010 CANCELED Bench Trial (10:30 AM) (Judicial Officer Togliatti, Jennifer)
 Vacated - per Order
 Stipulation and Order For Extension of Time to Complete Discovery and To Continue Trial
 05/13/2010 Calendar Call (9:15 AM) (Judicial Officer Togliatti, Jennifer)
 05/24/2010 Bench Trial (10:30 AM) (Judicial Officer Togliatti, Jennifer)

FINANCIAL INFORMATION

	Conversion Extended Connection Type No Convert Value @ 08A554970		
	Total Financial Assessment		585.00
	Total Payments and Credits		585.00
	Balance Due as of 01/07/2010		0.00
01/09/2008	Transaction		298.00
	Assessment		
01/09/2008	Conversion Payment	Receipt # 01403485	(298.00)
11/18/2009	Transaction		287.00
	Assessment		
11/18/2009	Payment (Window)	Receipt # 2009-69793-FAM	(287.00)
		JUNES LEGAL SERVICE	

1750
John S. Bartlett, #143
777 E. William St., Suite 201
Carson City, NV 89701
(775) 841-6444
(775) 841-2172 [fax]

Attorney for Plaintiff

FILED

JAN 19 2007

RONALD A. LONGTIN, JR., CLERK

By: K. Rogers
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR WASHOE COUNTY

JOHN LOHSE, DDS and BRENT
CORBRIDGE, DMD,

Plaintiffs,

vs.

STATE OF NEVADA ex rel. NEVADA
DEPARTMENT OF TAXATION,

Defendant.

Case No.: CV 05-00376

Dept. 8

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

This matter came on for bench trial on December 14, 2006. John S. Bartlett, Esq. appeared as counsel on behalf of the plaintiffs John Lohse DDS and Brent Corbridge DMD. Appearing as counsel on behalf of defendant State of Nevada was Dianna Hegeduis, Sr. Deputy Attorney General and David Pope, Sr. Deputy Attorney General.

Plaintiffs have brought this action to recover a refund of sales tax they paid to the Nevada Department of Taxation on the purchase of various items of tangible personal property plaintiffs apply to the teeth of their patients in the course of their professional practice of dentistry, specializing in orthodontics. The plaintiffs contend their retail purchase of the items detailed in their refund claim, consisting of bands, wires, brackets, pins, springs and similar items commonly referred to collectively as orthodontic braces, bonding materials, impression materials used to create models of a patient's mouth, the substances used to secure the brackets to the teeth, retainers and materials used to make retainers, and headgear worn in conjunction with orthodontic braces, are exempt from sales tax under the provisions of NRS 372.283(1)(d) and

1 NRS 374.287(1)(d) as medicines "sold to a licensed ...dentist... for the treatment of a human
2 being." As statutory support for their position, plaintiffs cite the language in NRS
3 372.283(2)(b)(4) that excludes from the definition of medicine "braces or supports other than
4 those prescribed or applied by a licensed provider of health care, within the scope of his practice,
5 for human use" as providing the authority for the definition of medicine to include "braces or
6 supports" that are prescribed or applied by a licensed provider of health care, within the scope of
7 his practice, for human use. Plaintiffs assert the orthodontic braces, retainers, and headgear are
8 encompassed within the terms "braces or supports," and they all fall within the statutory
9 definition of "medicine" set forth in NRS 372.283(2) and NRS 374.287(2) because these items
10 clearly are applied or connected to the teeth of their patients in the diagnosis, cure, mitigation,
11 treatment or prevention of disease or affliction of their patients' teeth, mouth, jaw and gums, and
12 are commonly recognized as such.

13 Defendant State of Nevada Department of Taxation counters that these items do not fall
14 within the statutory definition of a "medicine" because they are not applied "to the human body
15 in the diagnosis, cure, mitigation, treatment or prevention of disease or affliction of the human
16 body." Defendant further argues that the language in NRS 372.283(2)(b)(4) was not intended by
17 the Legislature to apply to orthodontic braces.

18 The Court having heard and considered the testimony of the two witnesses who testified,
19 Dr. Lohse for plaintiffs, and Dino DiCianno, Executive Director of the Nevada Department of
20 Taxation for the State, having reviewed and considered the Stipulations of the parties and the
21 Exhibits admitted into evidence, and believing itself to be fully informed on the applicable
22 language of the statutes at issue, makes the following findings of fact, and conclusions of law.

23 FINDINGS OF FACT

24 1. Plaintiffs John Lohse and Brent Corbridge are Nevada licensed dentists, specializing
25 in orthodontic dentistry, and operate their professional dental practice in Washoe County.

26 2. On July 25, 2003 plaintiffs, through their counsel, filed a claim with the Nevada
27 Department of Taxation pursuant to NRS 372.630 et seq., seeking a refund of sales taxes in the
28 amount of \$12,176.44, plus interest. In their claim plaintiffs asserted that their purchases of

1 bands, wires, brackets, pins, springs and similar items commonly referred to collectively as
2 orthodontic braces, bonding materials, impression materials used to create models of a patient's
3 mouth, the substances used to secure the brackets to the teeth, retainers and materials used to
4 make retainers, and headgear worn in conjunction with orthodontic braces, are exempt from sales
5 tax under the provisions of NRS 372.283(1)(d) and NRS 374.287(1)(d) as medicines "sold to a
6 licensed ...dentist... for the treatment of a human being." The refund claim purported to cover
7 the period from June 1, 2000 through the date the refund claim was filed, however, a review of
8 the invoices submitted in support of the claim and the summaries thereof indicate the claim only
9 included purchases from various vendors made between October 25, 2001 through February 27,
10 2003.

11 3. On July 30, 2003 the Nevada Department of Taxation denied their claim without a
12 hearing. ~~Plaintiffs filed a timely appeal of this denial to the Nevada Tax Commission.~~ On
13 December 1, 2004 the Nevada Tax Commission issued its written ruling denying the refund
14 claim. Plaintiffs timely filed this action on February 17, 2005 after fully exhausting their
15 administrative remedies.

16 4. Based on the testimony of Dr. Lohse, Exhibits H-1 through H-7 introduced into
17 evidence at the trial, and on documentation provided by plaintiffs from the American Association
18 of Orthodontics, the Court finds that the practice of orthodontic dentistry is concerned with the
19 diagnosis, prevention and treatment of dental and facial irregularities. The application of
20 orthodontic braces (the common terminology for the brackets, wires, pins, screws and other
21 materials that make up orthodontic braces) and facemasks used in conjunction with orthodontic
22 braces, to the human body offers the therapeutic benefits of correcting such afflictions as
23 crowded teeth, overjet or protruding upper teeth, a deep overbite, an open bite, excessive spacing
24 due to previous tooth loss, crossbite, and underbite (all referred to as "malocclusions" in the
25 technical jargon of the dentist). These conditions not only adversely affect a person's
26 appearance, but left uncorrected these conditions can also cause tooth loss, excessive tooth wear
27 or grinding, inefficient chewing, periodontal disease due to greater difficulty in cleaning teeth,
28 and misalignment of the jaw leading to chronic headaches and joint problems. Orthodontic

1 braces are also used in conjunction with other medical procedures to correct severe dentofacial
2 problems, cleft lip and palate, and other problems. While improvement of the physical
3 appearance of a patient's mouth or face is an important benefit from orthodontic treatment, the
4 Court rejects the notion that orthodontic braces are utilized solely for cosmetic reasons.

5 5. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, the
6 Court finds that retainers supplied by plaintiffs to their patients are worn by the patient for
7 purposes of maintaining the teeth in their proper alignment after correction through the use of
8 orthodontic braces, and so prevent the recurrence of malocclusions of the teeth.

9 6. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, the
10 Court finds that the materials purchased and applied to the teeth of their patients by the plaintiffs
11 in making impressions of the teeth are used for the purpose of diagnosing the specific problem to
12 ~~be corrected and to devise a plan to correct the particular malocclusion affecting the patient.~~

13 7. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, this
14 Court finds that certain of the materials purchased by the plaintiffs constitute a crown that is
15 placed to cover the tooth. See Exhibit G, Tab A, invoice no. 5153 for example.

16 8. On the basis of Dr. Lohse's testimony and the exhibits admitted into evidence, this
17 Court finds that sponges, cotton rolls and sani cloths purchased from Henry Schein are in the
18 category of a pad, compress or dressing.

19 9. Plaintiffs paid a total of \$12,176.44 in sales tax to its Nevada licensed vendors that
20 was then remitted to the Nevada Department of Taxation, on its purchase of the tangible personal
21 property documented in the invoices and summaries admitted into evidence in Joint Exhibit G
22 that make up the plaintiffs' refund claim.

23 CONCLUSIONS OF LAW

24 ~~X~~ 1. Plaintiffs fully exhausted all administrative remedies prior to bringing this action
25 under NRS 372.680.

26 ~~X~~ 2. An action brought pursuant to NRS 372.680 is an original proceeding, not an appeal
27 from a final decision by an administrative agency. *State of Nevada v. Obexer & Sons, Inc.*, 99
28 Nev. 233, 237, 660 P.2d 981, 984 (1983). This Court is not limited to a review of the record

1 before the administrative agency, the Court is free to take new evidence on issues of fact, and
2 owes no deference to findings by the administrative agency on issues of fact or on issues of law.

3 3. The Court finds that the language of NRS 372.283 is not so ambiguous within the
4 factual context of this case that resort to the legislative history of AB 373 (1995), the legislative
5 bill that amended NRS 372.283 to its current form, is necessary to resolve the issues of law in
6 this case. However, even if we examine the legislative history of this bill, there is nothing in the
7 history provided to this Court that provides any guidance on what types of "braces or supports"
8 provided by a licensed provider of health care within the scope of his practice for human use
9 were or were not intended to be exempt as medicine from sales or use tax.

10 4. The Court construes the language in NRS 372.283(2)(b)(4) and NRS 374.287(2)(b)(4)
11 to exclude from the definition of "medicine" only those "braces or supports" that are not
12 prescribed or applied by a licensed provider of health care within the scope of his practice for
13 human use. On the other hand, tangible personal property in the form or nature of a brace or
14 support prescribed or applied by a licensed dentist within the scope of his practice for human use
15 is a substance or preparation constituting a medicine if the brace or support is applied internally
16 or externally to the body of the patient in the diagnosis, cure, mitigation, treatment or prevention
17 of disease or affliction of the human body and which is commonly recognized as intended for
18 such use.

19 5. The bands, brackets, wires, pins, screws and other items purchased by plaintiffs,
20 which together constitute what is commonly known as an orthodontic brace, retainers and other
21 materials used to manufacture retainers, facemasks used in conjunction with orthodontic braces,
22 materials used to create impressions of a patient's mouth for purposes of diagnosis and treatment
23 of the patient, and those materials identified as falling in the category of a pad, compress or
24 dressing all fall within the statutory definition of a "medicine" as that term is defined in NRS
25 372.283(2) and NRS 374.287(2) because all of these items are applied to patients in the
26 diagnosis, cure, mitigation, treatment or prevention of disease or affliction of the human body
27 and are commonly recognized as intended for that use. Consequently, the plaintiffs' retail
28

1 purchases of these items are exempt from sales or use tax under NRS 372.283(1)(d) and NRS
2 374.287(1)(d).

3 6. Those items constituting a dental crown purchased by plaintiffs and applied to the
4 teeth of their patients also fall within the definition of a "prosthetic" as that term is defined in
5 Nev. Admin. Code 372.763(2), and so are exempt from sales or use tax under NRS 372.283(1)(a)
6 and NRS 374.287(1)(a).

7 7. Plaintiffs are entitled to a refund of the \$12,176.44 in sales taxes. According to NRS
8 372.695, plaintiffs are entitled to recover interest on the sales taxes to be refunded at the rate of
9 6% per annum from the date the taxes were paid by plaintiffs to a date not exceeding 30 days
10 prior to the refund warrant issued by the State.

11 JUDGMENT

12 ~~Judgment on the plaintiffs' action to recover a refund of \$12,176.44 in sales tax is~~
13 awarded to plaintiffs, together with interest thereon to be calculated in accordance with NRS
14 372.695, and costs of suit in the amount of \$448.80.

15 DATED this 18 day of January, 2007.

16
17 Steven R. Kosach
18 District Court Judge
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FILED

JUL 28 2008

HOWARD W. COMPTON, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 49001

CV05-00376
FILED

JUL 24 2008

TRACIE A. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

STATE OF NEVADA EX REL.
DEPARTMENT OF TAXATION,
Appellant,
vs.
JOHN LOHSE, D.D.S., AND BRENT
CORBRIDGE, DMD,
Respondents.

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in an action to recover a sales tax refund. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Nevada Department of Taxation (Tax Department) challenges the district court's finding that Nevada's sales and use tax exemption for "medicine" extends to orthodontic braces and related materials. Based on the plain language and meaning of Nevada's statutory "medicine" exemption, we agree with the district court's interpretation and therefore affirm its judgment in favor of respondent orthodontists. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Standard of review

~~Because this case requires us to interpret a statutory tax exemption, the proper standard of review is de novo.¹ In performing de~~

¹See State, Dep't Taxation v. McKesson Corp., 111 Nev. 810, 812, 896 P.2d 1145, 1146 (1995).

08-19109

novo review, however, we will not disturb the district court's purely factual findings if they are supported by substantial evidence.²

Additionally, because this appeal involves the interpretation of a tax exemption, we must strictly construe the applicable provisions in favor of finding taxability.³ Indeed, "any reasonable doubt about whether an exemption applies must be construed against the taxpayer."⁴ Nevertheless, "the court must always . . . avoid reading the exemption so narrowly [that] its application is defeated in cases rightly falling within its ambit."⁵

Discussion

Nevada's statutory sales and use tax exemption for "medicine" states in pertinent part that "[m]edicines . . . [s]old to a licensed . . . dentist . . . for the treatment of a human being" are exempt from Nevada sales and use tax liability.⁶ Under the exemption, "medicine" is defined as "any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment or prevention of disease or affliction of the human body and

²Herup v. First Boston Financial, 123 Nev. ___, ___, 162 P.3d 870, 872 (2007).

³Shetakis Dist. v. State, Dep't Taxation, 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992); Sierra Pac. Power v. Department Taxation, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980).

⁴Shetakis Dist., 108 Nev. at 907, 839 P.2d at 1319.

⁵Dawley, Inc. v. Indiana Dept. of State Revenue, 605 N.E.2d 1222, 1225 (Ind. Tax. 1992).

⁶NRS 372.283(1)(d)(4).

which is commonly recognized as a substance or preparation intended for such use.”⁷ In addition, the exemption specifically applies to “[b]races or supports” for human use that are “prescribed or applied by a licensed provider of health care, within his scope of practice.”⁸

As the Tax Department conceded at oral argument in this case, Nevada’s statutory “medicine” exemption is plain and unambiguous on its face. Thus, we may not go beyond that language in construing the exemption.⁹ Although a statute’s interpretation by the agency charged with its administration is persuasive and will be afforded “great deference” on appeal if it is within the statute’s plain language,¹⁰ the agency’s interpretation is not controlling—and this court has not hesitated to declare an agency’s interpretation invalid—where the interpretation exceeds the agency’s statutory authority, conflicts with existing statutory provisions, or is arbitrary and capricious.¹¹

Here, the parties dispute whether the medicine exemption’s plain language extends to orthodontic materials purchased by dentists. The specific materials at issue include “bands, wires, brackets, pins, springs and similar items commonly referred to collectively as orthodontic

⁷NRS 372.283(2)(a) (emphasis added).

⁸NRS 372.283(2)(b)(4).

⁹See Nevada Power Co. v. Public Serv. Comm’n, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986).

¹⁰State Tax Comm’n v. Nevada Cement Co., 117 Nev. 960, 968-69, 36 P.3d 418, 423 (2001); Nevada Power Co., 102 Nev. at 4, 711 P.2d at 869.

¹¹Meridian Gold v. State, Dep’t of Taxation, 119 Nev. 630, 81 P.3d 516 (2003).

braces, bonding materials, impression materials used to create models of a patient's mouth, the substances used to secure the brackets to the teeth, retainers and materials used to make retainers, and headgear worn in conjunction with orthodontic braces." While the Tax Department argues that these materials are not tax exempt because they are "just supplies and materials" and do not independently treat or prevent a "disease or affliction of the human body," the district court rejected this argument, following a bench trial. According to the district court, the orthodontic materials at issue plainly fall within the "medicine" exemption because they qualify as "braces or supports" that correct, treat, or prevent numerous afflictions, including misaligned or crowded teeth. For the reasons set forth below, we agree with the district court's reasoning.

In interpreting a statute's plain language, we will presume that the Legislature intended to use words in their usual and natural meaning.¹² Here, Nevada's "medicine" exemption states that prescribed "braces or supports" are tax exempt to the extent that they are commonly recognized as curing, mitigating, treating, or preventing diseases or afflictions of the human body.¹³ Although the exemption does not include language specifically defining the terms "braces or supports," we conclude that the orthodontic materials at issue in this case—including the materials used to make orthodontic braces, retainers, and headgear—fall within the plain meaning of those terms.

¹²McGrath v. State, Dep't of Pub. Safety, 123 Nev. ___, ___, 159 P.3d 239, 241 (2007).

¹³NRS 372.283.

The term "brace" is defined by Webster's New International Dictionary as "[t]hat which connects or fastens, as a clamp or buckle."¹⁴ More specifically, a "brace" is "[t]hat which holds anything tightly or supports it firmly, or gives rigidity or power of resistance; a bandage or prop."¹⁵ In this sense, a "brace" is a specific type of "support," which is defined as a device that "hold[s] [something else] up or in position . . . serve[s] as a foundation or prop . . . [or] bear[s] the weight or stress of [something else]."¹⁶

In our view, orthodontic braces (and their related treatment materials) clearly fall within the definition of "braces or supports" because they fasten and hold teeth tightly in an attempt to treat dental afflictions, such as misaligned or crowded teeth. Indeed, as recognized by one treatise on dental malpractice litigation, orthodontic dentistry "[t]reats all different modalities of movement of the teeth."¹⁷ In treating these "modalities of movement," the devices used by orthodontists (such as braces, retainers, and headgear) force teeth into proper alignment while "bracing" or "supporting" against future undesired teeth movement.¹⁸

¹⁴Webster's at 322 (2d. ed. 1961).

¹⁵Id.

¹⁶Id. at 2534 (defining the verb "to support").

¹⁷3 Norman L. Schafler, Dental Malpractice: Legal and Medical Handbook § 8.3 (3d. ed. 1996).

¹⁸See id.; see also 1 Schafler at § 1.28 (noting that orthodontics "has as its goal the proper alignment of the teeth in a physiological balance that allows the teeth to perform one of their most important functions, that of deflecting food away from the gums during chewing" and that
continued on next page . . .

Although the Tax Department suggests that the materials in question were taxable as mere "individual components" of braces, the district court specifically found that most of these materials—including wires, bands, brackets, pins, and springs—are collectively and commonly known as "orthodontic braces." Since this factual finding is supported by respondent John Lohse's trial testimony, we see no reason to disturb it on appeal. As a result, we affirm the district court's determination that all of the materials in question fall within the "medicine" exemption's reach.

Moreover, while the Tax Department asserts that orthodontic braces do not meet Nevada's applicable definition of "medicine" because such braces are cosmetic and do not necessarily cure, treat, or prevent a disease or affliction, the testimony at trial does not support that conclusion. Even though the Tax Department cites certain trial testimony in support of its argument, this testimony, when taken in its entirety, actually establishes that every orthodontic case has both cosmetic and medical elements:

[I]n every case we treat there's a cosmetic element to it. And that's certainly undeniable. Any case that we treat, even though it has a cosmetic effect, also has a medical benefit in that the bite is corrected. And, you know, we prevent in the long term wear on the teeth, breakdown of the gums and the bone, and also mitigate future TM-joint problems in a lot of cases.

... continued

"[w]hen the teeth are in proper alignment and also in proper occlusion, the patient more efficiently masticates (chews) food, and there are no excessive stresses on any individual tooth").

As a result, Lohse's testimony actually rebuts the Tax Department's claim that orthodontic braces are cosmetic (and not medical) in nature.¹⁹ Therefore, the district court properly treated the materials in question as "medicine."

Conclusion


For the reasons set forth above, we conclude that the district court properly determined that the orthodontic materials in question are

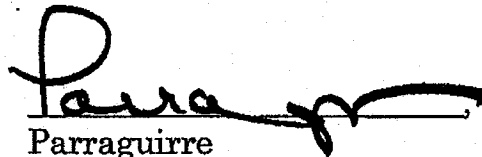
¹⁹Separately, the Tax Department points out that orthodontic braces are always "prescribed or applied by a licensed provider of health care," and thus, the qualifying language of the "medicine" exemption—which limits exempt "braces or supports" to those devices "prescribed or applied" by licensed health care providers—would be superfluous if the exemption applied to orthodontic braces. In making this argument, however, the Tax Department ignores the fact that the district court's interpretation of the exemption's "prescribed or applied" language still excludes numerous other devices—such as simple knee braces purchased at local drugstores, which would probably not be exempt.

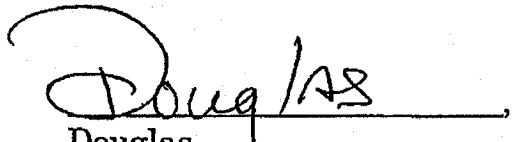
Similarly, the Tax Department suggests that a reference to "other supports and casts" in a different, unrelated subsection of the "medicine" exemption, limits the application of the "braces or supports" clause of the exemption. However, this argument fails because the "braces or supports" clause is part of the exemption's definition of "medicine," whereas the "other supports and casts" clause pertains to a separate exemption for prosthetic devices and ambulatory casts. See NRS 372.283(1)(a) (exempting "[p]rosthentic devices, orthotic appliances and ambulatory casts for human use, and other supports and casts if prescribed or applied by a licensed provider of health care, within his scope of practice, for human use") (emphasis added).

exempt under Nevada's statutory sales and use tax exemption for "medicine" beyond "any reasonable doubt."²⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Gibbons, C. J.


Parraguirre, J.


Douglas, J.

cc: Hon. Steven R. Kosach, District Judge
Lester H. Berkson, Settlement Judge
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
John S. Bartlett
Washoe District Court Clerk ✓

²⁰Shetakis Dist., 108 Nev. at 907, 839 P.2d at 1319.

STATE-CASE-TRL-CT, NV-TAXRPTR, ¶200-843, First Judicial District Court, Carson City, Department of Taxation v. Newmont Gold Company, Sales and use-- Administration and regulations-- Right of Department of Taxation to act independently of Tax Commission-- , (September 3, 1996)

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Department of Taxation v. Newmont Gold Company

, ¶200-843. First Judicial District Court, Carson City, , No. 96-00894A, , September 3, 1996.

Sales and use-- Administration and regulations-- Right of Department of Taxation to act independently of Tax Commission--

The Nevada Department of Taxation did not have standing as an aggrieved party to appeal the Nevada Tax Commission's reversal of a Department of Taxation hearing officer's decision. The Department of Taxation could not be aggrieved by a decision of the Tax Commission, because: (1) the Tax Commission is the head of the Department of Taxation, (2) the Tax Commission has the power to direct which proceedings, actions or prosecutions will be instituted, and (3) the Tax Commission has authority to review on appeal all Department of Taxation decisions. A case in which the Nevada Supreme Court allowed the Department of Motor Vehicles (DMV) to appeal its hearing officer's adverse decision was distinguishable because it did not involve a decision by the head of the DMV.

See ¶60-030, ¶61-640

ORDER

THIS MATTER comes before the Court upon the Motion to Dismiss filed by Defendant on July 3, 1996. This order is based upon a review of the Motion, the court file, and the law applicable to the issues raised in the Motion.

On June 30, 1995, the Plaintiff, Department of Taxation, issued a deficiency judgment upon Defendant, Newmont Gold Company, after an audit by Plaintiff of Defendant for the period of February 1, 1992 through December 31, 1994. The judgment was based upon Plaintiff's finding that sales tax totaling \$24,970,400.00 was due Plaintiff from Defendant's sale of a Refractory Ore Treatment Plant ("roaster") to Phillip Morris Capital Corporation for \$340,000,000.00.

On October 17, 1995, an appeal by Defendant of this deficiency judgment was heard by Administrative Hearing Officer Janice Wright in Carson City, Nevada. Ms. Wright rendered her decision upholding the deficiency judgment on February 1, 1996.

On May 2, 1996, the Tax Commission heard Defendant's appeal of the Hearing Officer's decision upholding the Department of Taxation's deficiency judgment. The Tax Commission voted unanimously to reverse the Decision and Order of the Hearing Officer finding that the leaseback transaction was not a bona fide sale subject to sales tax. Also, a majority of the Commission voted that even if the transaction was a sale leaseback, it was exempt under NRS 372.320 and 372.035(1).

Plaintiff filed its Petition for Judicial Review of the Tax Commission's decision on May 23, 1996. Defendant filed its Motion to Dismiss Plaintiff's Petition on July 3, 1996. Plaintiff argues in its Opposition to Defendant's Motion that while the Tax Commission is the statutory head of the Department of Taxation, its decisions favoring the taxpayer should be appealable by the Department. Plaintiff cites *State, Dep't of Motor Vehicles v. McGuire*, 827 P.2d 821

(Nev. 1992) in which the Nevada Supreme Court upheld that Department's appeal of its hearing officer's adverse decision. However, that case is distinguishable from the instant case in that the appeal was not of a decision by the head of that department as is the situation in the instant case.

Because the Tax Commission is not employed full time to administer this State's tax laws, and its members are not selected based upon their tax law expertise, Plaintiff argues that the Tax Commission's decisions should be appealable.

However, the Legislature has clearly established the Tax Commission's structure and authority as Head of the Department of Taxation. NRS 360.120(2). Further, the Legislature directed that the Tax Commission "... shall have the power to direct what proceedings, actions or prosecutions shall be instituted to support the law." NRS 360.260. Lastly, by statute, the Tax Commission has authority to review on appeal all decisions of officers of the Department of Taxation, and it "may reverse, affirm or modify them." NRS 360.245.

Therefore, because the Department of Taxation can not be aggrieved by a decision of its Head (Tax Commission), Defendant's Motion to dismiss Plaintiff's Petition for Judicial Review is granted. NRS 233B.130(1)(b).

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Plaintiff's Petition for Judicial Review is granted.

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AFFIDAVIT OF NORMAN J. AZEVEDO

1. I, Norman J. Azevedo, declare that I have personal knowledge of the matters set forth in this affidavit and can competently testify thereto if so called.
2. Exhibit 1 to the Department of Taxation's (the "Department") Motion to Dismiss is a copy of a memorandum to Bernie Anderson, Chairman of the Assembly Committee on Judiciary (the "Assembly Committee") dated May 7, 1999 entitled "Venue Sections of S.B. 362" that I authored in my capacity as Senior Deputy Attorney General (the "Venue Memorandum").
3. Exhibit 2 to the Department's Motion to Dismiss is a copy of minutes of the March 23, 1999 meeting of the Senate Committee on Taxation (the "Senate Committee"), at which I was present to answer questions regarding the venue provisions of S.B. 362 (the "Committee Minutes").
4. The Venue Memorandum and my remarks to the Senate Committee were provided in response to specific questions relating to the venue provisions in S.B. 362, *i.e.*, the amendments to existing tax refund statutes that expanded the jurisdictions in which tax refund actions could be brought. In preparing the Venue Memorandum and providing my remarks to the Senate Committee, I was not speaking on behalf of either Committee, any Member of the Legislature, the Department or the Nevada Tax Commission (the "Commission").
5. S.B. 362 did not change the remedy afforded to a taxpayer whose claim for refund of sales or use tax was denied by the Department (in the case of claims denied before the statute was amended) or the Commission (in the case of claims denied after the statute was amended). Prior to the passage of S.B. 362, NRS 372.680 provided that a taxpayer whose claim for sales or use tax refund had been denied by the *Department* may "bring an action against the department on the grounds set forth in the claim *in a court of competent jurisdiction in Carson City . . .*" After the passage of S.B. 362, NRS 372.680 provided, and continues to provide, that a taxpayer whose claim for sales or use tax refund has been denied by the *Commission* may "bring an action against the department

on the grounds set forth in the claim *in a court of competent jurisdiction in Carson City, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department . . .*” Both before and after the amendment, a taxpayer’s remedy was to “bring an action against the department.” Statutes authorizing refund actions for other taxes were similarly amended to expand the permissible venue from Carson City to Carson City, the county of residence or principal place of business of the claimant or a county in which relevant proceedings occurred.

6. As the Venue Memorandum explains, I thought these amendments were advisable because, in general, they conformed the permissible venues for tax refund actions to the venues in which petitions for judicial review must be filed under the Administrative Procedures Act (NRS 233B). For example, I began my discussion by noting that “[t]he Nevada Department of Taxation has been governed by this venue provision [NRS 233B.130(2)(b)] since its passage in 1965.” I concluded by recommending the amendments, because “[b]y having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers.” Thus, my point was simply that the *venue* provisions of existing statutes authorizing refund actions should be conformed to the existing *venue* provision in the APA.

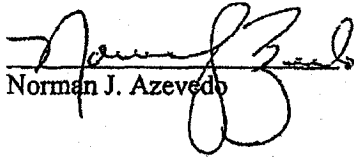
7. These amendments did not make refund actions in the district court *subject to* the APA. In both the Venue Memorandum and in my remarks to the Senate Committee, I made two statements about S.B. 362 that are cited by the Department that are not entirely complete with respect to sales and use tax claims for refund.

a. First, the Venue Memorandum states: “In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department [of] Taxation will proceed initially to an administrative hearing officer for an administrative trial.” However, S.B. 362 amended NRS 360.245(1) to require an appeal directly to the Commission first without the intermediate step of a hearing officer.

b. Second, the Venue Memorandum states that, following a final decision from the Commission, “the taxpayer may file a petition with a district court in a judicial review

proceeding." However, in the specific case of a claim for refund of sales and use tax that has been denied by the Commission, this statement would need to be modified to say: "the taxpayer must bring an action against the Department pursuant to NRS 372.680 to obtain a refund of sales and use tax previously paid."

Under penalties of perjury, I declare the foregoing to be true and correct. Executed this 8th day of May, 2009 in Carson City, Nevada.


Norman J. Azevedo

SB 362 - 1999

Introduced on Mar 10, 1999

By O'Connell,

Fiscal Note

Effect On Local Government: *No*

Effect on the State or on Industrial Insurance: *No*

Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Current Status: In Senate at Governor

Chapter 484 Sections 1 to 9 inclusive, 11 to 30, inclusive, 32 to 37, inclusive, 39 to 53.8, inclusive and section 54 of this act effective July 1, 1999. Section 10 of this act effective at 12:01 a.m. July 1, 1999. Sections 31 and 38 of this act effective July 1, 2000. Sections 26 and 27 of this act expire by limitation December 31, 2001.

Hearings

Senate Taxation Mar-23-1999 Amend, and do pass as amended

Assembly Taxation May-06-1999 No Action

Assembly Taxation May-11-1999 No Action

Assembly Taxation May-13-1999 Amend, and do pass as amended

Senate Taxation May-24-1999 Concur

Bill Text (PDF) As Introduced 1st Reprint Second Reprint As Enrolled

Bill Text (HTML) As Introduced 1st Reprint Second Reprint As Enrolled

Amendments (HTML) Amend. No.245Amend. No.945

10-Mar-99--Read first time. Referred to Committee on Taxation. To printer.

11-Mar-99--From printer. To committee.

✓16-Apr-99--From committee: Amend, and do pass as amended.

Placed on Second Reading File. Read second time. Amended.

(Amend. No. 245). To printer.

✓19-Apr-99--From printer. To engrossment. Engrossed. First reprint.✓

Read third time. Passed, as amended. Title approved, as amended.

(Yeas: 21, Nays: None). To Assembly.

20-Apr-99--In Assembly. Read first time. Referred to Committee on Taxation. To committee.

✓21-May-99--From committee: Amend, and do pass as amended.

Placed on Second Reading File. Read second time. Amended.

(Amend. No. 945). To printer. From printer. To re-engrossment. Read third time.

Passed, as amended. Title approved, as amended.

(Yeas: 40, Nays: None, Excused: 2). To Senate.

22-May-99--In Senate.

25-May-99--Assembly Amendment No. 945 concurred in. To enrollment.

26-May-99--Enrolled and delivered to Governor.

08-Jun-99--Approved by the Governor.

09-Jun-99--Chapter 484.



BILL SUMMARY
70th REGULAR SESSION
OF THE NEVADA STATE LEGISLATURE

PREPARED BY
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU
Nonpartisan Staff of the Nevada State Legislature

SENATE BILL 362
(Enrolled)

Senate Bill 362 makes various changes to the provisions governing the collection and payment of taxes. The measure requires Nevada's Department of Taxation to include in its notice to the taxpayer the date on which an audit conducted by the department will be completed. That date may only be extended by the department if written notice that includes an explanation of the reasons for the extension is given to the taxpayer. The measure provides that if the department determines, after an audit, that delinquent taxes are due, interest and penalties may not be imposed during the period of the extension.

In addition, S.B. 362 requires the department to give written notice to a taxpayer of a determination that the taxpayer is entitled to an exemption. The notice must be given within 30 days after the determination is made or, if the determination is made as a result of an audit, within 30 days after completion of the audit. The bill also clarifies the authority of the Nevada Tax Commission to review decisions of the department and certain procedures on appeal.

Senate Bill 362 also expands the Taxpayers' Bill of Rights to clarify that written notice is required if the department determines that a taxpayer is entitled to an exemption or has been taxed more than is required by law. Written instructions must also be provided that state how the taxpayer may petition for a reduction in, or the release of, a security required to be furnished under the state's laws governing revenue and taxation. The bill also states that taxpayers have the right to have statutes imposing taxes and any related regulations construed in favor of the taxpayer if the statutes or regulations are of doubtful validity. In addition, the department may waive penalties and any tax, penalty, and interest owed by a taxpayer who relies on advice from the department or the Attorney General.

Finally, S.B. 362 clarifies the method for calculating penalties and interest on overpayments and underpayments and authorizes persons to bring various actions relating to the payment of taxes in certain counties, in addition to Carson City.

LEGISLATIVE HEARINGS

MINUTES AND EXHIBITS

**MINUTES OF THE
SENATE COMMITTEE ON TAXATION**

**Seventieth Session
March 23, 1999**

The Senate Committee on Taxation was called to order by Chairman Mike McGinness, at 2:05 p.m., on Tuesday, March 23, 1999, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mike McGinness, Chairman
Senator Randolph J. Townsend
Senator Ann O'Connell
Senator Joseph M. Neal, Jr.
Senator Bob Coffin
Senator Michael Schneider

COMMITTEE MEMBERS ABSENT:

Senator Dean A. Rhoads, Vice Chairman (Excused)

GUEST LEGISLATORS PRESENT:

Senator Valerie Wiener, Clark County Senatorial District No. 3
Senator Lawrence E. Jacobsen, Western Nevada Senatorial District
Senator Maurice E. Washington, Washoe County Senatorial District No. 2
Assemblyman Lynn C. Hettrick, Douglas County, Carson City Assembly District
No. 39

STAFF MEMBERS PRESENT:

Kevin Welsh, Deputy Fiscal Analyst
Alice Nevin, Committee Secretary

OTHERS PRESENT:

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association, spoke in support of S.B. 362. She said the bill clarified some issues from the original taxpayer bill of rights and the amendments in S.B. 375 of the Sixty-ninth Session.

SENATE BILL 375 OF THE SIXTY-NINTH SESSION: Clarifies authority of Nevada tax commission and makes various other changes concerning taxation. (BDR 32-1050)

Ms. Vilardo said the bill sets up a very specific procedure for determining audit dates, hearings and appeals; claims procedures; a specific procedure on the issue of deficiency determinations or overages; what procedures will be used for refunds. She noted it clarifies two provisions from S.B. 375 of the Sixty-ninth Session. Ms. Vilardo referred to *Proposed Amendments to S.B. 362 (Exhibit I)*.

Senator O'Connell said the bill allows the filing of a court action in Clark County. She questioned why the two counties (Clark and Carson City) were specified, as opposed to allowing filing in other jurisdictions. Ms. Vilardo said originally all of the filings were in Carson City because the attorney general's office was located in Carson City. She noted the business tax was the first and only time there was a provision made that if a court action was to be filed it could be filed in Clark County, as well as Carson City. She said the attorney general's office would be the best one to answer why it could not be filed in other courts of competent jurisdiction in Nevada. Senator O'Connell said she would like to investigate that question. Ms. Vilardo explained the amendments to the bill and said she had worked with Mr. Pursell, from the Department of Taxation, and Norman J. Azevedo, Deputy Attorney General, Taxation Section, Office of the Attorney General, on the amendments. She said the biggest thing that could be accomplished for the taxpayer and the state was to have a clear, consistent set of rules.

Mr. Pursell referred to *Section by Section Outline of S.B. 362 (Exhibit J)*. He called attention to page 5, section 7, lines 30-35 of the bill, recommending rather than setting the thresholds in statute, let the Nevada Tax Commission regulate the amount of taxes, penalties and interest that could be considered for a waiver. He said a statement would need to be prepared, to keep on file at the department, with the specifics of the waiver.

Senator Neal asked for an explanation of the words "net deficiency" found on page 6, section 8, line 13 of the bill. Ms. Vilardo gave examples of how this could happen. Senator O'Connell clarified the language said there was a full year to try to balance the situation. Ms. Vilardo said there would be the reporting period and a need to balance out within the 3-year audit period. She concluded by asking for support of the bill.

Senator O'Connell asked why page 29, section 54, lines 20 and 21, specified the effective time of the act was July 1, 1999 at 12:01 a.m. Dino DiCianno, Deputy Executive Director, Department of Taxation said it had to do with the calculation of interest and penalties. Mr. Pursell stated this whole process would help him in his own budget because his revenue officers and auditors had performance indicators, and this would change the focus to education of the taxpayer and making sure the department was consistent when departing information on tax collection.

Senator Neal asked about the phrase "tax extensions." Ms. Vilardo referred to page 1, section 2, lines 10-13, saying the extension had to be caused by the department, not the taxpayer. She said if it was not the fault of the taxpayer, he would not be subject to interest and penalties. Senator Neal said under the doctrine of our law, if it is not stated, it is excluded. He clarified if the tax department audited a company and the needed records for the stated period of time could not be located, application had to be made for an extension. He continued, once an extension was requested, the company cannot be charged for the period of the extension. He noted the language is not clear on this issue. Ms. Vilardo said page 1, section 2, lines 10 - 13 says,

If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

After a short discussion, Ms. Vilardo said she would ask legal counsel to meet with Senator Neal to draft some additional wording in this section.

Senator O'Connell asked for clarification of the filing of a court action to any competent court-of-jurisdiction issue from the bill. She suggested removing the language referring to filing of a court action could be only in Carson City or

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Clark County. Mr. Azevedo said this particular provision was addressed in NRS chapter 232B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission. Chairman McGinness asked him to review this section and send an opinion back to the committee. Senator O'Connell asked for a draft of the amendment to be brought back to the committee. Chairman McGinness summarized the amendments proposed by Ms. Vilardo; Senator Neal's concern about the language on page 1, section 2, subsection 3; the clarifying statement on the competency of the court will be reviewed.

Stephanie Tyler, Lobbyist, Nevada Bell, also representing Sprint and AT&T, testified in support of the bill. She said the business community was pleased to see additional clarification. There were protections for the taxpayers and the entities that would be receiving revenues as a result of these actions. She noted the stability of those revenues was important, as was establishing a clear set of rules for the taxpayers with regard to their abilities, rights, and their processes of appeal.

Amy Halley Hill, Lobbyist, Las Vegas Chamber of Commerce, and Barrick Goldstrike Mines Inc., and Retail Association of America, said for the record she supported this legislation.

SENATOR COFFIN MOVED TO DO PASS A.B. 174.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RHOADS, SCHNEIDER AND TOWNSEND WERE ABSENT FOR THE VOTE.)

SENATOR O'CONNELL MOVED TO AMEND AND DO PASS S.B. 362.

SENATOR TOWNSEND SECONDED THE MOTION.

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THE MOTION CARRIED. (SENATORS RHOADS AND SCHNEIDER WERE
ABSENT FOR THE VOTE.)

Chairman McGinness adjourned the meeting at 5:10 p.m.

RESPECTFULLY SUBMITTED:

Alice Nevin,
Committee Secretary

APPROVED BY:

Senator Mike McGinness, Chairman

DATE: _____

PROPOSED AMENDMENTS TO SB362

- 2 -

1 Sec. 3. If an officer, employee or agent of the department
2 determines that a taxpayer is entitled to an exemption or has been taxed
3 or assessed more than is required by law, he shall give written notice of
4 that determination to the taxpayer. The notice must:

5 1. Be given within 30 days after the officer, employee or agent makes
6 his determination or, if the determination is made as a result of an audit,
7 within 30 days after the completion of the audit; and

8 2. If appropriate, include:

9 (a) An explanation that an overpayment may be credited against any
10 amount due from the taxpayer; or

11 (b) Instructions indicating the manner in which the taxpayer may
12 petition for a refund of any overpayment.

13 Sec. 4. NRS 360.245 is hereby amended to read as follows:

14 360.245 1. Except as otherwise provided in this Title:

15 (a) All decisions of the executive director or other officer of the
16 department made pursuant to ~~[subsection 2 of NRS 360.130]~~ this Title are
17 final unless appealed to the Nevada tax commission. ~~[as provided by law.]~~

18 (b) Any natural person, partnership, corporation, association or other
19 business or legal entity who is aggrieved by such a decision may ~~[so]~~
20 appeal the decision by filing a notice of appeal with the department within
21 30 days after service of the decision upon that person or business or legal
22 entity.

23 2. Service of the decision must be made personally or by certified mail.
24 If service is made by certified mail:

25 (a) The decision must be enclosed in an envelope which is addressed to
26 the taxpayer at his address as it appears in the records of the department.

27 (b) It is deemed to be complete at the time the appropriately addressed
28 envelope containing the decision is deposited with the United States Postal
29 Service.

30 3. The Nevada tax commission, as head of the department, may review
31 all ~~[other]~~ decisions made by the executive director ~~[and]~~ that are not
32 otherwise appealed to the commission pursuant to this section.

33 4. The Nevada tax commission may reverse, affirm or modify ~~[them]~~
34 ~~[any decision appealed to or reviewed by the commission pursuant]~~
35 ~~[to this section]~~ from the taxpayer or the department.

36 5. A decision of the Nevada tax commission is a final decision for the
37 purposes of judicial review. The executive director or any other employee
38 or representative of the department shall not seek judicial review of such a
39 decision.

40 ~~[5.]~~ 6. The Nevada tax commission shall provide by regulation for:

41 (a) Notice to be given to each county ~~[and other local government]~~
42 ~~[within the county]~~ of any decision upon an appeal to the commission that
43 the commission determines is likely to affect the revenue of the county or

the letter of determination to be sent,

.

← delete, conflicts with page 3, line 8.

EXHIBIT
0043

1 {12-} (l) To the release or reduction of a bond or other form of security
2 required to be furnished pursuant to the provisions of this Title by the
3 department in accordance with applicable statutes and regulations.

4 {13-} (m) To be free from investigation and surveillance by an officer,
5 agent or employee of the department for any purpose that is not directly
6 related to the administration of the provisions of this Title [-] that are
7 administered by the department.

8 {14-} (n) To be free from harassment and intimidation by an officer,
9 agent or employee of the department for any reason.

0 (o) To have statutes imposing taxes and any regulations adopted
1 pursuant thereto construed in favor of the taxpayer if those statutes or
2 regulations are of doubtful validity or effect, unless there is a specific
3 statutory provision that is applicable.

4 2. The provisions of this Title governing the administration and
5 collection of taxes by the department must not be construed in such a
6 manner as to interfere or conflict with the provisions of this section or any applicable regulations.

7 3. The provisions of this section apply to any tax administered and
8 collected pursuant to the provisions of this Title by the department or any applicable regulations.

9 Sec. 6. NRS 360.2935 is hereby amended to read as follows:

0 360.2935 A taxpayer is entitled to receive on any overpayment of taxes
1, after the offset required by NRS 360.320 has been made, a refund
2 together with interest at a rate determined pursuant to NRS 17.130. No
3 interest is allowed on a refund of any penalties or interest paid by a
4 taxpayer.

5 Sec. 7. NRS 360.294 is hereby amended to read as follows:

6 360.294 {Upon}

7 1. Except as otherwise provided in subsection 2, upon proof that a
8 taxpayer has relied to his detriment on written advice provided to him by an
9 officer, agent or employee of the department [-]

0 -[-] or on an opinion of the attorney general:

1 (a) ~~The executive director or his designee may waive taxes, penalties~~
2 ~~and interest owed by the taxpayer in an amount not to exceed \$5,000, and~~
3 ~~2-1 \$10,000; and~~

4 (b) ~~The Nevada tax commission may waive any such taxes, penalties~~
5 ~~and interest in an amount greater than \$5,000, \$10,000.~~

6 2. Upon proof that a taxpayer has in good faith collected or remitted
7 taxes imposed pursuant to the provisions of this Title that are
8 administered by the department, in reliance upon written advice provided
9 by an officer, agent or employee of the department, an opinion of the
10 attorney general or the Nevada tax commission, or the written results of
11 an audit of his records conducted by the department, the taxpayer may
12 not be required to pay delinquent taxes, penalties or interest if the

- (a) The Nevada Tax Commission shall set by regulation the amount of taxes, penalties and interest owed by the taxpayer which may be waived by the department and any criteria it determines to be necessary.
- (b) Whenever a waiver is granted pursuant to subsection (a) a statement must be prepared and placed on file at the department which contains:
- (i) the reason for the waiver
 - (ii) identifies the tax, interest and penalty due
 - (iii) the amount of tax, interest and penalty waived
 - (iv) the facts and circumstances which led to the waiver.



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department determines after the completion of a subsequent audit that the taxes he collected or remitted were deficient.

Sec. 8. NRS 360.320 is hereby amended to read as follows:
360.320 {In}

~~Except as otherwise provided in this Title, in making a determination of the amount required to be paid, the department may shall offset overpayments for a period or periods together with interest on the overpayments, a reporting period of an audit period against underpayments for another period or periods, against penalties, and against the interest on underpayments, the same reporting period. An overpayment of a tax may not be offset against an underpayment for any other tax required to be paid by the taxpayer.~~

~~2. If it is determined that there is a net deficiency:~~

~~(a) Any penalty imposed must be calculated based on the amount of the net deficiency.~~

~~(b) Any interest imposed on the net deficiency must be calculated from the date of the last overpayment or underpayment, whichever is later.~~

~~3. If it is determined that the taxpayer is entitled to a refund, any interest to which the taxpayer is entitled must be calculated from the date of the last overpayment or underpayment, whichever is later.~~

Sec. 9. NRS 360.395 is hereby amended to read as follows:

360.395 1. Before a person may seek judicial review pursuant to NRS 233B.130 from a final order of the [department] Nevada tax commission upon a petition for redetermination, he must:

(a) Pay the amount of the determination; or

(b) Enter into a written agreement with the department establishing a later date by which he must pay the amount of the determination.

2. If a court determines that the amount of the final order should be reduced or that the person does not owe any taxes, the department shall credit or refund any amount paid by the person that exceeds the amount owed ~~to~~, with interest determined in accordance with NRS 360.2935.

Sec. 10. NRS 360.417 is hereby amended to read as follows:

360.417 {Unless} Except as otherwise provided in NRS 360.320 and section 2 of this act and unless a different penalty or rate of interest is specifically provided by statute, any person who fails to pay any tax provided for in chapter 362, 364A, 365, 369, 370, 372, 373, 374, 377, 377A, 444A or 585 of NRS, or fee provided for in NRS 482.313 or 590.700 to 590.920, inclusive, to the state or a county within the time required, shall pay a penalty of not more than 10 percent of the amount of the tax or fee which is owed, as determined by the department, in addition to the tax or fee, plus interest at the rate of 1 percent per month, or fraction of a month, from the last day of the month following the period for which the amount or any portion of the amount should have been reported until



1. Except as otherwise provided in this title, in making a determination of the amount required to be paid, the department shall offset overpayments for a reporting period of an audit against underpayments for any other reporting period within the audit period.
2. If it is determined that there is a net deficiency, any penalty imposed must be calculated based on the amount of the net deficiency.
3. If a net underpayment or overpayment exists for any reporting period after the application of a prior reporting period's offset, including the prior period's interest owing or due, the additional interest will be determined for the net owed for that reporting period before the next reporting period's underpayment or overpayment is determined.
4. The provisions of subsections 1 through 3 do not apply if the taxpayer has submitted a report showing taxes due and has not remitted the taxes due in a timely manner.
5. For the purposes of this section a reporting period is a calendar month, calendar quarter, calendar year or any other reporting period.

the date of payment. *The amount of any penalty imposed must be based on a graduated schedule adopted by the ~~department~~ which takes into consideration the length of time the tax or fee remained unpaid.*

← commission

Sec. 11. NRS 360.4193 is hereby amended to read as follows:

360.4193 1. If a person is delinquent in the payment of any tax or fee administered by the department or has not paid the amount of a deficiency determination, the department may bring an action in a court of this state, a court of any other state or a court of the United States to collect the delinquent or deficient amount, penalties and interest. The action [must] :

Must

(a) ~~May not be brought if the decision that the payment is delinquent or that there is a deficiency determination is on appeal to the Nevada tax commission pursuant to NRS 360.245.~~

(b) Must be brought not later than 3 years after the payment became delinquent or the determination became final or within 5 years after the last recording of an abstract of judgment or of a certificate constituting a lien for tax owed.

2. The attorney general shall prosecute the action. The provisions of NRS and the Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure relating to service of summonses, pleadings, proofs, trials and appeals are applicable to the proceedings. In the action, a writ of attachment may issue. A bond or affidavit is not required before an attachment may be issued.

3. In the action, a certificate by the department showing the delinquency is prima facie evidence of:

- (a) The determination of the tax or fee or the amount of the tax or fee;
- (b) The delinquency of the amounts; and
- (c) The compliance by the department with all of the procedures required by law related to the computation and determination of the amounts.

Sec. 12. NRS 361.0687 is hereby amended to read as follows:

361.0687 1. A person who intends to locate or expand a business in this state may apply to the commission on economic development for a partial abatement from the taxes imposed by this chapter on the personal property of the new or expanded business.

2. The commission on economic development may approve an application for a partial abatement if the commission makes the following determinations:

(a) The goals of the business are consistent with the goals of the commission and the community concerning industrial development and diversification.

(b) The abatement is a significant factor in the decision of the applicant to locate or expand a business in this state or the appropriate affected local



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2. Failure to bring an action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

Sec. 34. NRS 372.685 is hereby amended to read as follows:

372.685 If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~before the mailing of notice by the department of its action on the claim,~~ consider the claim disallowed and file an appeal with the Nevada tax commission ~~within the 30 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 90 days after the decision is rendered,~~ bring an action against the department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

Sec. 35. NRS 372.705 is hereby amended to read as follows:

372.705 The department may recover any refund or part of it which is erroneously made and any credit or part of it which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City or Clark County unless the court with the consent of the attorney general orders a change of place of trial.

Sec. 37. NRS 372.750 is hereby amended to read as follows:

372.750 1. Except as otherwise provided in this section, it is a misdemeanor for any member of the tax commission or officer, agent or employee of the department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular of them, set forth or disclosed in any return, or to permit any return or copy of a return, or any book containing any abstract or particulars of it to be seen or examined by any person not connected with the department.

2. The tax commission may agree with any county fair and recreation board or the governing body of any county, city or town for the continuing exchange of information concerning taxpayers.

3. The governor may, by general or special order, authorize the examination of the records maintained by the department under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained may not be made public except to the extent and in the manner that the order may authorize that it be made public.

→ an administrative hearing officer. If the taxpayer is aggrieved by the decision of the administrative hearing officer, he may appeal the decision to the Nevada tax commission pursuant to NRS 360.24. If the taxpayer is aggrieved by the decision of the Nevada tax commission on appeal, he may within 45 days after the decision is rendered



(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~the mailing of the notice of the department's action~~ *a final decision* upon a claim filed pursuant to this chapter ~~it is rendered by the Nevada tax commission~~, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City or Clark County for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring an action within the time specified constitutes a waiver of any demand against the county on account of alleged overpayments.

Sec. 42. NRS 374.690 is hereby amended to read as follows:

374.690 If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~[- prior to the mailing of notice by the department of its action on the claim,]~~ consider the claim disallowed and ~~file an appeal with the Nevada tax commission within the 30 days after the last day of the 6 month period. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 90 days after the decision is rendered,~~ bring an action against the department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

Sec. 43. NRS 374.755 is hereby amended to read as follows:

374.755 1. Except as otherwise provided in this section, it is a misdemeanor for any member of the Nevada tax commission or ~~official~~ *officer, agent* or employee of the department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person not connected with the department.

2. The Nevada tax commission may agree with any county fair and recreation board or the governing body of any county, city or town for the continuing exchange of information concerning taxpayers.

3. The governor may, however, by general or special order, authorize ~~the~~ examination of the records maintained by the department under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained pursuant to the order of the governor

Replace with same language proposed
for page 21, lines 8-11.



2. The executive director shall set and maintain the rate of interest for late payments at the highest rate permissible pursuant to section 4 of article 10 of the Nevada constitution.

Sec. 53. NRS 375B.270 is hereby amended to read as follows:

375B.270 1. If any person who is liable for the tax fails to pay any portion of the tax imposed by NRS 375B.100 on or before the date the tax is due, he must, on motion of the department, be required by the district court having jurisdiction over the generation-skipping transfer to execute a bond to the State of Nevada in an amount equal to twice the amount of the tax due, with such sureties as the court may approve, conditioned upon the payment of the tax, plus interest on the tax at the rate of interest set by the executive director pursuant to NRS 375B.250 commencing on the date the tax became due, *unless otherwise provided in NRS 360.320 and section 2 of this act. The bond must be executed within a time certain to be fixed by the court and specified in the bond.*

2. The bond must be filed in the office of the clerk of the court, and a certified copy must be immediately transmitted to the department.

Sec. 54. 1. This section and sections 1 to 9, inclusive, and 11 to 53, inclusive, of this act become effective on July 1, 1999.

2. Section 10 of this act becomes effective at 12:01 a.m. on July 1, 1999.

3. Sections 31 and 38 become effective July 1, 2000

Add a section: The commission shall adopt regulations to carry out the provisions of sections 7 and 10 of this Act.



SECTION BY SECTION OUTLINE OF SB 362

Sections 2-11 Amend NRS 360 - General Provisions and Administration of Taxes

SECTION 2 - PAGE 1, LINES 3-13

Provides clarification regarding the notifications provided before and after an audit is conducted; and the granting of audit extensions.

SECTION 3 - PAGE 2, LINES 1-12

Provides procedures for notifying taxpayers of the audit determination, including how to request a refund if an overpayment has been made.

SECTION 4 - PAGE 2, LINE 13 THROUGH PAGE 3, LINE 23

Establishes that the taxpayer has the right to appeal before the tax commission in all cases, not just selected cases.

Clarifies a provision amended into SB 375 of the last session. The clarification provides that the department shall provide (when a decision of the tax commission might affect the revenue of a local government) a notice to the district attorney of a county which will include: 1) the identity of the entities within the county that might be affected by a decision of the tax commission and the issues to be considered.

SECTION 5 - PAGE 3, LINE 24, THROUGH PAGE 5 LINE 18 (Note: NRS 360.291 is known as the "Taxpayers Bill of Rights".)

Clarifies certain provisions of the TBR and adds two new provisions:

1. Adds to written instructions provided to the taxpayer information about the release or reduction in a bond required to be posted [subsection (f)(3)]; and
2. The requirement, from a number of court cases, that in the case of a conflict in statute regarding the collection or remittance of taxes that the conflict will be resolved in favor of the taxpayer [subsection (o)]

SECTION 6 - PAGE 5, LINES 19-24

Conforming language.

SECTION 7 - PAGE 5, LINE 25 THROUGH PAGE 6, LINE 2

This section contains three changes:

1. Clarification that reliance upon written information includes an opinion of the attorney general;
2. Increases the amount that may be waived by the department for interest, penalties and taxes.
3. Provides that if the taxpayer has relied on prior written advise of the department, an A.G.'s opinion or the written results of an audit, penalties or interest may not be collected if a subsequent audit shows a deficiency.

SECTION 8 - PAGE 6, LINES 3 - 20

Clarifies the manner in which underpayment and overpayment of taxes are offset and how penalties and interest are applied.

SECTION 9 - PAGE 6, LINES 21-31

Conforming language.

SECTION 10 - PAGE 6, LINE 32 THROUGH PAGE 7, LINE 3

Provides for a graduated payment schedule of a penalty imposed to be adopted the department.

SECTION 11 - PAGE 7, LINES 4-29

Provides that the department will not file a court action if a case is on appeal to the tax commission.

Section 12-16 Amend NRS 361 Property Tax

SECTION 12 - PAGE 7, LINES 30 THROUGH PAGE 10, LINE 37

Conforming language.

Section 13 - Page 10, lines 37, Page 11, lines 1 & 2

Provides that an action filed by a taxpayer may also be filed in Clark County.

SECTIONS 14-16 - PAGE 11 LINE 3 THROUGH PAGE 12, LINE 41

Conforming language.

Sections 17-19 Amend NRS 362 - Taxes on Mines and Minerals

SECTION 17 - PAGE 13, LINES 1-32

Clarify the rights of a taxpayer to file a claim for a refund of an overpayment.

SECTION 18 - PAGE 13, LINES 33-43, PAGE 14, LINES 1-3

Changes the interest on underpayment from 1 1/2% to 1% to parallel the changes made in SB 375 of last session. Also contains conforming language.

SECTION 19 - PAGE 14, LINES 4-22

Conforming language.

Sections 20-24 Amends NRS 364A - Business Tax

SECTIONS 20-22 - PAGE 14 LINE 23 THROUGH PAGE 16, LINE 31

Conforming language.

SECTION 23 - PAGE 16, LINES 32-42.

Clarifies the provision relating to time for filing a court action.

SECTION 24 - PAGE 17, LINES 1-14

Clarifies the time frames for appeals to the tax commission and the filing of court actions.

Sections 25-27 Amends NRS 365 - Taxes on Fuels

SECTIONS 25-27 - PAGE 17, LINE 15 THROUGH PAGE 18, LINE 7.

Conforming language.

Sections 28-30 Amends NRS 366 - Tax on Special Fuel

SECTIONS 28-30 - PAGE 18, LINE 8 THROUGH PAGE 19, LINE 38

Conforming language.

Sections 31-37 - Amends NRS 372 - Sales and Use Taxes (State Portion - 2%)

SECTION 31 - PAGE 19, LINES 39 THROUGH PAGE 20, LINE 17

Requires the department to provide written information which explains what is and is not taxable for the business so that the taxpayers is aware of his liability for the collection of taxes.

SECTIONS 32-37 - PAGE 20, LINE 18 THROUGH PAGE 22, LINE 27

Clarifies the time frames and procedures for filing appeals and claims.
Adds conforming language for the provisions in NRS 360.

Sections 38-43 Amends Local School Support Tax (Note: this section also governs the administrative sections of the "Basic City-County Relief Tax"; "Supplemental City-County Relief Tax"; and the "Local Options".

SECTIONS 38-43 - PAGE 22, LINE 28 THROUGH PAGE 26, LINE 29

Conforming language.

Sections 44-49 Amends NRS 375A - Taxes on Estates

SECTIONS 44-49 - PAGE 26, LINE 30 THROUGH PAGE 28, LINE 10

Clarifies the appeal procedure and adds conforming language.

Sections 50-53 - Amends NRS 375B - Generation-Skipping Transfer Tax

SECTIONS 50-53 - PAGE 28, LINE 19 THROUGH PAGE 29 LINE 17

Clarifies the appeal procedure and adds conforming language.

Sections 54 - Page 29, lines 18-21 - Effective dates.

**MINUTES OF THE
ASSEMBLY COMMITTEE ON TAXATION**

**Seventieth Session
May 6, 1999**

The Committee on Taxation was called to order at 1:40 p.m., on Thursday, May 6, 1999. Chairman David Goldwater presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All Exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. David Goldwater, Chairman
Mr. Roy Neighbors, Vice Chairman
Mr. Bernie Anderson
Mr. Morse Arberry, Jr.
Mr. Greg Brower
Mrs. Vivian Freeman
Ms. Dawn Gibbons
Mr. John Jay Lee
Mr. Mark Manendo
Mr. John Marvel
Mr. Harry Mortenson
Mr. Bob Price
Ms. Sandra Tiffany

COMMITTEE MEMBERS ABSENT:

Mr. John Jay Lee

GUEST LEGISLATORS PRESENT:

Senator Jon Porter, Clark County Senatorial District 1

STAFF MEMBERS PRESENT:

Ted Zuend, Fiscal Analyst
Nykki Kinsley, Committee Secretary

those cases the airport authority board, not the county commission imposed the taxes.

Ms. Vilardo agreed excluding voters could cause resentment and whenever possible they should consult voters. However, when the tax was indirect or specialized it was less likely scrutinized as much as a direct tax. She repeated Washoe County more specialized because any increase would go through the airport authority not the county commissioners.

Keith Lee, representing Southwest Airlines, as well as on Steven Horsford's authority America West, explained on first sight of the legislation, the airlines had some concerns. They observed Nevada profited from continuous commercial air travel into Reno and Las Vegas. Anything the state government did reducing the cost of the travel benefited the state. The industry felt apprehensive taking away another step to impose a tax. However, he explained after working with Senator Porter and Ms. Vilardo, they were pleased with the composition of the preamble language. He stated they support the bill.

Chairman Goldwater confirmed the airlines' support of the bill. Mr. Lee repeated they supported the bill with the preamble language in there. He thanked the committee for their consideration.

Chairman Goldwater closed the hearing on S.B. 287 and opened the hearing on S.B. 362.

Senate Bill 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

A summary prepared by Mr. Zuend on the various changes throughout the bill was included in the recorded (Exhibit G).

Ms. Vilardo explained the Nevada Taxpayers Association requested Senator O'Connell introduce S.B. 362. It was a product of a bill the committee heard in the 1997 session, commonly known as the Taxpayers' Bill of Rights. She emphasized S.B. 362 was a complicated bill with seven major provisions drafted in analogous language. Since the bill covered Title 32 which was the administration of several taxes the language was added to insure the conformity and congruence with the rest of the bill. She provided an outline of the changes made to the bill (Exhibit H). Ms. Vilardo asked the Chair if he would like her to review the entire bill. Chairman Goldwater asked her only to examine the substantive sections.

Ms. Vilardo began by reminding the committee NRS 360 referred to the general administrative procedure of the Department of Tax and the Tax Commission. She explained section 2, page 1, line 3 through page 2, line 3 provided clarification regarding audit notification and audit extensions. Business owners accepted audits as a liability of running a business. However, if during an audit the Department of Tax requested an extension the taxpayer should not be responsible for penalties or interest accumulated during the extension. Sections 3 and 3.5 provided procedures for notifying the taxpayer of the outcome of the audit. In addition, it required the adoption of procedures concerning refunds.

Ms. Vilardo remarked section 4, page 2, lines 17 through page 3, line 29 established an appeal process. In some instances, businesses found the Department of Tax did not have a statutory appeal process. The Department of Tax referred the aggrieved taxpayer to district court. The change allowed the taxpayer to appeal to the Tax Commission before the business and the state had incurred the legal expenses.

The next issue Ms. Vilardo referred to concerned the wording of the regulation concerning the county notification in A.B. 375 from the 1997 session. The contradictions prohibited its effectiveness. The Legislative Commission ruled they could not adopt the provision. S.B. 362 changed the language clarifying the county notification procedures. She felt the provision would need more elaboration in the future. Ms. Vilardo's next point also related to provisions set forth in A.B. 375. In an appeal case, the Tax Commission and the Department of Tax would not file a simultaneous court action. The intent was to save money and hope the normal process for adjudication will process all the states needs without additional burden on the business or the state.

Ms. Vilardo stated section 5 added two provisions to NRS 360.291. First, it required the Department of Tax to provide written instructions for bond procedures. Generally, a business posted a bond for the collection of sales tax. If the business went 36 consecutive months without a late payment, the business could request a reduction or release of the bond. The bill provided the taxpayer with written instructions explaining the procedures, which would reduce errors in the application process. Second, section 5 provided court cases concerning statutory conflicts regarding the collection or the remittance of taxes rewarded to the taxpayer. They based it on precedents of past court cases.

Ms. Vilardo continued explaining, section 7 had three changes, which were parallel to A.B. 12. First, it clarified the reliance upon written information from the Attorney General's Office. If the Attorney General's Office gave a taxpayer

invalid information which affected their audit, the Department of Tax would not hold the taxpayer responsible for the penalty and interest for that audit. Second, it updated an older statute and increased the total amount of interest and penalties waived. The Department of Taxation suggested regulations would set the waived amount. The Tax Commission would set anything above the waived amount. To discourage abuse, the bill required a detailed report of the case to be submitted and filed.

Ms. Vilardo discussed the audit procedure. She contented the audits focused on specific business areas and did not extend to other areas. If targeted areas of the audited business were not deficient, yet another area was and discovered later, the taxpayer would not be responsible for the fine and back interest. She reported the Department of Tax would work out the procedures including a closure letter identifying the specific areas audited. Assuming the law remained the same, if they found a deficiency in the same areas during a subsequent audit the department could not collect a deficiency judgement. If it was a new area then they could collect the interest and penalties.

Ms. Vilardo described the graduated payment schedule in section 10, which they modeled after existing provisions in the proceeds chapter. Depending on the number of days of a late payment was where they started to escalate the percentage of the penalty. She believed the current 10 percent penalty for a day late payment was too harsh because they charged interest as well.

Ms. Vilardo explained section 13 provided an aggrieved taxpayer could file an appeal in Clark County as well as Carson City. It would give easier access. She commended the Tax Commission and Department of Tax for holding hearings in a location appealing to the appellant.

Ms. Vilardo remarked section 17, the net proceeds for tax on mines and minerals clarified the rights of taxpayers to file a claim for a refund. In addition, they changed provisions to conform to the provision in Assemblyman Marvel's bill. Section 18 reduced an interest rate in an overlooked section of A.B. 375 to 1 percent conforming the section to the rest of the bill. The Department of Tax, the bill drafters, and the Nevada Taxpayers Association agreed to the suggested changes clarifying sections 20 through 24, on the business tax.

Ms. Vilardo stated sections 31 through 37 amended the sale and use tax act. She remarked in most cases concerning taxes, the businesses were told for the privilege of doing business in Nevada they get to post bonds and be audited. They excepted the responsibility. However, they thought since they were audited, they had the right to know what their liabilities were for collecting the

tax. They wanted detailed descriptions and definitions such as the circumstances under which services and freight charges were taxable, as well as administration exemptions. The Department of Tax needed time to prepare the information; therefore, it would become effective one year after passage. The sections also provided conforming language concerning NRS 372 and NRS 374.

Ms. Vilardo discussed sections 44 through 49 regarding NRS 375A on the estate tax. The language clarified the appeals procedures. Lastly, section 54 gave the effective dates most of which were this year.

Chairman Goldwater commended Ms. Vilardo's summary of the bill and called for questions from the committee.

Mr. Anderson questioned the filing procedure discussed in section 13. He realized Clark County had the largest population in Nevada. He asked for more clarification on the motivation for the change. He wanted to know if it was strictly because of the larger population or if there was another reason. Ms. Vilardo replied there were several reasons. Under the provisions in NRS 233B a taxpayer could file most contested cases within the appeal process with any court in the state. However, it required filing of certain cases in Carson City. She said she discussed the issue with several people at the Attorney General's Office and the Department of Taxation including Mr. Pursell. They agreed the provisions should conform to those in NRS 233B. Clark County was a reasonable choice because of the number of businesses and offices, which could handle the load. Ms. Vilardo stated she would agree to other counties across the state, if it did not create an additional burden with the Attorney General's Office.

Mr. Anderson thought it was the fact the Supreme Court was hearing appeals in Clark County. He repeated his question as to why Clark County should be the only one to receive the privilege. Ms. Vilardo referred the question to Mr. Pursell.

David Pursell, Executive Director, Department of Taxation, indicated when he spoke with Deputy Attorney General Norman Azevedo he understood they changed the provisions in the section 13 to conform with those in NRS 233B based on a population. He informed the committee if they needed further clarification he would discuss it with Mr. Azevedo and report back to them.

Mr. Anderson expressed curiosity as to why Clark County was the only county considered. He could understand if they chose it because of business

registration or the appellate hearings. Ms. Vilardo remarked she requested Clark County because of the large number of cases from businesses in Clark County, which filed cases in Carson City. She said the Attorney General's Office told her Clark County would not add a fiscal note. She mentioned extending the filing to the entire state could cause the addition of a fiscal note to the bill.

Mr. Anderson asserted he did not want to impede the bill. Although, he thought the information would be helpful. Chairman Goldwater asked if either Ms. Vilardo or Mr. Pursell could provide the information for the committee. Assemblyman Marvel felt the other counties were unaffected by the addition of Clark County because they currently filed in Carson City anyway.

Kami Dempsey, Las Vegas Chamber of Commerce, testified in place of Kara Kelley. She said as an organization which represented over 6,000 businesses they were always in favor of law which eased the burdens for businesses. They were happy with the way the bill provided clear notification and greater due process for all taxpayers.

Russ Fields, President, Nevada Mining Association voiced his support for S. B. 362. He was happy with the revisions to the Taxpayers' Bill of Rights. He expressed approval of the net proceeds for tax on mines and minerals in section 17. Its inclusion was important. He thanked the Nevada Taxpayers Association and the Department of Taxation for their work on the bill.

Clay Thomas, Assistant Chief, Motor Carrier Bureau, Department of Motor Vehicles and Public Safety (DMV&PS) asked for clarification on the bill. The DMV&PS had reviewed the bill. They noticed on page 1, section 2 subsection 1, line 4 addressed provisions of the title such as using the wording the title encompasses part of what the Motor Carrier Bureau was responsible for in collecting taxes. It referenced the Department of Taxation. They wondered if it encompassed the Motor Carrier Bureau, and its function. They asked if they would still operate under their own statutes NRS 366, 702, and 482.

He informed the committee the Motor Carriers Bureau conducted over 400 audits. He explained their appeal process had four phases. Of the 400 audits they did not have any appeals beyond the second phase, their re-determination hearing. Chairman Goldwater asked if the bill would interfere with the expeditious appeals process of the Motor Carriers Bureau. Mr. Thomas replied he was unsure. The encompassing language in section 2 placed the statutes, which Motor Carriers Bureau followed under the jurisdiction of the bill. Therefore, it would allow the Tax Commission to hear the appeals of their audit. He felt the process they currently used was advantageous to the entities which

used it. Chairman Goldwater thanked Mr. Thomas for calling attention to the matter. He said they would investigate it.

Chairman Goldwater confirmed the Department of Taxation acceptance of the bill. Mr. Pursell stated the department supported the bill. Chairman Goldwater closed the hearing on S. B. 362 and opened the hearing on S.B. 537.

Senate Bill 537: Revises provisions governing tax abatements for certain businesses. (BDR 32-708)

Included in the record was a summary prepared by Mr. Zuend on the various changes throughout the bill (Exhibit I).

Ms. Vilardo spoke in support of the bill. She began by telling the history behind the bill. It derived from the Legislative Committee investigation on the effects of the tax distribution. One of the issues identified after the 1997 session was the numerous tax abatements for a variety of industries. Some people referred to them as an exemption. However, exemptions exempted businesses without a qualified time period. Abatements had a specific time period. Nevertheless, from a long list compiled on property tax abatements, a bill the committee heard earlier in the session emerged. It set up parameters and criteria for the abatement. It was expanded to cover property tax, personal property tax, business tax and the sales tax.

Ms. Vilardo explained it was common for the parameters to change to fit a particular business the state wanted to attract by exempting them. Generally, the state looked at the exempting of an appealing industry then created the parameters for the abatement. Unfortunately, each time the legislature passed an abatement it did not match anything else.

As a result, Ms Vilardo became a member of a subcommittee along with Mr. Hobbs, Mr. Shriver, members of the Economic Development Committee in Reno, and Southern Nevada Development Authority, which charted out the exemptions and variations to draft legislation which would give the abatement more consistency. Ms. Vilardo told the committee she would speak generally on the bill and Mr. Shriver would speak on its specifics.

Next, Ms. Vilardo outlined the revisions made by S.B. 537. First, they listed all the general abatement qualifications in NRS 360, which was the administrative section. After all, having them all in the same chapter made them easier to locate and monitor. Secondly, current provisions allowed the commission to reduce the conditions on a company which applied for exemption. She told the

Bill Explanation

SENATE BILL NO. 362

Assembly Committee on Taxation

Hearing: May 6, 1999

SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Section 1: Adds sections 2, 3 and 3.5 of this act to chapter 360 of the NRS.

Section 2: Requires the department of taxation to notify a taxpayer concerning the date an audit will be completed.

Allows the department to extend the date that an audit will be completed if it provides a written notice to the taxpayer and an explanation of the reasons for the extension.

Provides, if after completion of an audit and if the department determines that delinquent taxes are due, that it may not impose any penalties or interest during the extension of the audit if the extension was not caused by the taxpayer.

Section 3: Provides that written notice be given to a taxpayer if someone affiliated with the department determines that the taxpayer is entitled to an exemption or has been taxed more than required by law.

The notice must be given within 30 days after a determination or, if the determination is a result of an audit, 30 days after completion of the audit. The notice must provide an explanation that the overpayment will be credited against any amount due or instructions on how a taxpayer obtains a refund of the overpayment.

Section 3.5: Requires the tax commission to adopt regulations to carry out sections 7 and 10 of this act.

Section 4: Clarifies that certain general provisions of the tax laws may be superseded by other provisions of the tax laws.

Clarifies that only parties aggrieved by a decision of the department of taxation may appeal the decision.

Clarifies that the tax commission may review any decision of the department and that the commission may reverse, affirm or modify any decision of the department that a taxpayer appeals or the commission reviews.

Exhibit G P 193
Assembly Committee on Taxation
Date: 5-6-99
Submitted by: TED ZUEHL
LCB FISCAL DIV.

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Requires the commission, when an appeal is heard, to notify the district attorney of each county which may be affected by the decision.

Section 5: This section amends the taxpayer bill of rights to:

- Clarify that a taxpayer is to be notified in writing when the department of taxation determines that he is entitled to an exemption or has been taxed more than required by law.
- Provide that a taxpayer is entitled to receive written instructions from the department on how to obtain a reduction or release of a bond or other security which he is required to furnish for taxes administered by the department.
- Provide that statutes and regulations are to be construed in favor of the taxpayer if they are of doubtful validity, unless there is a specific statutory provision that is applicable.
- Provide that the provisions of the taxation statutes or regulations administered by the department may not be construed to conflict with this section or applicable regulations.
- Provide that the taxpayer bill of rights applies to all taxation statutes and regulations administered by the department.

Section 6: Clarifies that overpaid taxes are to be credited against other taxes before any overpayment is refunded.

Section 7: Provides that the department of taxation may waive any tax, penalty or interest in conformity with regulations adopted by the tax commission, if a taxpayer has relied to his detriment on written advice from a representative of the department or an opinion of the attorney general. Requires the department, if it has approved a waiver, to maintain a statement of the reason for the waiver; the amount of tax, penalty and interest owed by the taxpayer; the amount of tax, penalty or interest waived; and the facts and circumstances which led to the waiver.

Provides, upon proof that a taxpayer has in good faith collected or remitted taxes by relying on the written advice from a representative of the department or an opinion of the attorney general or the written results of an audit, that the taxpayer may not be required to pay delinquent taxes, penalties or interest if a subsequent audit determines that the taxes collected were deficient.

Section 8: Revises provisions relating to the offsetting of overpayments and underpayments by a taxpayer by:

- Clarifying that the provisions in this section may be superseded by other provisions of the tax laws and that the provisions apply to a reporting period within an audit period.
- Requiring if there is a net deficiency, that a penalty is to be calculated against the net deficiency.
- Requiring, if there is a net deficiency, that interest imposed based on the net deficiency for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Requiring, if there is a net overpayment, the interest that the taxpayer is entitled to receive must be calculated for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Specifying that the provisions of the section do not apply if the taxpayer has not remitted the taxes due in a timely manner.
- Defining "reporting period" to include any reporting period.

Section 9: Provides that the prerequisites of action for judicial review of a redetermination must follow a final order of the tax commission, rather than the department of taxation.

Clarifies that any amount to be credited or refunded to a taxpayer, if a court modifies a final order in favor of a taxpayer, is determined by comparing the amount paid to the amount owed, including interest.

Section 10: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Provides that the amount of any penalty must be based on a graduated schedule which takes into consideration the length of time the tax or fee remained unpaid.

Section 11: Provides that an action for collection of delinquent taxes may not be brought when an appeal to the tax commission is pending.

Section 12: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 13: Provides that a taxpayer who wants to consolidate actions to recover property taxes may do so in a court in Clark County as well as Carson City.

Sections 14 to 15: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 16: Provides that an action for judicial review of a refund claim under the Senior Citizens' Property Tax Assistance Act follows a denial or final action of the tax commission, not the executive director of the department of taxation.

Section 17: Provides that the provisions relating to the crediting of overpayments of net proceeds taxes does not prohibit the taxpayer from requesting a refund of the overpayment.

Section 18: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Clarifies that appeals by a taxpayer over the imposition of penalties and interest are governed by the provisions of NRS 360.245.

Section 19: Clarifies that appeals by a taxpayer over the imposition of penalties are governed by the provisions of NRS 360.245.

Sections 20 to 22: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 23: Provides that an action for judicial review of a claim for refund of business taxes follows a decision of the tax commission, not the department of taxation.

Section 24: Provides, if the department of taxation fails to act on a claim for refund of the business tax in a timely manner, that an appeal must be made to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 90 days of the decision.

Section 25: Makes it an authorization rather than a requirement that the department of taxation cancel the license of a fuel dealer after a show cause hearing with the dealer.

Section 26: Provides that a fuel dealer after paying a tax under protest must appeal the imposition of the tax to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state treasurer in a court in Clark County as well as Carson City.

Section 27: Provides that an action for judicial review of a claim to recover fuel taxes paid follows a decision of the tax commission after an appeal.

Sections 28 to 29: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 30: Provides that a taxpayer who has paid special fuel taxes under protest may file an action to recover the taxes against the state treasurer in a court in Clark County as well as Carson City.

Section 31: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect the state sales and use tax including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

Section 32: Provides that NRS 360.320 is an exception to the interest or penalty provisions of this section.

Section 33: Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

Section 34: Provides, if the department of taxation fails to act on a claim for refund of the sales and use tax in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

Sections 35 to 36: Provides that certain actions relating to erroneous refunds may be brought in a court in Clark County as well as Carson City.

Section 37: Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

Section 38: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect local sales taxes including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

Sections 39 to 40: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 41: Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

Section 42: Provides, if the department of taxation fails to act on a claim for refund of local sales taxes in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

Section 43: Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

Section 44: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 45: Provides that a claim that a deficiency in the estate tax is erroneous may be appealed to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state within 3 years after the determination was made.

Section 46: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 47: Provides that section 2 and NRS 360.320 are exceptions to the bonding provisions in this section.

Section 48: Provides that NRS 360.320 is an exception to the penalty or interest provisions in this section.

Sections 49 to 50: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 51: Provides that a claim that a deficiency in the generation-skipping transfer tax is erroneous may be appealed to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state within 3 years after the determination was made.

Section 52: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 53: Provides that section 2 and NRS 360.320 are exceptions to the bonding provisions in this section.

Section 54: Makes all sections, except sections 10, 31 and 38, effective on July 1, 1999. Makes section 10 effective at 12:01 a.m. on July 1, 1999. Makes sections 31 and 38 effective on July 1, 2000.

SECTION BY SECTION OUTLINE OF SB 362 - FIRST REPRINT

Sections 2-11 Amend NRS 360 - General Provisions and Administration of Taxes

SECTION 2 - PAGE 1, LINE 3 THROUGH PAGE 2, LINE 2

Provides clarification regarding the notifications provided before and after an audit is conducted; and the granting of audit extensions.

SECTIONS 3 AND 3.5 - PAGE 2, LINES 3-16

Provides procedures for notifying taxpayers of the audit determination, including how to request a refund if an overpayment has been made.

SECTION 4 - PAGE 2, LINE 17 THROUGH PAGE 3, LINE 29

Establishes that the taxpayer has the right to appeal before the tax commission in all cases, not just selected cases.

Clarifies a provision amended into SB 375 of the last session. The clarification provides that the department shall provide (when a decision of the tax commission might affect the revenue of a local government) a notice to the district attorney of a county which will include: 1) the identity of the entities within the county that might be affected by a decision of the tax commission and the issues to be considered.

SECTION 5 - PAGE 3, LINE 30, THROUGH PAGE 5 LINE 24 (Note: NRS 360.291 is known as the "Taxpayers Bill of Rights".)

Clarifies certain provisions of the TBR and adds two new provisions:

1. Adds to written instructions provided to the taxpayer information about the release or reduction in a bond required to be posted [subsection (f)(3)]; and
2. The requirement, from a number of court cases, that in the case of a conflict in statute regarding the collection or remittance of taxes that the conflict will be resolved in favor of the taxpayer [subsection (o)]

SECTION 6 - PAGE 5, LINES 25-30

Conforming language.

SECTION 7 - PAGE 5, LINE 31 THROUGH PAGE 6, LINE 17

This section contains three changes:

1. Clarification that reliance upon written information includes an opinion of the attorney general;
2. Increases the amount that may be waived by the department for interest, penalties and taxes.
3. Provides that if the taxpayer has relied on prior written advise of the department, an A.G.'s opinion or the written results of an audit, penalties or interest may not be collected if a subsequent audit shows a deficiency.

SECTION 8 - PAGE 6, LINE 18 THROUGH PAGE 7, LINE 3

Clarifies the manner in which underpayment and overpayment of taxes are offset and how penalties and interest are applied.

SECTION 9 - PAGE 7, LINES 4-14

Conforming language.

SECTION 10 - PAGE 7, LINE 15 - 29

Provides for a graduated payment schedule of a penalty imposed to be adopted the department.

SECTION 11 - PAGE 7, LINE 30 THROUGH PAGE 8, LINE 13

Provides that the department will not file a court action if a case is on appeal to the tax commission.

Section 12-16 Amend NRS 361 Property Tax

SECTION 12 - PAGE 8, LINE 14 THROUGH PAGE 11, LINE 21

Conforming language.

SECTION 13 - PAGE 11, LINES 22 -29

Provides that an action filed by a taxpayer may also be filed in Clark County.

SECTIONS 14-16 - PAGE 11, LINE 30 THROUGH PAGE 13, LINE 26

Conforming language.

Sections 17-19 Amend NRS 362 - Taxes on Mines and Minerals

SECTION 17 - PAGE 13, LINE 27 THROUGH PAGE 14, LINE 15

Clarify the rights of a taxpayer to file a claim for a refund of an overpayment.

SECTION 18 - PAGE 14, LINES 16-29

Changes the interest on underpayment from 1 1/2% to 1% to parallel the changes made in SB 375 of last session. Also contains conforming language.

SECTION 19 - PAGE 14, LINE 30 THROUGH PAGE 15, LINE 6

Conforming language.

Sections 20-24 Amends NRS 364A - Business Tax

SECTIONS 20-22 - PAGE 15, LINE 7 THROUGH PAGE 17, LINE 16

Conforming language.

SECTION 23 - PAGE 17, LINES 17-27.

Clarifies the provision relating to time for filing a court action.

SECTION 24 - PAGE 17, LINES 28-41

Clarifies the time frames for appeals to the tax commission and the filing of court actions.

Sections 25-27 Amends NRS 365 - Taxes on Fuels

SECTIONS 25-27 - PAGE 18, LINES 1-36

Conforming language.

Sections 28-30 Amends NRS 366 - Tax on Special Fuel

SECTIONS 28-30 - PAGE 18, LINE 37 THROUGH PAGE 20, LINE 24

Conforming language.

Sections 31-37 - Amends NRS 372 - Sales and Use Taxes (State Portion - 2%)

SECTION 31 - PAGE 20, LINE 25 THROUGH PAGE 21, LINE 4

Requires the department to provide written information which explains what is and is not taxable for the business so that the taxpayers is aware of his liability for the collection of taxes.

SECTIONS 32-37 - PAGE 21, LINE 5 THROUGH PAGE 23, LINE 16

Clarifies the time frames and procedures for filing appeals and claims.
Adds conforming language for the provisions in NRS 360.

Sections 38-43 Amends Local School Support Tax (Note: this section also governs the administrative sections of the "Basic City-County Relief Tax"; "Supplemental City-County Relief Tax"; and the "Local Options".

SECTIONS 38-43 - PAGE 23, LINE 17 THROUGH PAGE 27, LINE 21

Conforming language.

Sections 44-49 Amends NRS 375A - Taxes on Estates

SECTIONS 44-49 - PAGE 27, LINE 22 THROUGH PAGE 28, LINE 43

Clarifies the appeal procedure and adds conforming language.

Sections 50-53 - Amends NRS 375B - Generation-Skipping Transfer Tax

SECTIONS 50-53 - PAGE 29, LINE 1 THROUGH PAGE 30 LINE 6

Clarifies the appeal procedure and adds conforming language.

Sections 54 - Page 30, lines 7-12 - Effective dates.

**MINUTES OF THE
ASSEMBLY COMMITTEE ON TAXATION**

**Seventieth Session
May 11, 1999**

The Committee on Taxation was called to order at 12:00 p.m., on Tuesday, May 11, 1999. Chairman David Goldwater presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All Exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. David Goldwater, Chairman
Mr. Roy Neighbors, Vice Chairman
Mr. Bernie Anderson
Mr. Greg Brower
Mrs. Vivian Freeman
Ms. Dawn Gibbons
Mr. Mark Manendo
Mr. John Marvel
Mr. Harry Mortenson

COMMITTEE MEMBERS ABSENT:

Mr. Morse Arberry, Jr.
Mr. John Jay Lee
Mr. Bob Price
Ms. Sandra Tiffany

STAFF MEMBERS PRESENT:

Ted Zuend, Fiscal Analyst
Nykki Kinsley, Committee Secretary

OTHERS PRESENT:

Russ Law, Nevada Department of Transportation
Daryl E. Capurro, Nevada Motor Transport Association
Bill Whitney, Regional Open Space Planner, Washoe County

The next item on the work session was S.B. 362.

Senate Bill 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Mr. Goldwater noted the bill was the "Taxpayers Bill of Rights" and explained it provided for additional notification to taxpayers regarding audits and elimination of additional penalties and interest on delinquent taxes when an audit extension was not caused by the taxpayer. The bill clarified how penalties and interest were calculated and provided for the appeal of decisions to the Nevada Tax Commission. Further, the bill expanded the Taxpayers' Bill of Rights to require notification regarding reduction or release of security and to have statutes and regulations generally construed in favor of the taxpayer. The bill allowed the department to waive penalties and interest based on regulations established by the Tax Commission and provided for waiver by the department when the taxpayer relied on advice from the department or an opinion of the attorney general. The bill authorized certain actions to be brought in Clark County and not just Carson City.

One committee member suggested amending the latter provision to allow actions to be brought in a court anywhere in the state.

The bill also required additional information regarding the collection of sales taxes to be furnished to a person when they were granted a sales tax permit.

The bill was supported by the Nevada Taxpayers Association. There was no opposition; however, a representative of the Department of Motor Vehicles (DMV) was concerned about provisions which might affect the DMV's administration of special fuel taxes. Included was language in section 2 which applied that provision to the administration of the Revenue and Taxation Title, sections 28 and 29, and possibly 30, that amended the special fuel tax statutes.

Mr. Anderson advised that the Attorney General's Office had given him a memo, which he had given to Mr. Goldwater earlier, and which might need to be examined. There were some amendments that were supposed to come to the bill earlier or that were overlooked, relative to the question of special fuel tax statutes. Unfortunately Mr. Zuend had not had those before preparing the work session document.

Mr. Goldwater stated action would be held pending receipt of those amendments.

Mr. Goldwater turned next to S.B. 428.

Senate Bill 428: Makes various changes concerning intoxicating liquor.
(BDR 32-1238)

Mr. Goldwater read from the work session document which stated in part the bill was principally designed to allow residents to import up to 12 cases of wine per year into Nevada, from smaller wineries that did not have a presence in the state. It also allowed suppliers to ship wine into the state as long as excise taxes were paid. The bill required a supplier of wine who shipped 100 or more cases of wine in a fiscal year to designate an importer, and one who shipped 200 or more cases to pay the \$500 fee for an importer's license. Finally, the bill required suppliers to maintain records of their shipments into Nevada for 4 years.

The bill was supported by affected parties and no concerns were raised by committee members. Several amendments were proposed:

- Case of wine was defined as 12 bottles containing 750 milliliters of wine.
- Amend section 3, page 1, line 9, by deleting 100 and inserting 25 to reduce the minimum number of cases required to designate an importer.
- Amend section 10, page 3, line 12, by inserting "other than a supplier, wholesaler or retailer" after "person."
- Amend by renumbering section 11 as section 12, and adding a new section to read as follows: "Sec. 11. The amendatory provisions of this act do not apply to not-for-sale liquor, including, but not limited to, complimentary samples of liquor to media writers, liquor used for consumer test marketing purposes, liquor used for laboratory analysis, and liquor shipped to a consumer to replace unsatisfactory liquor already purchased by the consumer." There was a note that stated: "This is the way it was proposed, but it probably needs to be added as another new section to chapter 369."

Mr. Anderson asked if "consumer test marketing purposes" included wine shipped in for a wine tasting event had to have the tax paid on it.

Senate Bill 538: Makes various changes relating to distribution of proceeds of certain taxes. (BDR 32-710)

Mr. Goldwater explained the bill simply clarified some provisions and fixed some oversights in S.B. 254 of the 1997 session that consolidated distribution of six local government revenues into a single intracounty formula. The bill was supported by the Department of Taxation. There was no opposition. One local government representative asked the Taxation Committee to send a letter of intent to the S.B.253 committee asking it to review how the revenue distribution formula was working relative to the goals the committee originally established, and to include those findings in the committee's final report, which Mr. Goldwater would submit to the committee for approval.

ASSEMBLYMAN ANDERSON MOVED TO DO PASS S.B.538.

SECONDED BY ASSEMBLYWOMAN FREEMAN.

THE MOTION CARRIED.

Mr. Goldwater noted the committee had three letters pending to the S.B. 253 committee members before the committee's close of business for approval.

Additionally, he said as soon as he received an opinion on the art tax and the gray market cigarettes he would distribute those to the committee. He also referred the committee to the memorandum from the attorney general regarding S.B. 362, on which action would be taken next meeting.

With no further business before the committee, Mr. Goldwater adjourned the meeting at 1:25 p.m.

**MINUTES OF THE
ASSEMBLY COMMITTEE ON TAXATION**

**Seventieth Session
May 13, 1999**

The Committee on Taxation was called to order at 2:20 p.m., on Thursday, May 13, 1999. Chairman David Goldwater presided in Room 3142 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All Exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. David Goldwater, Chairman
Mr. Roy Neighbors, Vice Chairman
Mr. Bernie Anderson
Mr. Greg Brower
Mrs. Vivian Freeman
Ms. Dawn Gibbons
Mr. John Jay Lee
Mr. Mark Manendo
Mr. John Marvel
Mr. Harry Mortenson
Mr. Bob Price
Ms. Sandra Tiffany

COMMITTEE MEMBERS ABSENT:

Mr. Morse Arberry, Jr.

STAFF MEMBERS PRESENT:

Ted Zuend, Fiscal Analyst
Nykki Kinsley, Committee Secretary

OTHERS PRESENT:

David Farside, Private citizen
Alfredo Alonso, Nevada Resort Association
Carole Vilardo, President, Nevada Taxpayers Association

Assemblyman Neighbors explained the bill arose because during the 1995 session a bill came through on special fuels. It was the consensus of opinion that many people were in violation and not paying the tax. That bill was passed and early estimates were around \$3 to \$4 million. The actual amount currently was \$12 million escaping taxation. The bill made it more difficult for people to evade the tax on using dyed fuels.

Mr. Goldwater noted there had been no amendments.

ASSEMBLYMAN NEIGHBORS MOVED DO PASS S.B. 349.

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

Discussion followed with Assemblywoman Tiffany noting the last paragraph of the work session document indicated the committee might want to consider amending the bill, but since it had not been considered, she asked for an explanation. Chairman Goldwater explained the Committee on Transportation received the petroleum fuel conversion tax bill and the Committee on Taxation had not had a chance to discuss the issue, he thought the bill might be a vehicle to discuss the conversion factor. However, it was late in the session therefore that issue would be set aside.

There was no further discussion and the vote was taken.

THE MOTION CARRIED.

Next on the work session was S.B. 362.

Senate Bill 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Chairman Goldwater explained the bill clarified certain statutes and improved conditions for taxpayers. It was the "taxpayer's bill of rights." Among other things, the bill allowed the department to waive penalties and interest based on regulations established by the Tax Commission and also provided for a waiver by the department when the taxpayer had relied on advice from the department or an opinion from of the attorney general. The bill authorized certain actions relating to payment of taxes to be brought in Clark County and not just Carson City. Mr. Goldwater noted one committee member suggested amending the provision to allow actions to be brought in a court anywhere in the state. The deputy attorney general for taxation sent the member a memorandum suggesting language for such an amendment. Finally, the bill required additional

information regarding the collection of sales taxes to be furnished to a person when they were granted a sales tax permit.

The bill was supported by the Nevada Taxpayers Association. There was no opposition to the bill; however, a representative of the Department of Motor Vehicles (DMV) was concerned about provisions which might affect the DMV's administration of special fuel taxes. The concern seemed to include language in sections 2, 28, 29, and possibly 30.

A revised proposed amendment (Exhibit F) was discussed by Mr. Zuend. One of the proposed amendments accommodated DMV's concern, which had to do with the authority of the tax commission applying to DMV.

Page 1 of the bill would be amended in section 2. 1, line 3, by adding "*by the department*" which indicated the Department of Taxation.

The other amendments were from Mr. Anderson's original concern and they conformed to what his intent was believed to be. Those amendments were written by the deputy attorney general. Mr. Zuend pointed out the DMV would also like to have sections 28 and 29 removed because they did not apply. The provision in section 2 was removed so the exception would not be needed.

Regarding section 30, Mr. Zuend discussed it with Clay Thomas, assistant chief, DMV, who did not want to be in the filing for all counties at present. Perhaps after DMV had taken over the administration of the gasoline tax as well. Therefore, Mr. Thomas preferred section 30 also be eliminated.

One additional section the amendment did not cover dealt with business tax. In section 23, there was also the filing in a court of competent jurisdiction. Mr. Zuend felt the committee might want to amend that section to incorporate the language "Clark County and not just Carson City," and there was no reason the business tax should be excluded from those provisions. He also noted the word "*department*" should replace "*agency*" in all those amendments.

Assemblyman Anderson said it was his understanding if sections 28, 29, and 30 were removed, it would solve the concerns of the DMV. In addition, section 23 would be amended as set forth above. Mr. Zuend confirmed that was correct. Mr. Anderson asked to make a motion to which the Chair agreed.

ASSEMBLYMAN ANDERSON MOVED TO AMEND AND DO PASS
S.B. 362 AS RECOMMENDED ABOVE.

ASSEMBLYMAN PRICE SECONDED THE MOTION.

Mr. Goldwater noted the only amendment not included by Mr. Anderson's motion had been section 17.6, as stated on page 1 of Exhibit F, as follows: *"If the certificate prepared pursuant to this section shows a net loss for the year covered by the certificate or an amount of tax due for that year which is less than an overpayment made for the proceeding year, the amount or remaining amount of the overpayment must be refunded to the taxpayer within 30 days after the certification was sent to the taxpayer."* Mr. Anderson said that should have been included.

There was no further discussion and the vote was taken.

THE MOTION CARRIED.

Mr. Goldwater referred to the next bill, S.B. 521, known as the "art tax" bill, discussed on page 5 of the work session document (Exhibit D).

Senate Bill 521: Revises provisions governing exemption of works of fine art from certain taxes. (BDR 32-1661)

The bill made a number of substantive changes in the property and sales tax exemptions for the public display of fine art that were adopted by the 1997 legislature. The changes provided:

- Specifically that an exempted taxpayer may charge a fee for the public display of the fine art;
- That the exempted taxpayer must offer a 50 percent discount from the fee for Nevada residents during specified hours each week;
- That taxes were due when a fee was charged to the extent the taxpayer earned "net revenue" from those fees;
- That fine art for public display which had been leased was eligible for the exemption;
- That the fine art displayed must be made available for student tours, by appointment and without charge, for at least 5 hours on at least 20 days during the year the exemption was claimed; and

REVISED - MAY 13, 1999

Proposed Amendments to SB 362 - First Reprint

AMEND PAGE 1

Section 2. 1. line 3 by adding as follows:

If an audit is conducted by the department pursuant to the provisions of this Title, the date on which the audit will be completed must be included in the notice to the taxpayer that the audit will be conducted.

AMEND PAGE 11

Section 13. line 29 by deleting and replacing as follows:

City ~~[Nevada.],~~ [for Clark County] in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.

AMEND PAGE 14

Section 17.6 line 4 through 15 by deleting and replacing as follows:

6. If an overpayment was made and subsection 1 or 2 of NRS 362.145 applies to the taxpayer for the current calendar year or the taxpayer chooses to pay the tax pursuant to subsection 1 or 2 of NRS 362.145 for the current calendar year, [one half of] the over payment may be credited ~~[towards]~~ toward the payment due on August 1 of the current calendar year, ~~[and one quarter may be credited towards each of the other two payments due for the current calendar year.]~~ If neither subsection 1 nor subsection 2 of NRS 362.145 ~~[is applicable]~~ applies to the taxpayer for the current calendar year and the tax is paid on or before May 10 of the next calendar year, the overpayment may be credited ~~[towards]~~ toward that payment. If the certificate prepared pursuant to this section shows a net loss for the year covered by the certificate or an amount of tax due for that year which is less than an overpayment made for the proceeding year, the amount or remaining amount of the overpayment must be refunded to the taxpayer within 30 days after the certification was sent to the taxpayer.

Exhibit F

Page 1 Assembly Committee on Taxation

Date: 5-13-99

Submitted By: Ted Zuend

I. C. R. Fiscal Division Page 1 of 1

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Proposed Amendments to SB 362 Continued

AMEND PAGE 18

Section 26. line 25 through 26 by deleting and replacing as follows:

~~for Clark County~~ in and for the county in which the aggrieved party resides, or
in and for the county where the agency proceeding occurred.

AMEND PAGE 20

Section 30. 2. line 24 by deleting and replacing as follows:

~~for Clark County~~ in and for the county in which the aggrieved party resides, or
in and for the county where the agency proceeding occurred for the recovery of the
amount paid under protest

AMEND PAGE 21

Section 33. 1. line 26 by deleting and replacing as follows:

in a court of competent jurisdiction in Carson City, in and for the county in which
the aggrieved party resides, or in and for the county where the agency proceeding
occurred for the recovery of the whole or any part of the amount with respect to
which the claim has been disallowed.

AMEND PAGE 22

Section 35. line 7 by deleting and replacing as follows:

~~for Clark County~~ in and for the county in which the aggrieved party resides or in
and for the county where the agency proceeding occurred

Section 36. line 9 by deleting and replacing as follows:

~~for Clark County~~ in and for the county in which the aggrieved party resides or in
and for the county where the agency proceeding occurred

AMEND PAGE 25

Section 41. line 40 by deleting and replacing as follows:

~~for Clark County~~ in and for the county in which the aggrieved party resides or in
and for the county where the agency proceeding occurred

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Writer's Direct Dial (775) 684-1222

Fax (775) 687-5798

MEMORANDUM

DATE: May 7, 1999

TO: Assemblyman Bernie Anderson
Chairman, Assembly Committee on Judiciary

FROM: Norm Azevedo, Sr. Deputy Attorney General

SUBJECT: *Venue Sections of S.B. 362*

Pursuant to the request of the Executive Director of the Nevada Department of Taxation, I have prepared this memorandum to address your venue inquiries. The sections of S.B. 362 that contain the venue provisions are as follows:

1. Section 13 applicable to Chapter 361 of the NRS (property tax).
2. Section 26 applicable to Chapter 365 of the NRS (cigarette tax).
3. Section 30 applicable to Chapter 366 of the NRS (special fuel tax).
4. Sections 33 and 36 applicable to Chapter 372 of the NRS (sales and use tax).
5. Section 41 applicable to Chapter 374 of the NRS (sales and use tax).

I was previously requested by Senator Ann O'Connell to prepare a memorandum addressing the venue concerns. A copy of my memorandum to Senator O'Connell is enclosed for your review. As you will note in my memorandum, I made reference to NRS 233B.130(2)(b) of which a copy is also enclosed for your review.

For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised Statutes, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in

Assemblyman Bernie Anderson, Chairman
Assembly Committee on Judiciary
May 7, 1999
Page 2

1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).¹ By having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers. To the extent it is the desire to harmonize the venue provisions of S.B. 362 and the venue provisions of NRS 233B.130(2)(b), I would recommend the following language modifications to the designated sections of S.B. 362:

Sec. 13. NRS 361.435 is hereby amended to read as follows:

361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City ~~[Nevada.]~~ *or Clark County, in any court of competent jurisdiction*

¹ It may also be advisable to caution the language in NRS 364A.280 to follow NRS 233B.130(2)(b). See Section 73 of S.B. 362.

in Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may ***file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may*** bring an action against the state treasurer in ~~{the district court in and for}~~ ***a court of competent jurisdiction in Carson City or Clark County*** for the recovery of the excise tax so paid under protest ***in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred.***

Sec. 30. NRS 366.660 is hereby amended to read as follows:

366.660 1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or any officer thereof to prevent or enjoin the collection pursuant to this chapter of any excise tax or other amount required to be collected.

2. After payment of any such excise tax or other amount under protest, verified and setting forth the grounds of objection to the legality thereof, filed with the department at the time of payment of the tax or other amount protested, the special fuel supplier, special fuel dealer or special fuel user making the payment may bring an action against the state treasurer in ~~{the district court in and for}~~ ***a court of competent jurisdiction in Carson City or Clark County*** for the recovery of the amount so paid under protest ***in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the amount so paid under protest.***

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~{the mailing of the notice of the department's action}~~ ***a final decision*** upon a claim filed pursuant to this chapter ~~{}~~ ***is rendered by the Nevada tax commission***, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City ***or Clark county*** for the

Assemblyman Bernie Anderson, Chairman
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recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial *the action must be tried in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred unless the court with the consent of the attorney general orders a change of place of trial.*

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~{the mailing of the notice of the department's action}~~ *a final decision* upon a claim filed pursuant to this chapter ~~{ }~~ *is rendered by the Nevada tax commission*, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark County* for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

To the extent you need any further information or assistance, you may contact me at 684-1222. I will be out of the office for the remainder of May 7, 1999 and will return first thing Monday morning, May 10, 1999.

Enclosures

NJA:jm

6

**MINUTES OF THE
SENATE COMMITTEE ON TAXATION**

**Seventieth Session
May 24, 1999**

The Senate Committee on Taxation was called to order by Chairman Mike McGinness, at 12:06 p.m., on Monday, May 24, 1999, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mike McGinness, Chairman
Senator Dean A. Rhoads, Vice Chairman
Senator Randolph J. Townsend
Senator Ann O'Connell
Senator Joseph M. Neal Jr.
Senator Bob Coffin
Senator Michael Schneider

STAFF MEMBERS PRESENT:

Kevin Welsh, Fiscal Analyst
Mavis Scarff, Committee Secretary

Chairman McGinness requested a motion to concur or to not concur on Amendment No. 1116 to Senate Bill (S.B.) 428.

SENATE BILL 428: Makes various changes concerning intoxicating liquor.
(BDR 32-1238)

SENATOR COFFIN MOVED TO CONCUR WITH AMENDMENT NO. 1116
TO SENATE BILL 428.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Senate Committee on Taxation
May 24, 1999
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Senator McGinness called for a motion to concur or to not concur on Amendment No. 945 to Senate Bill 362.

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

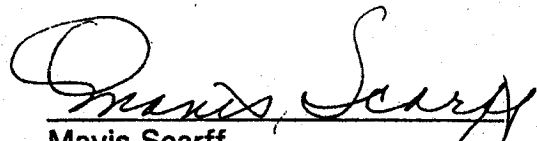
SENATOR O'CONNELL MOVED TO CONCUR ON AMENDMENT NO. 945 TO SENATE BILL 362.

SENATOR TOWNSEND SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Chairman McGinness adjourned the meeting at 12:21 p.m.

RESPECTFULLY SUBMITTED:



Mavis Scarff,
Committee Secretary

APPROVED BY:



Senator Mike McGinness, Chairman

DATE: _____

5/26/99

BILLS

SENATE BILL NO. 362—SENATOR O'CONNELL

MARCH 10, 1999

Referred to Committee on Taxation

SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in *bolded italics* is new; matter between brackets (~~omitted material~~) is material to be omitted.

AN ACT relating to taxation; prohibiting, under certain circumstances, the imposition of penalties and interest on delinquent taxes for the period during which an audit of a taxpayer is extended; revising the manner in which penalties and interest are calculated if a taxpayer has made overpayments and underpayments; providing for the appeal of any decision of the executive director or other officer of the department of taxation to the Nevada tax commission; expanding the Taxpayers' Bill of Rights; increasing the amount of taxes, penalties and interest that may be waived if a taxpayer has relied to his detriment on the advice of the department; authorizing certain actions relating to the payment of taxes to be brought in Clark County; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Chapter 360 of NRS is hereby amended by adding thereto
- 2 the provisions set forth as sections 2 and 3 of this act.
- 3 Sec. 2. 1. *If an audit is conducted pursuant to the provisions of*
- 4 *this Title, the date on which the audit will be completed must be included*
- 5 *in the notice to the taxpayer that the audit will be conducted.*
- 6 2. *The date on which the audit will be completed may be extended by*
- 7 *the department if the department gives prior written notice of the*
- 8 *extension to the taxpayer. The notice must include an explanation of the*
- 9 *reason or reasons that the extension is required.*
- 10 3. *If, after the audit, the department determines that delinquent taxes*
- 11 *are due, interest and penalties may not be imposed for the period of the*
- 12 *extension if the taxpayer did not request the extension or was not*
- 13 *otherwise the cause of the extension.*



* S B 3 6 2 *

1 Sec. 3. If an officer, employee or agent of the department
2 determines that a taxpayer is entitled to an exemption or has been taxed
3 or assessed more than is required by law, he shall give written notice of
4 that determination to the taxpayer. The notice must:

5 1. Be given within 30 days after the officer, employee or agent makes
6 his determination or, if the determination is made as a result of an audit,
7 within 30 days after the completion of the audit; and

8 2. If appropriate, include:

9 (a) An explanation that an overpayment may be credited against any
10 amount due from the taxpayer; or

11 (b) Instructions indicating the manner in which the taxpayer may
12 petition for a refund of any overpayment.

13 Sec. 4. NRS 360.245 is hereby amended to read as follows:

14 360.245 1. Except as otherwise provided in this Title:

15 (a) All decisions of the executive director or other officer of the
16 department made pursuant to ~~subsection 2 of NRS 360.130~~ this Title are
17 final unless appealed to the Nevada tax commission. ~~as provided by law.~~

18 (b) Any natural person, partnership, corporation, association or other
19 business or legal entity who is aggrieved by such a decision may ~~so~~
20 appeal the decision by filing a notice of appeal with the department within
21 30 days after service of the decision upon that person or business or legal
22 entity.

23 2. Service of the decision must be made personally or by certified mail.
24 If service is made by certified mail:

25 (a) The decision must be enclosed in an envelope which is addressed to
26 the taxpayer at his address as it appears in the records of the department.

27 (b) It is deemed to be complete at the time the appropriately addressed
28 envelope containing the decision is deposited with the United States Postal
29 Service.

30 3. The Nevada tax commission, as head of the department, may review
31 all ~~other~~ decisions made by the executive director ~~and~~ that are not
32 otherwise appealed to the commission pursuant to this section.

33 4. The Nevada tax commission may reverse, affirm or modify ~~them~~
34 ~~any~~ decision appealed to or reviewed by the commission pursuant
35 to this section.

36 5. A decision of the Nevada tax commission is a final decision for the
37 purposes of judicial review. The executive director or any other employee
38 or representative of the department shall not seek judicial review of such a
39 decision.

40 ~~5.~~ 6. The Nevada tax commission shall provide by regulation for:

41 (a) Notice to be given to each county and other local government
42 within the county of any decision upon an appeal to the commission that
43 the commission determines is likely to affect the revenue of the county or

1 other local government. The regulations must specify the form and contents
2 of the notice and requirements for the number of days before a meeting of
3 the commission that the notice must be transmitted. ~~to the county or~~
4 ~~counties.~~ If the parties to the appeal enter into a stipulation as to the
5 issues that will be heard on appeal, the commission shall transmit a copy
6 of the notice to the district attorney of each county which the commission
7 determines is likely to be affected by the decision. Upon receipt of such a
8 notice, the ~~county~~ district attorney shall transmit a copy of the notice to
9 each local government within the county which ~~it~~ the commission
10 determines is likely to be affected by the decision. If there is no such
11 stipulation, the commission shall transmit a copy of the notice,
12 accompanied by a summary of the issues that will be heard on appeal, to
13 the governing bodies of the counties and other local governments which
14 the commission determines are likely to be affected by the decision.

15 (b) The manner in which a county or other local government which is
16 not a party to such an appeal may become a party, and the procedure for its
17 participation in the appeal.

18 ~~6.~~ 7. A county or other local government which is a party and is
19 aggrieved by the decision of the Nevada tax commission is entitled to seek
20 judicial review of the decision.

21 ~~7.~~ 8. Upon application by a taxpayer, the Nevada tax commission
22 shall review the denial of relief pursuant to NRS 361.4835 and may grant,
23 deny or modify the relief sought.

24 Sec. 5. NRS 360.291 is hereby amended to read as follows:

25 360.291 1. The legislature hereby declares that each taxpayer has the
26 right:

27 ~~1.~~ (a) To be treated by officers and employees of the department with
28 courtesy, fairness, uniformity, consistency and common sense.

29 ~~2.~~ (b) To a prompt response from the department to each
30 communication from the taxpayer.

31 ~~3.~~ (c) To provide the minimum documentation and other information
32 as may reasonably be required by the department to carry out its duties.

33 ~~4.~~ (d) To written explanations of common errors, oversights and
34 violations that taxpayers experience and instructions on how to avoid such
35 problems.

36 ~~5.~~ (e) To be ~~informed~~ notified, in writing, by the department
37 whenever its officer, employee or agent determines that the taxpayer is
38 entitled to an exemption or has been taxed or assessed more than is
39 required by law.

40 ~~6.~~ (f) To written instructions indicating how the taxpayer may petition
41 for:

42 ~~6.~~ (1) An adjustment of an assessment; ~~for~~



1 ~~-(b)-~~ (2) A refund or credit for overpayment of taxes, interest or
2 penalties ~~+~~
3 ~~-7-~~; or
4 (3) *A reduction in or the release of a bond or other form of security*
5 *required to be furnished pursuant to the provisions of this Title that are*
6 *administered by the department.*
7 (g) To recover an overpayment of taxes promptly upon the final
8 determination of such an overpayment.
9 ~~18-~~ (h) To obtain specific advice from the department concerning taxes
10 imposed by the state.
11 ~~19-~~ (i) In any meeting with the department, including an audit,
12 conference, interview or hearing:
13 ~~1(a)-~~ (1) To an explanation by an officer, agent or employee of the
14 department that describes the procedures to be followed and the taxpayer's
15 rights thereunder;
16 ~~1(b)-~~ (2) To be represented by himself or anyone who is otherwise
17 authorized by law to represent him before the department;
18 ~~1(c)-~~ (3) To make an audio recording using the taxpayer's own
19 equipment and at the taxpayer's own expense; and
20 ~~1(d)-~~ (4) To receive a copy of any document or audio recording made
21 by or in the possession of the department relating to the determination or
22 collection of any tax for which the taxpayer is assessed, upon payment of
23 the actual cost to the department of making the copy.
24 ~~10-~~ (j) To a full explanation of the department's authority to assess a
25 tax or to collect delinquent taxes, including the procedures and notices for
26 review and appeal that are required for the protection of the taxpayer. An
27 explanation which meets the requirements of this section must also be
28 included with each notice to a taxpayer that an audit will be conducted by
29 the department.
30 ~~11-~~ (k) To the immediate release of any lien which the department has
31 placed on real or personal property for the nonpayment of any tax when:
32 ~~1(a)-~~ (1) The tax is paid;
33 ~~1(b)-~~ (2) The period of limitation for collecting the tax expires;
34 ~~1(c)-~~ (3) The lien is the result of an error by the department;
35 ~~1(d)-~~ (4) The department determines that the taxes, interest and
36 penalties are secured sufficiently by a lien on other property;
37 ~~1(e)-~~ (5) The release or subordination of the lien will not jeopardize the
38 collection of the taxes, interest and penalties;
39 ~~1(f)-~~ (6) The release of the lien will facilitate the collection of the taxes,
40 interest and penalties; or
41 ~~1(g)-~~ (7) The department determines that the lien is creating an
42 economic hardship.

1 ~~12-~~ (l) To the release or reduction of a bond *or other form of security*
2 *required to be furnished pursuant to the provisions of this Title* by the
3 department in accordance with applicable statutes and regulations.
4 ~~13-~~ (m) To be free from investigation and surveillance by an officer,
5 agent or employee of the department for any purpose that is not directly
6 related to the administration of the provisions of this Title ~~1-~~ *that are*
7 *administered by the department.*
8 ~~14-~~ (n) To be free from harassment and intimidation by an officer,
9 agent or employee of the department for any reason.
10 (o) *To have statutes imposing taxes and any regulations adopted*
11 *pursuant thereto construed in favor of the taxpayer if those statutes or*
12 *regulations are of doubtful validity or effect, unless there is a specific*
13 *statutory provision that is applicable.*
14 2. *The provisions of this Title governing the administration and*
15 *collection of taxes by the department must not be construed in such a*
16 *manner as to interfere or conflict with the provisions of this section.*
17 3. *The provisions of this section apply to any tax administered and*
18 *collected pursuant to the provisions of this Title by the department.*
19 Sec. 6. NRS 360.2935 is hereby amended to read as follows:
20 360.2935 A taxpayer is entitled to receive on any overpayment of taxes
21 , *after the offset required by NRS 360.320 has been made*, a refund
22 together with interest at a rate determined pursuant to NRS 17.130. No
23 interest is allowed on a refund of any penalties or interest paid by a
24 taxpayer.
25 Sec. 7. NRS 360.294 is hereby amended to read as follows:
26 360.294 ~~1Upon~~
27 1. *Except as otherwise provided in subsection 2, upon* proof that a
28 taxpayer has relied to his detriment on written advice provided to him by an
29 *officer, agent or employee of the department* ~~1-~~
30 ~~1-~~ *or on an opinion of the attorney general:*
31 (a) The executive director or his designee may waive taxes, penalties
32 and interest owed by the taxpayer in an amount not to exceed ~~1\$5,000;~~ and
33 ~~2-~~ *\$10,000; and*
34 (b) The Nevada tax commission may waive any such taxes, penalties
35 and interest in an amount greater than ~~1\$5,000-~~ *\$10,000.*
36 2. *Upon proof that a taxpayer has in good faith collected or remitted*
37 *taxes imposed pursuant to the provisions of this Title that are*
38 *administered by the department, in reliance upon written advice provided*
39 *by an officer, agent or employee of the department, an opinion of the*
40 *attorney general or the Nevada tax commission, or the written results of*
41 *an audit of his records conducted by the department, the taxpayer may*
42 *not be required to pay delinquent taxes, penalties or interest if the*



1 department determines after the completion of a subsequent audit that
2 the taxes he collected or remitted were deficient.

3 Sec. 8. NRS 360.320 is hereby amended to read as follows:

4 360.320 ~~{In}~~

5 1. Except as otherwise provided in this Title, in making a
6 determination of the amount required to be paid, the department ~~{may}~~
7 shall offset overpayments for ~~{a period or periods, together with interest on~~
8 ~~the overpayments,}~~ a reporting period of an audit period against
9 underpayments for ~~{another period or periods, against penalties, and against~~
10 ~~the interest on underpayments,}~~ the same reporting period. An
11 overpayment of a tax may not be offset against an underpayment for any
12 other tax required to be paid by the taxpayer.

13 2. If it is determined that there is a net deficiency:

14 (a) Any penalty imposed must be calculated based on the amount of
15 the net deficiency.

16 (b) Any interest imposed on the net deficiency must be calculated from
17 the date of the last overpayment or underpayment, whichever is later.

18 3. If it is determined that the taxpayer is entitled to a refund, any
19 interest to which the taxpayer is entitled must be calculated from the date
20 of the last overpayment or underpayment, whichever is later.

21 Sec. 9. NRS 360.395 is hereby amended to read as follows:

22 360.395 1. Before a person may seek judicial review pursuant to
23 NRS 233B.130 from a final order of the ~~{department}~~ Nevada tax
24 commission upon a petition for redetermination, he must:

25 (a) Pay the amount of the determination; or

26 (b) Enter into a written agreement with the department establishing a
27 later date by which he must pay the amount of the determination.

28 2. If a court determines that the amount of the final order should be
29 reduced or that the person does not owe any taxes, the department shall
30 credit or refund any amount paid by the person that exceeds the amount
31 owed ~~{+}~~, with interest determined in accordance with NRS 360.2935.

32 Sec. 10. NRS 360.417 is hereby amended to read as follows:

33 360.417 ~~{Unless}~~ Except as otherwise provided in NRS 360.320 and
34 section 2 of this act and unless a different penalty or rate of interest is
35 specifically provided by statute, any person who fails to pay any tax
36 provided for in chapter 362, 364A, 365, 369, 370, 372, 373, 374, 377,
37 377A, 444A or 585 of NRS, or fee provided for in NRS 482.313 or
38 590.700 to 590.920, inclusive, to the state or a county within the time
39 required, shall pay a penalty of not more than 10 percent of the amount of
40 the tax or fee which is owed, as determined by the department, in addition
41 to the tax or fee, plus interest at the rate of 1 percent per month, or fraction
42 of a month, from the last day of the month following the period for which
43 the amount or any portion of the amount should have been reported until

1 the date of payment. The amount of any penalty imposed must be based
2 on a graduated schedule adopted by the department which takes into
3 consideration the length of time the tax or fee remained unpaid.

4 Sec. 11. NRS 360.4193 is hereby amended to read as follows:

5 360.4193 1. If a person is delinquent in the payment of any tax or fee
6 administered by the department or has not paid the amount of a deficiency
7 determination, the department may bring an action in a court of this state, a
8 court of any other state or a court of the United States to collect the
9 delinquent or deficient amount, penalties and interest. The action ~~{must}~~ :

10 (a) May not be brought if the decision that the payment is delinquent
11 or that there is a deficiency determination is on appeal to the Nevada tax
12 commission pursuant to NRS 360.245.

13 (b) Must be brought not later than 3 years after the payment became
14 delinquent or the determination became final or within 5 years after the last
15 recording of an abstract of judgment or of a certificate constituting a lien
16 for tax owed.

17 2. The attorney general shall prosecute the action. The provisions of
18 NRS and the Nevada Rules of Civil Procedure and Nevada Rules of
19 Appellate Procedure relating to service of summons, pleadings, proofs,
20 trials and appeals are applicable to the proceedings. In the action, a writ of
21 attachment may issue. A bond or affidavit is not required before an
22 attachment may be issued.

23 3. In the action, a certificate by the department showing the
24 delinquency is prima facie evidence of:

25 (a) The determination of the tax or fee or the amount of the tax or fee;

26 (b) The delinquency of the amounts; and

27 (c) The compliance by the department with all of the procedures
28 required by law related to the computation and determination of the
29 amounts.

30 Sec. 12. NRS 361.0687 is hereby amended to read as follows:

31 361.0687 1. A person who intends to locate or expand a business in
32 this state may apply to the commission on economic development for a
33 partial abatement from the taxes imposed by this chapter on the personal
34 property of the new or expanded business.

35 2. The commission on economic development may approve an
36 application for a partial abatement if the commission makes the following
37 determinations:

38 (a) The goals of the business are consistent with the goals of the
39 commission and the community concerning industrial development and
40 diversification.

41 (b) The abatement is a significant factor in the decision of the applicant
42 to locate or expand a business in this state or the appropriate affected local



* 5 8 3 6 2 *



* 5 8 3 6 2 *

1 government determines that the abatement will be beneficial to the
2 economic development of the community.

3 (c) The average hourly wage which will be paid by the new or expanded
4 business to its employees in this state is at least 125 percent of the average
5 statewide industrial hourly wage as established by the employment security
6 division of the department of employment, training and rehabilitation on
7 July 1 of each fiscal year.

8 (d) The business will provide a health insurance plan for all employees
9 that includes an option for health insurance coverage for dependents of the
10 employees.

11 (e) The cost to the business for the benefits the business provides to its
12 employees in this state will meet the minimum requirements for benefits
13 established by the commission pursuant to subsection 8-1 9.

14 (f) A capital investment for personal property will be made to locate or
15 expand the business in Nevada which is at least:

16 (1) If the personal property directly related to the establishment of the
17 business in this state is primarily located in a county whose population:

18 (I) Is 100,000 or more, \$50,000,000.

19 (II) Is less than 100,000, \$20,000,000.

20 (2) If the personal property directly related to the expansion of the
21 business is primarily located in a county whose population:

22 (I) Is 100,000 or more, \$10,000,000.

23 (II) Is less than 100,000, \$4,000,000.

24 (g) The business will create at least the following number of new, full-
25 time and permanent jobs in the State of Nevada by the fourth quarter that it
26 is in operation:

27 (1) If a new business will be primarily located in a county whose
28 population:

29 (I) Is 100,000 or more, 100 jobs.

30 (II) Is less than 100,000, 35 jobs.

31 (2) If an expanded business will be primarily located in a county
32 whose population:

33 (I) Is 100,000 or more, and the business has at least 100 employees
34 in this state, 20 jobs. An expanded business primarily located in such a
35 county that has less than 100 employees is not eligible for a partial
36 abatement pursuant to this section.

37 (II) Is less than 100,000, and the business has at least 35 employees
38 in this state, 10 jobs. An expanded business primarily located in such a
39 county that has less than 35 employees is not eligible for a partial
40 abatement pursuant to this section.

41 (h) For the expansion of a business primarily located in a county whose
42 population:

1 (1) Is 100,000 or more, the book value of the assets of the business in
2 this state is at least \$20,000,000.

3 (2) Is less than 100,000, the book value of the assets of the business
4 in this state is at least \$5,000,000.

5 (i) The business is registered pursuant to the laws of this state or the
6 applicant commits to obtain a valid business license and all other permits
7 required by the county, city or town in which the business operates.

8 (j) The proposed abatement has been approved by the governing body of
9 the appropriate affected local government as determined pursuant to the
10 regulations adopted pursuant to subsection 8-1 9. In determining whether to
11 approve a proposed abatement, the governing body shall consider whether
12 the taxes to be paid by the business are sufficient to pay for any investment
13 required to be made by the local government for services associated with
14 the relocation or expansion of the business, including, without limitation,
15 costs related to the construction and maintenance of roads, sewer and water
16 services, fire and police protection, and the construction and maintenance
17 of schools.

18 (k) The applicant has executed an agreement with the commission which
19 states that the business will continue in operation in Nevada for 10 or more
20 years after the date on which a certificate of eligibility for the abatement is
21 issued pursuant to subsection 5 and will continue to meet the eligibility
22 requirements contained in this subsection. The agreement must bind the
23 successors in interest of the business for the required period.

24 3. An applicant shall, upon the request of the executive director of the
25 commission on economic development, furnish him with copies of all
26 records necessary to verify that the applicant meets the requirements of
27 subsection 2.

28 4. The percentage of the abatement must be 50 percent of the taxes
29 payable each year.

30 5. If an application for a partial abatement is approved, the commission
31 on economic development shall immediately forward a certificate of
32 eligibility for the abatement to:

33 (a) The department; and

34 (b) The county assessor of each county in which personal property
35 directly related to the establishment or expansion of the business will be
36 located.

37 6. Upon receipt by the department of the certificate of eligibility, the
38 taxpayer is eligible for an abatement from the tax imposed by this chapter
39 for 10 years:

40 (a) For the expansion of a business, on all personal property of the
41 business that is located in Nevada and directly related to the expansion of
42 the business in this state.



1 (b) For a new business, on all personal property of the business that is
2 located in Nevada and directly related to the establishment of the business
3 in this state.

4 7. If a business for which an abatement has been approved is not
5 maintained in this state in accordance with the agreement required in
6 subsection 2, for at least 10 years after the commission on economic
7 development approved the abatement, the person who applied for the
8 abatement shall repay to the county treasurer or treasurers who would have
9 received the taxes but for the abatement the total amount of all taxes that
10 were abated pursuant to this section. ~~{The}~~ *Except as otherwise provided in*
11 *NRS 360.320 and section 2 of this act, the person who applied for the*
12 *abatement shall pay interest on the amount due at the rate of 10 percent per*
13 *annum for each month, or portion thereof, from the last day of the month*
14 *following the period for which the payment would have been made if the*
15 *abatement had not been granted until the date of the actual payment of the*
16 *tax.*

17 8. A county treasurer:

18 (a) Shall deposit any money that he receives pursuant to subsection 7 in
19 one or more of the funds established by a local government of the county
20 pursuant to NRS 354.611, 354.6113 or 354.6115; and

21 (b) May use the money deposited pursuant to paragraph (a) only for the
22 purposes authorized by NRS 354.611, 354.6113 and 354.6115.

23 9. The commission on economic development shall adopt regulations
24 necessary to carry out the provisions of this section. The regulations must
25 include, but not be limited to:

26 (a) A method for determining the appropriate affected local government
27 to approve a proposed abatement and the procedure for obtaining such
28 approval; and

29 (b) Minimum requirements for benefits that a business applying for a
30 partial abatement must offer to its employees to be approved for the partial
31 abatement.

32 10. The department shall adopt regulations concerning how county
33 assessors shall administer partial abatements approved pursuant to this
34 section.

35 11. An applicant for an abatement who is aggrieved by a final decision
36 of the commission on economic development may petition for judicial
37 review in the manner provided in chapter 233B of NRS.

38 Sec. 13. NRS 361.435 is hereby amended to read as follows:

39 361.435 Any property owner owning property of like kind in more than
40 one county in the state and desiring to proceed with a suit under the
41 provisions of NRS 361.420 may, where the issues in the cases are
42 substantially the same in all or in some of the counties concerning the
43 assessment of taxes on such property, consolidate any of the suits in one



1 action and bring the action in any court of competent jurisdiction in Carson
2 City ~~{Nevada}~~ *or Clark County.*

3 Sec. 14. NRS 361.5648 is hereby amended to read as follows:

4 361.5648 1. Within 30 days after the first Monday in March of each
5 year, with respect to each property on which the tax is delinquent, the tax
6 receiver of the county shall mail notice of the delinquency by first-class
7 mail to:

8 (a) The owner or owners of the property;

9 (b) The person or persons listed as the taxpayer or taxpayers on the tax
10 rolls, at their last known addresses, if the names and addresses are known;
11 and

12 (c) Each holder of a recorded security interest if the holder has made a
13 request in writing to the tax receiver for the notice, which identifies the
14 secured property by the parcel number assigned to it in accordance with the
15 provisions of NRS 361.189.

16 2. The notice of delinquency must state:

17 (a) The name of the owner of the property, if known.

18 (b) The description of the property on which the taxes are a lien.

19 (c) The amount of the taxes due on the property and the penalties and
20 costs as provided by law.

21 (d) That if the amount is not paid by the taxpayer or his successor in
22 interest, the tax receiver will, at 5 p.m. on the first Monday in June of the
23 current year, issue to the county treasurer, as trustee for the state and
24 county, a certificate authorizing him to hold the property, subject to
25 redemption within 2 years after the date of the issuance of the certificate, by
26 payment of the taxes and accruing taxes, penalties and costs, together with
27 interest on the taxes at the rate of 10 percent per annum from the date due
28 until paid as provided by law, *except as otherwise provided in NRS*
29 *360.320 and section 2 of this act*, and that redemption may be made in
30 accordance with the provisions of chapter 21 of NRS in regard to real
31 property sold under execution.

32 3. Within 30 days after mailing the original notice of delinquency, the
33 tax receiver shall issue his personal affidavit to the board of county
34 commissioners affirming that due notice has been mailed with respect to
35 each parcel. The affidavit must recite the number of letters mailed, the
36 number of letters returned, and the number of letters finally determined to
37 be undeliverable. Until the period of redemption has expired, the tax
38 receiver shall maintain detailed records which contain such information as
39 the department may prescribe in support of his affidavit.

40 4. A second copy of the notice of delinquency must be sent by certified
41 mail, not less than 60 days before the expiration of the period of
42 redemption as stated in the notice.

43 5. The cost of each mailing must be charged to the delinquent taxpayer.



1 Sec. 15. NRS 361.570 is hereby amended to read as follows:
2 361.570 1. Pursuant to the notice given as provided in NRS
3 361.5648 and 361.565 and at the time stated in the notice, the tax receiver
4 shall make out his certificate authorizing the county treasurer, as trustee for
5 the state and county, to hold the property described in the notice for the
6 period of 2 years after the first Monday in June of the year the certificate is
7 dated, unless sooner redeemed.
8 2. The certificate must specify:
9 (a) The amount of delinquency, including the amount and year of
10 assessment;
11 (b) The taxes and the penalties and costs added thereto, and that, *except*
12 *as otherwise provided in NRS 360.320 and section 2 of this act*, interest
13 on the taxes will be added at the rate of 10 percent per annum from the date
14 due until paid; and
15 (c) The name of the owner or taxpayer, if known.
16 3. The certificate must state, and it is hereby provided:
17 (a) That the property may be redeemed within 2 years ~~from~~ *after* its
18 date; and
19 (b) That, if not redeemed, the title to the property vests in the county for
20 the benefit of the state and county.
21 4. Until the expiration of the period of redemption, the property held
22 pursuant to the certificate must be assessed annually to the county treasurer
23 as trustee, and before the owner or his successor redeems the property, he
24 shall also pay the county treasurer holding the certificate any additional
25 taxes assessed and accrued against the property after the date of the
26 certificate, together with the interest on the taxes at the rate of 10 percent
27 per annum from the date due until paid ~~from~~, *unless otherwise provided in*
28 *NRS 360.320 or section 2 of this act*.
29 5. The county treasurer shall take certificates issued to him under the
30 provisions of this section.
31 Sec. 16. NRS 361.870 is hereby amended to read as follows:
32 361.870 1. Any claimant aggrieved by a decision of the department
33 or a county assessor which denies the refund claimed under the Senior
34 Citizens' Property Tax Assistance Act may have a review of the denial
35 before the ~~executive director~~ *Nevada tax commission* if, within 30 days
36 after the claimant receives notice of the denial, he submits a written
37 petition for review to the ~~department~~ *commission*.
38 2. Any claimant aggrieved by the denial in whole or in part of relief
39 claimed under the Senior Citizens' Property Tax Assistance Act, or by any
40 other final action or review of the ~~executive director~~ *Nevada tax*
41 *commission*, is entitled to judicial review thereof.

1 Sec. 17. NRS 362.130 is hereby amended to read as follows:
2 362.130 1. When the department determines from the annual
3 statement filed pursuant to NRS 362.110 the net proceeds of any minerals
4 extracted, it shall prepare its certificate of the amount of the net proceeds
5 and the tax due and shall send a copy to the owner of the mine, operator of
6 the mine ~~or~~ or recipient of the royalty, as the case may be.
7 2. The certificate must be prepared and mailed not later than April 20
8 immediately following the month of February during which the statement
9 was filed.
10 3. The tax due, as indicated in the certificate prepared pursuant to this
11 section, must be paid on or before May 10 of the year in which the
12 certificate is received.
13 4. If the owner of the mine, operator of the mine ~~or~~ or recipient of the
14 royalty paid taxes pursuant to subsection 1 or 2 of NRS 362.145, the
15 certificate must indicate any deficiency remaining from the previous
16 calendar year or any overpayment of the taxes made for the previous
17 calendar year.
18 5. Any deficiency remaining from the previous calendar year, as
19 indicated on the certificate prepared pursuant to this section, must be paid
20 on or before May 10 of the year in which the certificate is received.
21 6. If an overpayment was made and subsection 1 or 2 of NRS 362.145
22 applies to the taxpayer for the current calendar year or the taxpayer chooses
23 to pay the tax pursuant to subsection 1 or 2 of NRS 362.145 for the current
24 calendar year, one-half of the overpayment may be credited towards the
25 payment due on August 1 of the current calendar year and one-quarter may
26 be credited towards each of the other two payments due for the current
27 calendar year. If neither subsection 1 nor subsection 2 of NRS 362.145 is
28 applicable to the taxpayer for the current calendar year and the tax is paid
29 on or before May 10 of the next calendar year, the overpayment may be
30 credited towards that payment. *The provisions of this subsection do not*
31 *prohibit the taxpayer from filing a claim for a refund of the overpayment*
32 *with the department*.
33 Sec. 18. NRS 362.160 is hereby amended to read as follows:
34 362.160 1. ~~Except as otherwise provided in NRS 360.320 and~~
35 *section 2 of this act*, if the amount of any tax required by NRS 362.100 to
36 362.240, inclusive, is not paid within 10 days after it is due, it is delinquent
37 and must be collected as other delinquent taxes are collected by law,
38 together with a penalty of 10 percent of the amount of the tax which is
39 owed, as determined by the department, in addition to the tax, plus interest
40 at the rate of ~~1~~ 1 percent per month, or fraction of a month, from the
41 date the tax was due until the date of payment.
42 2. Any person extracting any mineral or receiving a royalty may appeal
43 from the imposition of the penalty and interest to the Nevada tax



1 commission by filing a notice of appeal ~~{within 30 days after the tax~~
2 ~~became due}~~ in accordance with the requirements set forth in NRS
3 360.245.

4 Sec. 19. NRS 362.230 is hereby amended to read as follows:

5 362.230 1. Every person extracting any mineral in this state, or
6 receiving a royalty in connection therewith, who fails to file with the
7 department the statements provided for in NRS 362.100 to 362.240,
8 inclusive, during the time and in the manner provided for in NRS 362.100
9 to 362.240, inclusive, shall pay a penalty of not more than \$5,000. If any
10 such person fails to file the statement, the department may ascertain and
11 certify the net proceeds of the minerals extracted or the value of the royalty
12 from all data and information obtainable, and the amount of the tax due
13 must be computed on the basis of the amount due so ascertained and
14 certified.

15 2. The executive director shall determine the amount of the penalty.
16 This penalty becomes a debt due the State of Nevada and, upon collection,
17 must be deposited in the state treasury to the credit of the state general
18 fund.

19 3. Any person extracting any mineral or receiving a royalty may appeal
20 from the imposition of the penalty to the Nevada tax commission by filing a
21 notice of appeal ~~{within 30 days after the decision of the executive~~
22 ~~director}~~ in accordance with the requirements set forth in NRS 360.245.

23 Sec. 20. NRS 364A.170 is hereby amended to read as follows:

24 364A.170 1. A proposed business that qualifies pursuant to the
25 provisions of this section is entitled to an exemption of:

26 (a) Eighty percent of the amount of tax otherwise due pursuant to NRS
27 364A.140 during the first 4 quarters of its operation;

28 (b) Sixty percent of the amount of tax otherwise due pursuant to NRS
29 364A.140 during the second 4 quarters of its operation;

30 (c) Forty percent of the amount of tax otherwise due pursuant to NRS
31 364A.140 during the third 4 quarters of its operation; and

32 (d) Twenty percent of the amount of tax otherwise due pursuant to NRS
33 364A.140 during the fourth 4 quarters of its operation.

34 2. A proposed business is entitled to the exemption pursuant to
35 subsection 1 if:

36 (a) In a county whose population is 35,000 or more:

37 (1) The business will have 75 or more full-time employees on the
38 payroll of the business by the fourth quarter that it is in operation;

39 (2) Establishing the business will require the business to make a
40 capital investment of \$1,000,000 in Nevada; and

41 (3) The exemption is approved by the commission on economic
42 development pursuant to subsection 3.

43 (b) In a county whose population is less than 35,000:

1 (1) The business will have 25 or more full-time employees on the
2 payroll of the business by the fourth quarter that it is in operation;

3 (2) Establishing the business will require the business to make a
4 capital investment of \$250,000 in Nevada; and

5 (3) The exemption is approved by the commission on economic
6 development pursuant to subsection 3.

7 3. A proposed business must apply to the commission on economic
8 development to obtain the exemption authorized pursuant to this section.
9 The commission shall certify a business's eligibility for the exemption
10 pursuant to this section if:

11 (a) The proposed business commits to the requirements of
12 subparagraphs (1) and (2) of paragraph (a) or (b) of subsection 2,
13 whichever is applicable; and

14 (b) The proposed business is consistent with the commission's plan for
15 economic diversification and development.

16 Upon certification, the commission shall immediately forward the
17 certificate of eligibility for the exemption to the Nevada tax commission.

18 4. Upon receipt of such a certificate, the Nevada tax commission shall
19 include the exemption in the calculation of the tax paid by the business. A
20 business for which an exemption is approved that does not:

21 (a) Have the required number of full-time employees on the payroll of
22 the business by the fourth quarter that it is in operation; or

23 (b) Make the required capital investment in Nevada in the course of
24 establishing the business,

25 is required to repay to the department the amount of the exemption that was
26 allowed pursuant to this section before the business's failure to comply
27 unless the Nevada tax commission determines that the business has
28 substantially complied with the requirements of this section. ~~{The}~~ Except
29 as otherwise provided in NRS 360.320 and section 2 of this act, the
30 business is also required to pay interest on the amount due at the rate most
31 recently established pursuant to NRS 99.040 for each month, or portion
32 thereof, from the last day of the month following the period for which the
33 payment would have been made had the exemption not been granted until
34 the date of payment of the tax.

35 5. The commission on economic development shall adopt regulations
36 governing the determination made pursuant to subsection 3 of a proposed
37 business's eligibility for the exemption provided in this section.

38 6. The Nevada tax commission:

39 (a) Shall adopt regulations governing the investments that qualify for the
40 purposes of the required capital investment pursuant to subparagraph (2) of
41 paragraph (a) or (b) of subsection 2.

42 (b) May adopt such other regulations as are necessary to carry out the
43 provisions of this section.



1 Sec. 21. NRS 364A.180 is hereby amended to read as follows:
2 364A.180 Upon written application made before the date on which
3 payment must be made, for good cause the department may extend by 30
4 days the time within which a business is required to pay the tax imposed by
5 this chapter. If the tax is paid during the period of extension, no penalty or
6 late charge may be imposed for failure to pay at the time required, but the
7 business shall pay interest at the rate most recently established pursuant to
8 NRS 99.040 for each month, or fraction of a month, from the last day of the
9 month following the date on which the amount would have been due
10 without the extension until the date of payment ~~{} , unless otherwise~~
11 *provided in NRS 360.320 or section 2 of this act.*

12 Sec. 22. NRS 364A.260 is hereby amended to read as follows:
13 364A.260 1. ~~{Interest}~~ *Except as otherwise provided in NRS*
14 *360.320, interest* must be paid upon any overpayment of any amount of the
15 fee or tax imposed by this chapter at the rate of one-half of 1 percent per
16 month, or fraction thereof, from the last day of the calendar month
17 following the period for which the overpayment was made. No refund or
18 credit may be made of any interest imposed upon the person or business
19 making the overpayment with respect to the amount being refunded or
20 credited.

21 2. The interest must be paid:
22 (a) In the case of a refund, to the last day of the calendar month
23 following the date upon which the person making the overpayment, if he
24 has not already filed a claim, is notified by the department that a claim may
25 be filed or the date upon which the claim is certified to the state board of
26 examiners, whichever is earlier.

27 (b) In the case of a credit, to the same date as that to which interest is
28 computed on the fee or tax or amount against which the credit is applied.

29 3. If the department determines that any overpayment has been
30 made intentionally or by reason of carelessness, it shall not allow any
31 interest on it.

32 Sec. 23. NRS 364A.280 is hereby amended to read as follows:
33 364A.280 1. Within 90 days after ~~{the mailing of the notice of the~~
34 ~~department's action}~~ *a final decision* upon a claim filed pursuant to this
35 chapter ~~{} is rendered by the Nevada tax commission,~~ the claimant may
36 bring an action against the department on the grounds set forth in the claim
37 in a court of competent jurisdiction in Carson City or Clark County for the
38 recovery of the whole or any part of the amount with respect to which the
39 claim has been disallowed.

40 2. Failure to bring an action within the time specified constitutes a
41 waiver of any demand against the state on account of alleged
42 overpayments.

1 Sec. 24. NRS 364A.290 is hereby amended to read as follows:

2 364A.290 1. If the department fails to mail notice of action on a
3 claim within 6 months after the claim is filed, the claimant may ~~{before the~~
4 ~~mailing of notice by the department of its action on the claim}~~ consider the
5 claim disallowed and *file an appeal with the Nevada tax commission*
6 *within the 30 days after the last day of the 6-month period. If the*
7 *claimant is aggrieved by the decision of the commission rendered on*
8 *appeal, he may, within 90 days after the decision is rendered,* bring an
9 action against the department on the grounds set forth in the claim for the
10 recovery of the whole or any part of the amount claimed as an
11 overpayment.

12 2. If judgment is rendered for the plaintiff, the amount of the judgment
13 must first be credited towards any fee or tax due from the plaintiff.

14 3. The balance of the judgment must be refunded to the plaintiff.

15 Sec. 25. NRS 365.310 is hereby amended to read as follows:

16 365.310 1. The department ~~{shall have power to}~~ *may* suspend,
17 cancel or revoke the license of any dealer refusing or neglecting to comply
18 with the provisions of this chapter.

19 2. If a dealer becomes delinquent in the payment of excise taxes as
20 prescribed by this chapter to the extent that his liability exceeds the total
21 amount of bond furnished by the dealer, the department shall suspend his
22 license immediately.

23 3. Before revoking or canceling any license issued under this chapter,
24 the department shall send a notice by registered or certified mail to the
25 dealer at his last known address. The notice ~~{shall}~~ *must* order the dealer to
26 show cause why his license should not be revoked by appearing before the
27 department at Carson City, Nevada, or such other place in this state as may
28 be designated by the department, at a time not less than 10 days after the
29 mailing of the notice. The department shall allow the dealer an opportunity
30 to be heard in pursuance of such notice, and thereafter the department ~~{shall~~
31 ~~have full power to}~~ *may* revoke or cancel his license.

32 Sec. 26. NRS 365.460 is hereby amended to read as follows:

33 365.460 After payment of any excise tax under protest duly verified,
34 served on the department, and setting forth the grounds of objection to the
35 legality of the excise tax, the dealer paying the excise tax may *file an*
36 *appeal with the Nevada tax commission pursuant to NRS 360.245. If the*
37 *dealer is aggrieved by the decision of the commission rendered on*
38 *appeal, he may* bring an action against the state treasurer in ~~{the district~~
39 ~~court in and for}~~ *a court of competent jurisdiction in Carson City or Clark*
40 *County for the recovery of the excise tax so paid under protest.*

41 Sec. 27. NRS 365.470 is hereby amended to read as follows:

42 365.470 1. No action authorized by NRS 365.460 may be instituted
43 more than 90 days after ~~{the last day prescribed for the payment of the~~



1 ~~excise tax without penalty; a final decision is rendered by the Nevada tax~~
2 ~~commission on appeal.~~ Failure to bring suit within the 90 days ~~shall~~
3 ~~constitute~~ constitutes a waiver of any and all demands against the state on
4 account of alleged overpayment of excise taxes.

5 2. No grounds of illegality of the excise tax ~~shall~~ may be considered
6 by the court other than those set forth in the protest filed at the time of the
7 payment of the excise tax.

8 Sec. 28. NRS 366.395 is hereby amended to read as follows:

9 366.395 1. ~~Any~~ Except as otherwise provided in NRS 360.320 and
10 section 2 of this act, any person who fails to pay any excise tax, except
11 taxes assessed pursuant to the provisions of NRS 366.405, within the time
12 prescribed by this chapter shall pay, in addition to the tax, a penalty of:

13 (a) If the amount of the tax owed is \$50 or more, 10 percent of the
14 amount owed or \$50, whichever is greater; or

15 (b) If the amount of the tax owed is less than \$50, 10 percent of the
16 amount owed,
17 plus interest on the amount of the tax at the rate of 1 percent per month or
18 fraction thereof, from the date the tax became finally due until the date of
19 payment.

20 2. A tax return or statement is considered delinquent when it has not
21 been received by the department by the date the tax return or statement is
22 due, as prescribed by the provisions of this chapter.

23 Sec. 29. NRS 366.405 is hereby amended to read as follows:

24 366.405 1. If the department is not satisfied with the records or
25 statements of, or with the amount of tax paid by, any person pursuant to the
26 provisions of this chapter, or the department does not receive a return from
27 a person who is required to file a return pursuant to this chapter, it may
28 make an additional or estimated assessment of tax due from that person
29 based upon any information available to it. ~~Every~~ Except as otherwise
30 provided in NRS 360.320 and section 2 of this act, every additional or
31 estimated assessment bears interest at the rate of 1 percent per month, or
32 fraction thereof, from the date the tax became due until it is paid.

33 2. If an additional assessment is imposed, a penalty of 10 percent of the
34 amount of the additional assessment must be added thereto. If any part of
35 the deficiency is found to be caused by fraud or an intent to evade the
36 provisions of this chapter or the regulations adopted pursuant to those
37 provisions, a penalty of 25 percent of the amount of the additional
38 assessment must be added thereto.

39 3. The department shall give the person written notice of the additional
40 assessment. The notice may be served personally or by mail in the manner
41 prescribed by Rule 5 of the Nevada Rules of Civil Procedure addressed to
42 the person at his address as it appears in the records of the department.
43 Every notice of additional assessment proposed to be assessed pursuant to

1 the provisions of this chapter must be served within 4 years after the
2 claimed erroneous report was filed.

3 4. If a special fuel user, special fuel dealer or special fuel supplier
4 refuses or fails to make available to the department, upon request, such
5 records, reports or other information as determined by the department to be
6 necessary to enable it to determine that the amount of tax paid by the user
7 or supplier is correct, the additional or estimated assessment made pursuant
8 to the provisions of this section is presumed to be correct and the burden is
9 upon the person challenging the assessment to establish that it is erroneous.

10 5. Any person against whom an assessment has been made pursuant to
11 the provisions of this section may petition the department in writing for a
12 redetermination within 30 days after service of the notice. If a petition is
13 not filed with the department within that period, the assessment becomes
14 final.

15 6. If a petition for redetermination is filed within 30 days, the
16 department shall reconsider the assessment and send the petitioner, by
17 certified mail, notice of its decision and the reasons therefor. A petitioner
18 aggrieved by the department's decision may appeal the decision by
19 submitting a written request to the department for a hearing not later than
20 30 days after notice of the decision was mailed by the department. The
21 department shall schedule an administrative hearing and provide to the
22 petitioner, not less than 10 days before the hearing, notice of the time and
23 place of the hearing. The department may continue the hearing as it deems
24 necessary.

25 7. The order of the department upon a petition becomes final 30 days
26 after service of notice thereof.

27 Sec. 30. NRS 366.660 is hereby amended to read as follows:

28 366.660 1. No injunction, writ of mandate or other legal or equitable
29 process may issue in any suit, action or proceeding in any court against this
30 state or any officer thereof to prevent or enjoin the collection pursuant to
31 this chapter of any excise tax or other amount required to be collected.

32 2. After payment of any such excise tax or other amount under protest,
33 verified and setting forth the grounds of objection to the legality thereof,
34 filed with the department at the time of payment of the tax or other amount
35 protested, the special fuel supplier, special fuel dealer or special fuel user
36 making the payment may bring an action against the state treasurer in ~~the~~
37 ~~district court in and for~~ a court of competent jurisdiction in Carson City
38 or Clark County for the recovery of the amount so paid under protest.

39 Sec. 31. NRS 372.135 is hereby amended to read as follows:

40 372.135 1. After compliance with NRS 372.125, 372.130 and
41 372.510 by the applicant, the department shall ~~grant~~ :

42 (a) Grant and issue to each applicant a separate permit for each place of
43 business within the state.



1 (b) Provide the applicant with a full, written explanation of the
2 liability of the applicant for the collection and payment of the taxes
3 imposed by this chapter. The explanation required by this paragraph:

4 (1) Must include the procedures for the collection and payment of
5 the taxes that are specifically applicable to the type of business conducted
6 by the applicant, including, without limitation and when appropriate:

7 (I) An explanation of the circumstances under which a service
8 provided by the applicant is taxable;

9 (II) The procedures for administering exemptions; and

10 (III) The circumstances under which charges for freight are
11 taxable.

12 (2) Is in addition to, and not in lieu of, the instructions and
13 information required to be provided by NRS 360.2925.

14 2. A permit is not assignable ~~to~~ and is valid only for the person in
15 whose name it is issued and for the transaction of business at the place
16 designated on it. It must at all times be conspicuously displayed at the place
17 for which it is issued.

18 Sec. 32. NRS 372.660 is hereby amended to read as follows:

19 372.660 1. ~~Interest~~ Except as otherwise provided in NRS 360.320,
20 interest must be paid upon any overpayment of any amount of tax at the
21 rate of one-half of 1 percent per month from the last day of the calendar
22 month following the period for which the overpayment was made. No
23 refund or credit may be made of any interest imposed upon the person
24 making the overpayment with respect to the amount being refunded or
25 credited.

26 2. The interest must be paid:

27 (a) In the case of a refund, to the last day of the calendar month
28 following the date upon which the person making the overpayment, if he
29 has not already filed a claim, is notified by the department that a claim may
30 be filed or the date upon which the claim is certified to the state board of
31 examiners, whichever is earlier.

32 (b) In the case of a credit, to the same date as that to which interest is
33 computed on the tax or amount against which the credit is applied.

34 Sec. 33. NRS 372.680 is hereby amended to read as follows:

35 372.680 1. Within 90 days after ~~the mailing of the notice of the~~
36 ~~department's action~~ a final decision upon a claim filed pursuant to this
37 chapter ~~is rendered by the Nevada tax commission~~, the claimant may
38 bring an action against the department on the grounds set forth in the claim
39 in a court of competent jurisdiction in Carson City or Clark County for the
40 recovery of the whole or any part of the amount with respect to which the
41 claim has been disallowed.

1 2. Failure to bring an action within the time specified constitutes a
2 waiver of any demand against the state on account of alleged
3 overpayments.

4 Sec. 34. NRS 372.685 is hereby amended to read as follows:

5 372.685 If the department fails to mail notice of action on a claim
6 within 6 months after the claim is filed, the claimant may ~~before the~~
7 ~~mailing of notice by the department of its action on the claim,~~ consider the
8 claim disallowed and file an appeal with the Nevada tax commission
9 within the 30 days after the last day of the 6-month period. If the
10 claimant is aggrieved by the decision of the commission on appeal, he
11 may, within 90 days after the decision is rendered, bring an action against
12 the department on the grounds set forth in the claim for the recovery of the
13 whole or any part of the amount claimed as an overpayment.

14 Sec. 35. NRS 372.705 is hereby amended to read as follows:

15 372.705 The department may recover any refund or part of it which is
16 erroneously made and any credit or part of it which is erroneously allowed
17 in an action brought in a court of competent jurisdiction in Carson City or
18 Clark County in the name of the State of Nevada.

19 Sec. 36. NRS 372.710 is hereby amended to read as follows:

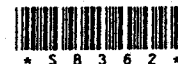
20 372.710 The action must be tried in Carson City or Clark County
21 unless the court with the consent of the attorney general orders a change of
22 place of trial.

23 Sec. 37. NRS 372.750 is hereby amended to read as follows:

24 372.750 1. Except as otherwise provided in this section, it is a
25 misdemeanor for any member of the tax commission or officer, agent or
26 employee of the department to make known in any manner whatever the
27 business affairs, operations or information obtained by an investigation of
28 records and equipment of any retailer or any other person visited or
29 examined in the discharge of official duty, or the amount or source of
30 income, profits, losses, expenditures or any particular of them, set forth or
31 disclosed in any return, or to permit any return or copy of a return, or any
32 book containing any abstract or particulars of it to be seen or examined by
33 any person not connected with the department.

34 2. The tax commission may agree with any county fair and recreation
35 board or the governing body of any county, city or town for the continuing
36 exchange of information concerning taxpayers.

37 3. The governor may, by general or special order, authorize the
38 examination of the records maintained by the department under this chapter
39 by other state officers, by tax officers of another state, by the Federal
40 Government, if a reciprocal arrangement exists, or by any other person. The
41 information so obtained may not be made public except to the extent and in
42 the manner that the order may authorize that it be made public.



1 4. Upon written request made by a public officer of a local
2 government, the executive director shall furnish from the records of the
3 department, the name and address of the owner of any seller or retailer who
4 must file a return with the department. The request must set forth the social
5 security number of the owner of the seller or retailer about which the
6 request is made and contain a statement signed by the proper authority of
7 the local government certifying that the request is made to allow the proper
8 authority to enforce a law to recover a debt or obligation owed to the local
9 government. The information obtained by the local government is
10 confidential and may not be used or disclosed for any purpose other than
11 the collection of a debt or obligation owed to that local government. The
12 executive director may charge a reasonable fee for the cost of providing the
13 requested information.

14 5. Successors, receivers, trustees, executors, administrators, assignees
15 and guarantors, if directly interested, may be given information as to the
16 items included in the measure and amounts of any unpaid tax or amounts of
17 tax required to be collected, interest and penalties.

18 6. Relevant information may be disclosed as evidence in an appeal by
19 the taxpayer from a determination of tax due.

20 7. At any time after a determination, decision or order of the executive
21 director or other officer of the department imposing upon a person a
22 penalty for fraud or intent to evade the tax imposed by this chapter on the
23 sale, storage, use or other consumption of any vehicle, vessel or aircraft
24 becomes final or is affirmed by the commission, any member of the
25 commission or officer, *agent* or employee of the department may publicly
26 disclose the identity of that person and the amount of tax assessed and
27 penalties imposed against him.

28 **Sec. 38.** NRS 374.140 is hereby amended to read as follows:

29 374.140 1. After compliance with NRS 374.130, 374.135 and
30 374.515 by the applicant, the department shall ~~grant~~:

31 (a) *Grant* and issue to each applicant a separate permit for each place of
32 business within the county.

33 (b) *Provide the applicant with a full, written explanation of the*
34 *liability of the applicant for the collection and payment of the taxes*
35 *imposed by this chapter. The explanation required by this paragraph:*

36 (1) *Must include the procedures for the collection and payment of*
37 *the taxes that are specifically applicable to the type of business conducted*
38 *by the applicant, including, without limitation and when appropriate:*

39 (I) *An explanation of the circumstances under which a service*
40 *provided by the applicant is taxable;*

41 (II) *The procedures for administering exemptions; and*

42 (III) *The circumstances under which charges for freight are*
43 *taxable.*

1 (2) *Is in addition to, and not in lieu of, the instructions and*
2 *information required to be provided by NRS 360.2925.*

3 2. A permit ~~{shall not be assignable, and shall be}~~ *is not assignable*
4 *and is valid only for the person in whose name it is issued and for the*
5 *transaction of business at the place designated therein. ~~It shall~~ A permit*
6 *must at all times be conspicuously displayed at the place for which it is*
7 *issued.*

8 **Sec. 39.** NRS 374.357 is hereby amended to read as follows:

9 374.357 1. A person who maintains a business or intends to locate a
10 business in this state may apply to the commission on economic
11 development for an abatement from the taxes imposed by this chapter on
12 the gross receipts from the sale, and the storage, use or other consumption,
13 of eligible machinery or equipment for use by a business which has been
14 approved for an abatement pursuant to subsection 2.

15 2. The commission on economic development may approve an
16 application for an abatement if:

17 (a) The goals of the business are consistent with the goals of the
18 commission concerning industrial development and diversification;

19 (b) The commission determines that the abatement is a significant factor
20 in the decision of the applicant to locate or expand a business in this state;

21 (c) The average hourly wage paid by the business to its employees in
22 this state is at least equal to the average statewide industrial hourly wage as
23 established by the employment security division of the department of
24 employment, training and rehabilitation on July 1 of each fiscal year;

25 (d) The business provides a health insurance plan for its employees that
26 includes an option for health insurance coverage for dependents of
27 employees;

28 (e) The business is registered pursuant to the laws of this state or the
29 applicant commits to obtain a valid business license and all other permits
30 required by the county, city or town in which the business operates;

31 (f) The business will provide at least 10 full-time, permanent jobs in
32 Nevada by the fourth quarter that it is in operation; and

33 (g) The applicant commits to maintaining his business in this state for at
34 least 5 years.

35 3. An applicant shall, upon the request of the executive director of the
36 commission on economic development, furnish to the director copies of all
37 records necessary for the director to verify that the applicant meets the
38 requirement of paragraph (c) of subsection 2.

39 4. The commission on economic development may approve an
40 application for an abatement which does not meet the requirements of
41 subsection 2 if the commission determines that such an approval is
42 warranted.



1 5. If an application for an abatement is approved, the taxpayer is
2 eligible for an abatement from the tax imposed by this chapter for 2 years.

3 6. If an application for an abatement is approved, the commission on
4 economic development shall immediately forward a certificate of eligibility
5 for the abatement to the Nevada tax commission.

6 7. If a business for which an abatement has been approved is not
7 maintained in this state for at least 5 years after the commission on
8 economic development approved the abatement, the person who applied for
9 the abatement shall repay to the department the amount of the abatement
10 that was allowed pursuant to this section before the failure of the business
11 to comply unless the Nevada tax commission determines that the business
12 has substantially complied with the requirements of this section. ~~{The}~~
13 *Except as otherwise provided in NRS 360.320 and section 2 of this act,*
14 *the person who applied for the abatement shall pay interest on the amount*
15 *due at the rate most recently established pursuant to NRS 99.040 for each*
16 *month, or portion thereof, from the last day of the month following the*
17 *period for which the payment would have been made had the abatement not*
18 *been granted until the date of the actual payment of the tax.*

19 8. The commission on economic development shall adopt regulations
20 which it considers necessary to carry out the provisions of this section.

21 9. As used in this section, unless the context otherwise requires,
22 "eligible machinery or equipment" means machinery or equipment for
23 which a deduction is authorized pursuant to 26 U.S.C. § 179. The term
24 does not include:

- 25 (a) Buildings or the structural components of buildings;
- 26 (b) Equipment used by a public utility;
- 27 (c) Equipment used for medical treatment;
- 28 (d) Machinery or equipment used in mining; or
- 29 (e) Machinery or equipment used in gaming.

30 Sec. 40. NRS 374.665 is hereby amended to read as follows:

31 374.665 1. ~~{Interest}~~ *Except as otherwise provided in NRS 360.320,*
32 *interest must be paid upon any overpayment of any amount of tax at the*
33 *rate of one-half of 1 percent per month from the last day of the calendar*
34 *month following the period for which the overpayment was made. ~~{But}~~*
35 *no* *No refund or credit may be made of any interest imposed upon the*
36 *person making the overpayment with respect to the amount being refunded*
37 *or credited.*

38 2. The interest must be paid as follows:

39 (a) In the case of a refund, to the last day of the calendar month
40 following the date upon which the person making the overpayment, if he
41 has not already filed a claim, is notified by the department that a claim may
42 be filed or the date upon which the claim is certified to the board of county
43 commissioners, whichever date is earlier.

1 (b) In the case of a credit, to the same date as that to which interest is
2 computed on the tax or amount against which the credit is applied.

3 Sec. 41. NRS 374.685 is hereby amended to read as follows:

4 374.685 1. Within 90 days after ~~{the mailing of the notice of the~~
5 ~~department's action}~~ *a final decision* upon a claim filed pursuant to this
6 chapter ~~{it}~~ *is rendered by the Nevada tax commission*, the claimant may
7 bring an action against the department on the grounds set forth in the claim
8 in a court of competent jurisdiction in Carson City or Clark County for the
9 recovery of the whole or any part of the amount with respect to which the
10 claim has been disallowed.

11 2. Failure to bring *an* action within the time specified constitutes a
12 waiver of any demand against the county on account of alleged
13 overpayments.

14 Sec. 42. NRS 374.690 is hereby amended to read as follows:

15 374.690 If the department fails to mail notice of action on a claim
16 within 6 months after the claim is filed, the claimant may ~~{prior to the~~
17 ~~mailing of notice by the department of its action on the claim}~~ consider the
18 claim disallowed and *file an appeal with the Nevada tax commission*
19 *within the 30 days after the last day of the 6-month period. If the*
20 *claimant is aggrieved by the decision of the commission on appeal, he*
21 *may, within 90 days after the decision is rendered, bring an action against*
22 *the department on the grounds set forth in the claim for the recovery of the*
23 *whole or any part of the amount claimed as an overpayment.*

24 Sec. 43. NRS 374.755 is hereby amended to read as follows:

25 374.755 1. Except as otherwise provided in this section, it is a
26 misdemeanor for any member of the Nevada tax commission or ~~{official}~~
27 *officer, agent* or employee of the department to make known in any manner
28 whatever the business affairs, operations or information obtained by an
29 investigation of records and equipment of any retailer or any other person
30 visited or examined in the discharge of official duty, or the amount or
31 source of income, profits, losses, expenditures or any particular thereof, set
32 forth or disclosed in any return, or to permit any return or copy thereof, or
33 any book containing any abstract or particulars thereof to be seen or
34 examined by any person not connected with the department.

35 2. The Nevada tax commission may agree with any county fair and
36 recreation board or the governing body of any county, city or town for the
37 continuing exchange of information concerning taxpayers.

38 3. The governor may, however, by general or special order, authorize
39 *the* examination of the records maintained by the department under this
40 chapter by other state officers, by tax officers of another state, by the
41 Federal Government, if a reciprocal arrangement exists, or by any other
42 person. The information so obtained pursuant to the order of the governor



1 may not be made public except to the extent and in the manner that the
2 order may authorize that it be made public.

3 4. Upon written request made by a public officer of a local
4 government, the executive director shall furnish from the records of the
5 department, the name and address of the owner of any seller or retailer who
6 must file a return with the department. The request must set forth the social
7 security number of the owner of the seller or retailer about which the
8 request is made and contain a statement signed by the proper authority of
9 the local government certifying that the request is made to allow the proper
10 authority to enforce a law to recover a debt or obligation owed to the local
11 government. The information obtained by the local government is
12 confidential and may not be used or disclosed for any purpose other than
13 the collection of a debt or obligation owed to that local government. The
14 executive director may charge a reasonable fee for the cost of providing the
15 requested information.

16 5. Successors, receivers, trustees, executors, administrators, assignees
17 and guarantors, if directly interested, may be given information as to the
18 items included in the measure and amounts of any unpaid tax or amounts of
19 tax required to be collected, interest and penalties.

20 6. Relevant information may be disclosed as evidence in an appeal by
21 the taxpayer from a determination of tax due.

22 7. At any time after a determination, decision or order of the executive
23 director or other officer of the department imposing upon a person a
24 penalty for fraud or intent to evade the tax imposed by this chapter on the
25 sale, storage, use or other consumption of any vehicle, vessel or aircraft
26 becomes final or is affirmed by the commission, any member of the
27 commission or officer, *agent* or employee of the department may publicly
28 disclose the identity of that person and the amount of tax assessed and
29 penalties imposed against him.

30 Sec. 44. NRS 375A.170 is hereby amended to read as follows:

31 375A.170 If the return provided for in NRS 375A.150 is not filed
32 within the time specified in that section or the extension specified in NRS
33 375A.155, then the personal representative shall pay, *except as otherwise*
34 *provided in NRS 360.320 and section 2 of this act*, and in addition to the
35 interest provided in NRS 375A.205, a penalty equal to 5 percent of the tax
36 due, as finally determined, for each month or portion of a month during
37 which that failure to file continues, not exceeding 25 percent in the
38 aggregate, unless it is shown that there was reasonable cause for the failure
39 to file. If a similar penalty for failure to file timely the federal estate tax
40 return is waived, that waiver shall be deemed to constitute reasonable cause
41 for purposes of this section.



1 Sec. 45. NRS 375A.195 is hereby amended to read as follows:

2 375A.195 If it is claimed that a deficiency has been determined in an
3 erroneous amount, any person who is liable for the tax may ~~it~~ *appeal the*
4 *determination to the Nevada tax commission pursuant to NRS 360.245.*
5 *If the person who is liable for the tax is aggrieved by the decision of the*
6 *commission on appeal, he may*, within 3 years after the determination was
7 made, bring an action against the State of Nevada in the district court
8 having jurisdiction over the estate to have the tax modified in whole or in
9 part.

10 Sec. 46. NRS 375A.205 is hereby amended to read as follows:

11 375A.205 1. The tax imposed by NRS 375A.100 does not bear
12 interest if it is paid before the date on which it otherwise becomes
13 delinquent. ~~That~~ *Except as otherwise provided in NRS 360.320 and section*
14 *2 of this act*, if the tax is paid after that date, the tax bears interest at the
15 rate set by the executive director, from the date it became delinquent until it
16 is paid.

17 2. The executive director shall set and maintain the rate of interest for
18 late payments at the highest rate permissible pursuant to section 4 of article
19 10 of the Nevada constitution.

20 Sec. 47. NRS 375A.215 is hereby amended to read as follows:

21 375A.215 1. If any personal representative fails to pay any tax
22 imposed by NRS 375A.100 for which he is liable before the date the tax
23 becomes delinquent, he must, on motion of the department, be required by
24 the district court having jurisdiction over the estate to execute a bond to the
25 State of Nevada in an amount equal to twice the amount of the tax, with
26 such sureties as the court may approve, conditioned for the payment of the
27 tax, plus interest on the tax at the rate of interest set by the executive
28 director pursuant to NRS 375A.205 commencing on the date the tax
29 became delinquent, *unless otherwise provided in NRS 360.320 or section*
30 *2 of this act. The bond must be executed* within a certain time to be fixed
31 by the court and specified in the bond.

32 2. The bond must be filed in the office of the clerk of the court, and a
33 certified copy must be immediately transmitted to the department.

34 3. If the bond is not filed within 20 days after the date of the filing of
35 the order requiring it, the letters of the personal representative affected
36 must be revoked upon motion of the department.

37 Sec. 48. NRS 375A.225 is hereby amended to read as follows:

38 375A.225 Interest must be paid upon any overpayment of the tax due
39 under NRS 375A.100 at the rate of interest set by the executive director
40 pursuant to NRS 375A.205. ~~That~~ *Except as otherwise provided in NRS*
41 *360.320*, the interest must be allowed from the date on which payment of
42 the tax would have become delinquent, if not paid, or the date of actual



1 payment, whichever is later, to a date preceding the date of the refund by
2 not more than 30 days, as determined by the department.

3 Sec. 49. NRS 375A.690 is hereby amended to read as follows:

4 375A.690 ~~It~~ *Except as otherwise provided in NRS 360.320 and*
5 *section 2 of this act, if the board determines that a decedent dies domiciled*
6 *in this state, the total amount of interest and penalties for nonpayment of*
7 *the tax, between the date of the election and the final determination of the*
8 *board, must not exceed an amount determined by applying the rate of*
9 *interest set by the executive director pursuant to NRS 375A.205 to the*
10 *amount of the taxes due.*

11 Sec. 50. NRS 375B.190 is hereby amended to read as follows:

12 375B.190 If the return required by NRS 375B.150 is not filed within
13 the time specified in that section or the extension specified in NRS
14 375B.160, the person liable for the tax shall pay, *except as otherwise*
15 *provided in NRS 360.320 and section 2 of this act, and in addition to the*
16 *interest provided in NRS 375B.250, a penalty equal to 5 percent of the tax*
17 *due, as finally determined, for each month or portion of a month during*
18 *which that failure to file continues, not exceeding 25 percent in the*
19 *aggregate, unless it is shown that there was reasonable cause for the failure*
20 *to file. If a similar penalty for failure to file timely the federal estate tax*
21 *return is waived, that waiver shall be deemed to constitute reasonable cause*
22 *for purposes of this section.*

23 Sec. 51. NRS 375B.230 is hereby amended to read as follows:

24 375B.230 1. If it is claimed that a deficiency has been determined in
25 an erroneous amount, any person who is liable for the tax may ~~it~~ *appeal*
26 *the determination to the Nevada tax commission pursuant to NRS*
27 *360.245. If the person who is liable for the tax is aggrieved by the*
28 *decision of the commission on appeal, he may, within 3 years after the*
29 *determination was made, bring an action against the State of Nevada in the*
30 *district court having jurisdiction over the property which was transferred to*
31 *have the tax modified in whole or in part.*

32 2. The department shall give notice of the deficiency determined,
33 together with any penalty for failure to file a return, by personal service or
34 by mail to the person filing the return at the address stated in the return, or,
35 if no return is filed, to the person liable for the tax. Copies of the notice of
36 deficiency may in the same manner be given to such other persons as the
37 department deems advisable.

38 Sec. 52. NRS 375B.250 is hereby amended to read as follows:

39 375B.250 1. ~~It~~ *Except as otherwise provided in NRS 360.320 and*
40 *section 2 of this act, if the tax is paid after the due date, the tax bears*
41 *interest at the rate set by the executive director, from the due date of the*
42 *return.*

1 2. The executive director shall set and maintain the rate of interest for
2 late payments at the highest rate permissible pursuant to section 4 of article
3 10 of the Nevada constitution.

4 Sec. 53. NRS 375B.270 is hereby amended to read as follows:

5 375B.270 1. If any person who is liable for the tax fails to pay any
6 portion of the tax imposed by NRS 375B.100 on or before the date the tax
7 is due, he must, on motion of the department, be required by the district
8 court having jurisdiction over the generation-skipping transfer to execute a
9 bond to the State of Nevada in an amount equal to twice the amount of the
10 tax due, with such sureties as the court may approve, conditioned upon the
11 payment of the tax, plus interest on the tax at the rate of interest set by the
12 executive director pursuant to NRS 375B.250 commencing on the date the
13 tax became due, *unless otherwise provided in NRS 360.320 and section 2*
14 *of this act. The bond must be executed within a time certain to be fixed by*
15 *the court and specified in the bond.*

16 2. The bond must be filed in the office of the clerk of the court, and a
17 certified copy must be immediately transmitted to the department.

18 Sec. 54. 1. This section and sections 1 to 9, inclusive, and 11 to 53,
19 inclusive, of this act become effective on July 1, 1999.

20 2. Section 10 of this act becomes effective at 12:01 a.m. on July 1,
21 1999.



SENATE BILL NO. 362—SENATOR O'CONNELL

MARCH 10, 1999

Referred to Committee on Taxation

SUMMARY—Makes various changes to provisions governing collection and payment of taxes.
(BDR 32-219)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

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

AN ACT relating to taxation; prohibiting, under certain circumstances, the imposition of penalties and interest on delinquent taxes for the period during which an audit of a taxpayer is extended; revising the manner in which penalties and interest are calculated if a taxpayer has made overpayments and underpayments; providing for the appeal of any decision of the executive director or other officer of the department of taxation to the Nevada tax commission; requiring the department to adopt certain regulations; expanding the Taxpayers' Bill of Rights; increasing the amount of taxes, penalties and interest that may be waived if a taxpayer has relied to his detriment on the advice of the department; authorizing certain actions relating to the payment of taxes to be brought in Clark County; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 **Section 1.** Chapter 360 of NRS is hereby amended by adding thereto
- 2 the provisions set forth as sections 2, 3 and 3.5 of this act.
- 3 **Sec. 2. 1.** *If an audit is conducted pursuant to the provisions of*
- 4 *this Title, the date on which the audit will be completed must be included*
- 5 *in the notice to the taxpayer that the audit will be conducted.*
- 6 **2.** *The date on which the audit will be completed may be extended by*
- 7 *the department if the department gives prior written notice of the*
- 8 *extension to the taxpayer. The notice must include an explanation of the*
- 9 *reason or reasons that the extension is required.*
- 10 **3.** *If, after the audit, the department determines that delinquent taxes*
- 11 *are due, interest and penalties may not be imposed for the period of the*

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4 ***the provisions of this Title, the date on which the audit will be completed***
5 ***must be included in the notice to the taxpayer that the audit will be***
6 ***conducted.***
7 **2. *The date on which the audit will be completed may be extended by***
8 ***the department if the department gives prior written notice of the***
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Senate Bill No. 362—Senator O'Connell

CHAPTER 484

AN ACT relating to taxation; prohibiting, under certain circumstances, the imposition of penalties and interest on delinquent taxes for the period during which an audit of a taxpayer is extended; revising the manner in which penalties and interest are calculated if a taxpayer has made overpayments and underpayments; providing for the appeal of any decision of the executive director or other officer of the department of taxation to the Nevada tax commission; requiring the commission to adopt certain regulations; expanding the Taxpayers' Bill of Rights; increasing the amount of taxes, penalties and interest that may be waived if a taxpayer has relied to his detriment on the advice of the department; authorizing certain actions relating to the payment of taxes to be brought in various counties; and providing other matters properly relating thereto.

[Approved June 8, 1999]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 360 of NRS is hereby amended by adding thereto the provisions set forth as sections 2, 3 and 3.5 of this act.

Sec. 2. 1. *If an audit is conducted by the department pursuant to the provisions of this Title, the date on which the audit will be completed must be included in the notice to the taxpayer that the audit will be conducted.*

2. The date on which the audit will be completed may be extended by the department if the department gives prior written notice of the extension to the taxpayer. The notice must include an explanation of the reason or reasons that the extension is required.

3. If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

Sec. 3. *If an officer, employee or agent of the department determines that a taxpayer is entitled to an exemption or has been taxed or assessed more than is required by law, he shall give written notice of that determination to the taxpayer. The notice must:*

1. Be given within 30 days after the officer, employee or agent makes his determination or, if the determination is made as a result of an audit, within 30 days after the completion of the audit; and

2. If appropriate, include:

(a) An explanation that an overpayment may be credited against any amount due from the taxpayer; or

(b) Instructions indicating the manner in which the taxpayer may petition for a refund of any overpayment.

Sec. 3.5. *The Nevada tax commission shall adopt regulations to carry out the provisions of NRS 360.294 and 360.417.*

Sec. 4. NRS 360.245 is hereby amended to read as follows:

360.245 1. *Except as otherwise provided in this Title:*

(a) All decisions of the executive director or other officer of the department made pursuant to {subsection 2 of NRS 360.130} this Title are final unless appealed to the Nevada tax commission. {as provided by law.}

(b) Any natural person, partnership, corporation, association or other business or legal entity *who is aggrieved by such a decision* may ~~{sø}~~ appeal *the decision* by filing a notice of appeal with the department within 30 days after service of the decision upon that person or business or legal entity.

2. Service of the decision must be made personally or by certified mail. If service is made by certified mail:

(a) The decision must be enclosed in an envelope which is addressed to the taxpayer at his address as it appears in the records of the department.

(b) It is deemed to be complete at the time the appropriately addressed envelope containing the decision is deposited with the United States Postal Service.

3. The Nevada tax commission, as head of the department, may review all ~~{other}~~ decisions made by the executive director ~~{and}~~ *that are not otherwise appealed to the commission pursuant to this section.*

4. *The Nevada tax commission may reverse, affirm or modify ~~{them}~~ —4.} any decision of the department that is:*

(a) *Appealed to the commission by a taxpayer pursuant to this section;*
or

(b) *Reviewed by the commission pursuant to this section.*

5. A decision of the Nevada tax commission is a final decision for the purposes of judicial review. The executive director or any other employee or representative of the department shall not seek judicial review of such a decision.

~~{5.}~~ 6. The Nevada tax commission shall provide by regulation for:

(a) Notice to *be given to* each county of any decision upon an appeal to the commission that the commission determines is likely to affect the revenue of the county or other local government. The regulations must specify the form and contents of the notice and requirements for the number of days before a meeting of the commission that the notice must be transmitted. ~~{to the county or counties.}~~ *If the parties to the appeal enter into a stipulation as to the issues that will be heard on appeal, the commission shall transmit a copy of the notice to the district attorney of each county which the commission determines is likely to be affected by the decision.* Upon receipt of such a notice, the ~~{county}~~ district attorney shall transmit a copy of the notice to each local government within the county which ~~{it}~~ *the commission* determines is likely to be affected by the decision. *If there is no such stipulation, the commission shall transmit a copy of the notice, accompanied by the names of the parties and the amount on appeal, if any, to the governing bodies of the counties and other local governments which the commission determines are likely to be affected by the decision.*

(b) The manner in which a county or other local government which is not a party to such an appeal may become a party, and the procedure for its participation in the appeal.

~~{6.}~~ 7. A county or other local government which is a party and is aggrieved by the decision of the Nevada tax commission is entitled to seek judicial review of the decision.

~~{7.}~~ 8. Upon application by a taxpayer, the Nevada tax commission shall review the denial of relief pursuant to NRS 361.4835 and may grant, deny or modify the relief sought.

Sec. 5. NRS 360.291 is hereby amended to read as follows:

360.291 1. The legislature hereby declares that each taxpayer has the right:

~~{1-}~~ (a) To be treated by officers and employees of the department with courtesy, fairness, uniformity, consistency and common sense.

~~{2-}~~ (b) To a prompt response from the department to each communication from the taxpayer.

~~{3-}~~ (c) To provide the minimum documentation and other information as may reasonably be required by the department to carry out its duties.

~~{4-}~~ (d) To written explanations of common errors, oversights and violations that taxpayers experience and instructions on how to avoid such problems.

~~{5-}~~ (e) To be ~~{informed}~~ *notified, in writing*, by the department whenever its officer, employee or agent determines that the taxpayer is entitled to an exemption or has been taxed or assessed more than is required by law.

~~{6-}~~ (f) To written instructions indicating how the taxpayer may petition for:

~~{(a)}~~ (1) An adjustment of an assessment; ~~{or}~~

~~{(b)}~~ (2) A refund or credit for overpayment of taxes, interest or penalties ~~{or}~~

~~{7-}~~ ; or

(3) *A reduction in or the release of a bond or other form of security required to be furnished pursuant to the provisions of this Title that are administered by the department.*

(g) To recover an overpayment of taxes promptly upon the final determination of such an overpayment.

~~{8-}~~ (h) To obtain specific advice from the department concerning taxes imposed by the state.

~~{9-}~~ (i) In any meeting with the department, including an audit, conference, interview or hearing:

~~{(a)}~~ (1) To an explanation by an officer, *agent* or employee of the department that describes the procedures to be followed and the taxpayer's rights thereunder;

~~{(b)}~~ (2) To be represented by himself or anyone who is otherwise authorized by law to represent him before the department;

~~{(c)}~~ (3) To make an audio recording using the taxpayer's own equipment and at the taxpayer's own expense; and

~~{(d)}~~ (4) To receive a copy of any document or audio recording made by or in the possession of the department relating to the determination or collection of any tax for which the taxpayer is assessed, upon payment of the actual cost to the department of making the copy.

~~{10-}~~ (j) To a full explanation of the department's authority to assess a tax or to collect delinquent taxes, including the procedures and notices for review and appeal that are required for the protection of the taxpayer. An explanation which meets the requirements of this section must also be included with each notice to a taxpayer that an audit will be conducted by the department.

~~{11.}~~ (k) To the immediate release of any lien which the department has placed on real or personal property for the nonpayment of any tax when:

- ~~{(a)}~~ (1) The tax is paid;
- ~~{(b)}~~ (2) The period of limitation for collecting the tax expires;
- ~~{(c)}~~ (3) The lien is the result of an error by the department;
- ~~{(d)}~~ (4) The department determines that the taxes, interest and penalties are secured sufficiently by a lien on other property;
- ~~{(e)}~~ (5) The release or subordination of the lien will not jeopardize the collection of the taxes, interest and penalties;
- ~~{(f)}~~ (6) The release of the lien will facilitate the collection of the taxes, interest and penalties; or
- ~~{(g)}~~ (7) The department determines that the lien is creating an economic hardship.

~~{12.}~~ (l) To the release or reduction of a bond *or other form of security* required *to be furnished pursuant to the provisions of this Title* by the department in accordance with applicable statutes and regulations.

~~{13.}~~ (m) To be free from investigation and surveillance by an officer, agent or employee of the department for any purpose that is not directly related to the administration of the provisions of this Title ~~{-}~~ *that are administered by the department.*

~~{14.}~~ (n) To be free from harassment and intimidation by an officer, agent or employee of the department for any reason.

(o) To have statutes imposing taxes and any regulations adopted pursuant thereto construed in favor of the taxpayer if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable.

2. The provisions of this Title governing the administration and collection of taxes by the department must not be construed in such a manner as to interfere or conflict with the provisions of this section or any applicable regulations.

3. The provisions of this section apply to any tax administered and collected pursuant to the provisions of this Title or any applicable regulations by the department.

Sec. 6. NRS 360.2935 is hereby amended to read as follows:

360.2935 A taxpayer is entitled to receive on any overpayment of taxes, *after the offset required by NRS 360.320 has been made*, a refund together with interest at a rate determined pursuant to NRS 17.130. No interest is allowed on a refund of any penalties or interest paid by a taxpayer.

Sec. 7. NRS 360.294 is hereby amended to read as follows:

360.294 ~~{Upon}~~

1. Except as otherwise provided in subsection 2, upon proof that a taxpayer has relied to his detriment on written advice provided to him by an officer, agent or employee of the department {-

~~1. The executive director or his designee may waive taxes, penalties and interest owed by the taxpayer in an amount not to exceed \$5,000; and~~

~~2. The Nevada tax commission may waive any such taxes, penalties and interest in an amount greater than \$5,000.}~~ *or on an opinion of the attorney general:*

(a) The department may waive any tax, penalty and interest owed by the taxpayer if the taxpayer meets the criteria adopted by regulation by the Nevada tax commission pursuant to section 3.5 of this act; and

(b) If a waiver is granted pursuant to paragraph (a), the department shall prepare and maintain on file a statement which contains:

- (1) The reason for the waiver;
- (2) The amount of the tax, penalty and interest owed by the taxpayer;
- (3) The amount of the tax, penalty and interest waived by the department; and
- (4) The facts and circumstances which led to the waiver.

2. Upon proof that a taxpayer has in good faith collected or remitted taxes imposed pursuant to the provisions of this Title that are administered by the department, in reliance upon written advice provided by an officer, agent or employee of the department, an opinion of the attorney general or the Nevada tax commission, or the written results of an audit of his records conducted by the department, the taxpayer may not be required to pay delinquent taxes, penalties or interest if the department determines after the completion of a subsequent audit that the taxes he collected or remitted were deficient.

Sec. 8. NRS 360.320 is hereby amended to read as follows:
360.320 ~~It~~

1. Except as otherwise provided in this Title, in making a determination of the amount required to be paid, the department ~~may~~ shall offset overpayments for ~~a period or periods, together with interest on the overpayments,~~ a reporting period of an audit period against underpayments for ~~another period or periods, against penalties, and against the interest on underpayments.~~ any other reporting period within the audit period.

2. If it is determined that there is a net deficiency, any penalty imposed must be calculated based on the amount of the net deficiency.

3. If it is determined that:

(a) There is a net deficiency for a reporting period after offsetting any overpayment from any previous reporting period, any interest imposed on the net deficiency must be calculated before determining whether there is an overpayment or net deficiency for the next reporting period within the audit period.

(b) There is a net overpayment for a reporting period after offsetting any net deficiency from any previous reporting period, any interest to which the taxpayer is entitled must be calculated before determining whether there is an overpayment or net deficiency for the next reporting period within the audit period.

4. The provisions of this section do not apply if the taxpayer has submitted a report that shows taxes due and has not remitted the taxes due in a timely manner.

5. As used in this section, "reporting period" includes, without limitation, a calendar month, a calendar quarter, a calendar year and any other period for reporting.

Sec. 9. NRS 360.395 is hereby amended to read as follows:

360.395 1. Before a person may seek judicial review pursuant to NRS 233B.130 from a final order of the ~~{department}~~ *Nevada tax commission* upon a petition for redetermination, he must:

- (a) Pay the amount of the determination; or
- (b) Enter into a written agreement with the department establishing a later date by which he must pay the amount of the determination.

2. If a court determines that the amount of the final order should be reduced or that the person does not owe any taxes, the department shall credit or refund any amount paid by the person that exceeds the amount owed ~~{,}~~ *, with interest determined in accordance with NRS 360.2935.*

Sec. 10. NRS 360.417 is hereby amended to read as follows:

360.417 ~~{Unless}~~ *Except as otherwise provided in NRS 360.320 and section 2 of this act and unless* a different penalty or rate of interest is specifically provided by statute, any person who fails to pay any tax provided for in chapter 362, 364A, 365, 369, 370, 372, 373, 374, 377, 377A, 444A or 585 of NRS, or fee provided for in NRS 482.313 or 590.700 to 590.920, inclusive, to the state or a county within the time required, shall pay a penalty of not more than 10 percent of the amount of the tax or fee which is owed, as determined by the department, in addition to the tax or fee, plus interest at the rate of 1 percent per month, or fraction of a month, from the last day of the month following the period for which the amount or any portion of the amount should have been reported until the date of payment. *The amount of any penalty imposed must be based on a graduated schedule adopted by the Nevada tax commission which takes into consideration the length of time the tax or fee remained unpaid.*

Sec. 11. NRS 360.4193 is hereby amended to read as follows:

360.4193 1. If a person is delinquent in the payment of any tax or fee administered by the department or has not paid the amount of a deficiency determination, the department may bring an action in a court of this state, a court of any other state or a court of the United States to collect the delinquent or deficient amount, penalties and interest. The action ~~{must}~~ :

(a) *May not be brought if the decision that the payment is delinquent or that there is a deficiency determination is on appeal to the Nevada tax commission pursuant to NRS 360.245.*

(b) *Must be brought not later than 3 years after the payment became delinquent or the determination became final or within 5 years after the last recording of an abstract of judgment or of a certificate constituting a lien for tax owed.*

2. The attorney general shall prosecute the action. The provisions of NRS and the Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings. In the action, a writ of attachment may issue. A bond or affidavit is not required before an attachment may be issued.

3. In the action, a certificate by the department showing the delinquency is prima facie evidence of:

- (a) The determination of the tax or fee or the amount of the tax or fee;
- (b) The delinquency of the amounts; and

(c) The compliance by the department with all of the procedures required by law related to the computation and determination of the amounts.

Sec. 12. NRS 361.0687 is hereby amended to read as follows:

361.0687 1. A person who intends to locate or expand a business in this state may apply to the commission on economic development for a partial abatement from the taxes imposed by this chapter on the personal property of the new or expanded business.

2. The commission on economic development may approve an application for a partial abatement if the commission makes the following determinations:

(a) The goals of the business are consistent with the goals of the commission and the community concerning industrial development and diversification.

(b) The abatement is a significant factor in the decision of the applicant to locate or expand a business in this state or the appropriate affected local government determines that the abatement will be beneficial to the economic development of the community.

(c) The average hourly wage which will be paid by the new or expanded business to its employees in this state is at least 125 percent of the average statewide industrial hourly wage as established by the employment security division of the department of employment, training and rehabilitation on July 1 of each fiscal year.

(d) The business will provide a health insurance plan for all employees that includes an option for health insurance coverage for dependents of the employees.

(e) The cost to the business for the benefits the business provides to its employees in this state will meet the minimum requirements for benefits established by the commission pursuant to subsection ~~8~~ 9.

(f) A capital investment for personal property will be made to locate or expand the business in Nevada which is at least:

(1) If the personal property directly related to the establishment of the business in this state is primarily located in a county whose population:

(I) Is 100,000 or more, \$50,000,000.

(II) Is less than 100,000, \$20,000,000.

(2) If the personal property directly related to the expansion of the business is primarily located in a county whose population:

(I) Is 100,000 or more, \$10,000,000.

(II) Is less than 100,000, \$4,000,000.

(g) The business will create at least the following number of new, full-time and permanent jobs in the State of Nevada by the fourth quarter that it is in operation:

(1) If a new business will be primarily located in a county whose population:

(I) Is 100,000 or more, 100 jobs.

(II) Is less than 100,000, 35 jobs.

(2) If an expanded business will be primarily located in a county whose population:

(I) Is 100,000 or more, and the business has at least 100 employees in this state, 20 jobs. An expanded business primarily located in such a

county that has less than 100 employees is not eligible for a partial abatement pursuant to this section.

(II) Is less than 100,000, and the business has at least 35 employees in this state, 10 jobs. An expanded business primarily located in such a county that has less than 35 employees is not eligible for a partial abatement pursuant to this section.

(h) For the expansion of a business primarily located in a county whose population:

(1) Is 100,000 or more, the book value of the assets of the business in this state is at least \$20,000,000.

(2) Is less than 100,000, the book value of the assets of the business in this state is at least \$5,000,000.

(i) The business is registered pursuant to the laws of this state or the applicant commits to obtain a valid business license and all other permits required by the county, city or town in which the business operates.

(j) The proposed abatement has been approved by the governing body of the appropriate affected local government as determined pursuant to the regulations adopted pursuant to subsection {8-} 9. In determining whether to approve a proposed abatement, the governing body shall consider whether the taxes to be paid by the business are sufficient to pay for any investment required to be made by the local government for services associated with the relocation or expansion of the business, including, without limitation, costs related to the construction and maintenance of roads, sewer and water services, fire and police protection, and the construction and maintenance of schools.

(k) The applicant has executed an agreement with the commission which states that the business will continue in operation in Nevada for 10 or more years after the date on which a certificate of eligibility for the abatement is issued pursuant to subsection 5 and will continue to meet the eligibility requirements contained in this subsection. The agreement must bind the successors in interest of the business for the required period.

3. An applicant shall, upon the request of the executive director of the commission on economic development, furnish him with copies of all records necessary to verify that the applicant meets the requirements of subsection 2.

4. The percentage of the abatement must be 50 percent of the taxes payable each year.

5. If an application for a partial abatement is approved, the commission on economic development shall immediately forward a certificate of eligibility for the abatement to:

(a) The department; and

(b) The county assessor of each county in which personal property directly related to the establishment or expansion of the business will be located.

6. Upon receipt by the department of the certificate of eligibility, the taxpayer is eligible for an abatement from the tax imposed by this chapter for 10 years:

(a) For the expansion of a business, on all personal property of the business that is located in Nevada and directly related to the expansion of the business in this state.

(b) For a new business, on all personal property of the business that is located in Nevada and directly related to the establishment of the business in this state.

7. If a business for which an abatement has been approved is not maintained in this state in accordance with the agreement required in subsection 2, for at least 10 years after the commission on economic development approved the abatement, the person who applied for the abatement shall repay to the county treasurer or treasurers who would have received the taxes but for the abatement the total amount of all taxes that were abated pursuant to this section. ~~{The}~~ *Except as otherwise provided in NRS 360.320 and section 2 of this act, the person who applied for the abatement shall pay interest on the amount due at the rate of 10 percent per annum for each month, or portion thereof, from the last day of the month following the period for which the payment would have been made if the abatement had not been granted until the date of the actual payment of the tax.*

8. A county treasurer:

(a) Shall deposit any money that he receives pursuant to subsection 7 in one or more of the funds established by a local government of the county pursuant to NRS 354.611, 354.6113 or 354.6115; and

(b) May use the money deposited pursuant to paragraph (a) only for the purposes authorized by NRS 354.611, 354.6113 and 354.6115.

9. The commission on economic development shall adopt regulations necessary to carry out the provisions of this section. The regulations must include, but not be limited to:

(a) A method for determining the appropriate affected local government to approve a proposed abatement and the procedure for obtaining such approval; and

(b) Minimum requirements for benefits that a business applying for a partial abatement must offer to its employees to be approved for the partial abatement.

10. The department shall adopt regulations concerning how county assessors shall administer partial abatements approved pursuant to this section.

11. An applicant for an abatement who is aggrieved by a final decision of the commission on economic development may petition for judicial review in the manner provided in chapter 233B of NRS.

Sec. 13. NRS 361.435 is hereby amended to read as follows:

361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City, ~~{Nevada}~~ *the county of this state where the property owner resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department.*

Sec. 14. NRS 361.5648 is hereby amended to read as follows:

361.5648 1. Within 30 days after the first Monday in March of each year, with respect to each property on which the tax is delinquent, the tax receiver of the county shall mail notice of the delinquency by first-class mail to:

(a) The owner or owners of the property;
(b) The person or persons listed as the taxpayer or taxpayers on the tax rolls, at their last known addresses, if the names and addresses are known; and

(c) Each holder of a recorded security interest if the holder has made a request in writing to the tax receiver for the notice, which identifies the secured property by the parcel number assigned to it in accordance with the provisions of NRS 361.189.

2. The notice of delinquency must state:

(a) The name of the owner of the property, if known.
(b) The description of the property on which the taxes are a lien.
(c) The amount of the taxes due on the property and the penalties and costs as provided by law.

(d) That if the amount is not paid by the taxpayer or his successor in interest, the tax receiver will, at 5 p.m. on the first Monday in June of the current year, issue to the county treasurer, as trustee for the state and county, a certificate authorizing him to hold the property, subject to redemption within 2 years after the date of the issuance of the certificate, by payment of the taxes and accruing taxes, penalties and costs, together with interest on the taxes at the rate of 10 percent per annum from *the* date due until paid as provided by law, *except as otherwise provided in NRS 360.320 and section 2 of this act*, and that redemption may be made in accordance with the provisions of chapter 21 of NRS in regard to real property sold under execution.

3. Within 30 days after mailing the original notice of delinquency, the tax receiver shall issue his personal affidavit to the board of county commissioners affirming that due notice has been mailed with respect to each parcel. The affidavit must recite the number of letters mailed, the number of letters returned, and the number of letters finally determined to be undeliverable. Until the period of redemption has expired, the tax receiver shall maintain detailed records which contain such information as the department may prescribe in support of his affidavit.

4. A second copy of the notice of delinquency must be sent by certified mail, not less than 60 days before the expiration of the period of redemption as stated in the notice.

5. The cost of each mailing must be charged to the delinquent taxpayer.

Sec. 15. NRS 361.570 is hereby amended to read as follows:

361.570 1. Pursuant to the notice given as provided in NRS 361.5648 and 361.565 and at the time stated in the notice, the tax receiver shall make out his certificate authorizing the county treasurer, as trustee for the state and county, to hold the property described in the notice for the period of 2 years after the first Monday in June of the year the certificate is dated, unless sooner redeemed.

2. The certificate must specify:

(a) The amount of delinquency, including the amount and year of assessment;

(b) The taxes and the penalties and costs added thereto, and that, *except as otherwise provided in NRS 360.320 and section 2 of this act*, interest on the taxes will be added at the rate of 10 percent per annum from the date due until paid; and

(c) The name of the owner or taxpayer, if known.

3. The certificate must state, and it is hereby provided:

(a) That the property may be redeemed within 2 years ~~from~~ *after* its date; and

(b) That, if not redeemed, the title to the property vests in the county for the benefit of the state and county.

4. Until the expiration of the period of redemption, the property held pursuant to the certificate must be assessed annually to the county treasurer as trustee, and before the owner or his successor redeems the property, he shall also pay the county treasurer holding the certificate any additional taxes assessed and accrued against the property after the date of the certificate, together with the interest on the taxes at the rate of 10 percent per annum from the date due until paid ~~+~~, *unless otherwise provided in NRS 360.320 or section 2 of this act*.

5. The county treasurer shall take certificates issued to him under the provisions of this section.

Sec. 16. NRS 361.870 is hereby amended to read as follows:

361.870 1. Any claimant aggrieved by a decision of the department or a county assessor which denies the refund claimed under the Senior Citizens' Property Tax Assistance Act may have a review of the denial before the ~~executive director~~ *Nevada tax commission* if, within 30 days after the claimant receives notice of the denial, he submits a written petition for review to the ~~department~~ *commission*.

2. Any claimant aggrieved by the denial in whole or in part of relief claimed under the Senior Citizens' Property Tax Assistance Act, or by any other final action or review of the ~~executive director~~, *Nevada tax commission*, is entitled to judicial review thereof.

Sec. 17. (Deleted by amendment.)

Sec. 18. NRS 362.160 is hereby amended to read as follows:

362.160 1. ~~It~~ *Except as otherwise provided in NRS 360.320 and section 2 of this act*, if the amount of any tax required by NRS 362.100 to 362.240, inclusive, is not paid within 10 days after it is due, it is delinquent and must be collected as other delinquent taxes are collected by law, together with a penalty of 10 percent of the amount of the tax which is owed, as determined by the department, in addition to the tax, plus interest at the rate of ~~1.5~~ *1* percent per month, or fraction of a month, from the date the tax was due until the date of payment.

2. Any person extracting any mineral or receiving a royalty may appeal from the imposition of the penalty and interest to the Nevada tax commission by filing a notice of appeal ~~within 30 days after the tax became due~~ *in accordance with the requirements set forth in NRS 360.245*.

Sec. 19. NRS 362.230 is hereby amended to read as follows:

362.230 1. Every person extracting any mineral in this state, or receiving a royalty in connection therewith, who fails to file with the department the statements provided for in NRS 362.100 to 362.240, inclusive, during the time and in the manner provided for in NRS 362.100 to 362.240, inclusive, shall pay a penalty of not more than \$5,000. If any such person fails to file the statement, the department may ascertain and certify the net proceeds of the minerals extracted or the value of the royalty from all data and information obtainable, and the amount of the tax due must be computed on the basis of the amount due so ascertained and certified.

2. The executive director shall determine the amount of the penalty. This penalty becomes a debt due the State of Nevada and, upon collection, must be deposited in the state treasury to the credit of the state general fund.

3. Any person extracting any mineral or receiving a royalty may appeal from the imposition of the penalty to the Nevada tax commission by filing a notice of appeal ~~within 30 days after the decision of the executive director.~~ *in accordance with the requirements set forth in NRS 360.245.*

Sec. 20. NRS 364A.170 is hereby amended to read as follows:

364A.170 1. A proposed business that qualifies pursuant to the provisions of this section is entitled to an exemption of:

(a) Eighty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the first 4 quarters of its operation;

(b) Sixty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the second 4 quarters of its operation;

(c) Forty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the third 4 quarters of its operation; and

(d) Twenty percent of the amount of tax otherwise due pursuant to NRS 364A.140 during the fourth 4 quarters of its operation.

2. A proposed business is entitled to the exemption pursuant to subsection 1 if:

(a) In a county whose population is 35,000 or more:

(1) The business will have 75 or more full-time employees on the payroll of the business by the fourth quarter that it is in operation;

(2) Establishing the business will require the business to make a capital investment of \$1,000,000 in Nevada; and

(3) The exemption is approved by the commission on economic development pursuant to subsection 3.

(b) In a county whose population is less than 35,000:

(1) The business will have 25 or more full-time employees on the payroll of the business by the fourth quarter that it is in operation;

(2) Establishing the business will require the business to make a capital investment of \$250,000 in Nevada; and

(3) The exemption is approved by the commission on economic development pursuant to subsection 3.

3. A proposed business must apply to the commission on economic development to obtain the exemption authorized pursuant to this section. The commission shall certify a business's eligibility for the exemption pursuant to this section if:

(a) The proposed business commits to the requirements of subparagraphs (1) and (2) of paragraph (a) or (b) of subsection 2, whichever is applicable; and

(b) The proposed business is consistent with the commission's plan for economic diversification and development.

Upon certification, the commission shall immediately forward the certificate of eligibility for the exemption to the Nevada tax commission.

4. Upon receipt of such a certificate, the Nevada tax commission shall include the exemption in the calculation of the tax paid by the business. A business for which an exemption is approved that does not:

(a) Have the required number of full-time employees on the payroll of the business by the fourth quarter that it is in operation; or

(b) Make the required capital investment in Nevada in the course of establishing the business,

is required to repay to the department the amount of the exemption that was allowed pursuant to this section before the business's failure to comply unless the Nevada tax commission determines that the business has substantially complied with the requirements of this section. *{The} Except as otherwise provided in NRS 360.320 and section 2 of this act, the business is also required to pay interest on the amount due at the rate most recently established pursuant to NRS 99.040 for each month, or portion thereof, from the last day of the month following the period for which the payment would have been made had the exemption not been granted until the date of payment of the tax.*

5. The commission on economic development shall adopt regulations governing the determination made pursuant to subsection 3 of a proposed business's eligibility for the exemption provided in this section.

6. The Nevada tax commission:

(a) Shall adopt regulations governing the investments that qualify for the purposes of the required capital investment pursuant to subparagraph (2) of paragraph (a) or (b) of subsection 2.

(b) May adopt such other regulations as are necessary to carry out the provisions of this section.

Sec. 21. NRS 364A.180 is hereby amended to read as follows:

364A.180 Upon written application made before the date on which payment must be made, for good cause the department may extend by 30 days the time within which a business is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the business shall pay interest at the rate most recently established pursuant to NRS 99.040 for each month, or fraction of a month, from the last day of the month following the date on which the amount would have been due without the extension until the date of payment *{-}*, *unless otherwise provided in NRS 360.320 or section 2 of this act.*

Sec. 22. NRS 364A.260 is hereby amended to read as follows:

364A.260 1. *{Interest} Except as otherwise provided in NRS 360.320, interest* must be paid upon any overpayment of any amount of the fee or tax imposed by this chapter at the rate of one-half of 1 percent per month, or fraction thereof, from the last day of the calendar month following the period

for which the overpayment was made. No refund or credit may be made of any interest imposed upon the person or business making the overpayment with respect to the amount being refunded or credited.

2. The interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the department that a claim may be filed or the date upon which the claim is certified to the state board of examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the fee or tax or amount against which the credit is applied.

3. If the department determines that any overpayment has been made intentionally or by reason of carelessness, it shall not allow any interest on it.

Sec. 23. NRS 364A.280 is hereby amended to read as follows:

364A.280 1. Within 90 days after ~~{the mailing of the notice of the department's action}~~ *a final decision* upon a claim filed pursuant to this chapter ~~{}~~ *is rendered by the Nevada tax commission*, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City ~~{or Clark County}~~, *the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department*, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

Sec. 24. NRS 364A.290 is hereby amended to read as follows:

364A.290 1. If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~{, before the mailing of notice by the department of its action on the claim,}~~ consider the claim disallowed and *file an appeal with the Nevada tax commission within the 30 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the commission rendered on appeal, he may, within 90 days after the decision is rendered*, bring an action against the department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

2. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any fee or tax due from the plaintiff.

3. The balance of the judgment must be refunded to the plaintiff.

Sec. 25. NRS 365.310 is hereby amended to read as follows:

365.310 1. The department ~~{shall have power to}~~ *may* suspend, cancel or revoke the license of any dealer refusing or neglecting to comply with the provisions of this chapter.

2. If a dealer becomes delinquent in the payment of excise taxes as prescribed by this chapter to the extent that his liability exceeds the total amount of bond furnished by the dealer, the department shall suspend his license immediately.

3. Before revoking or canceling any license issued under this chapter, the department shall send a notice by registered or certified mail to the dealer at his last known address. The notice ~~{shall}~~ **must** order the dealer to show cause why his license should not be revoked by appearing before the department at Carson City, Nevada, or such other place in this state as may be designated by the department, at a time not less than 10 days after the mailing of the notice. The department shall allow the dealer an opportunity to be heard in pursuance of such notice, and thereafter the department ~~{shall have full power to}~~ **may** revoke or cancel his license.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may **file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may** bring an action against the state treasurer in ~~{the district court in and for}~~ **a court of competent jurisdiction in Carson City, the county of this state where the dealer resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,** for the recovery of the excise tax so paid under protest.

Sec. 27. NRS 365.470 is hereby amended to read as follows:

365.470 1. No action authorized by NRS 365.460 may be instituted more than 90 days after ~~{the last day prescribed for the payment of the excise tax without penalty}~~ **a final decision is rendered by the Nevada tax commission on appeal.** Failure to bring suit within the 90 days ~~{shall constitute}~~ **constitutes** a waiver of any and all demands against the state on account of alleged overpayment of excise taxes.

2. No grounds of illegality of the excise tax ~~{shall}~~ **may** be considered by the court other than those set forth in the protest filed at the time of the payment of the excise tax.

Secs. 28-30. (Deleted by amendment.)

Sec. 31. NRS 372.135 is hereby amended to read as follows:

372.135 1. After compliance with NRS 372.125, 372.130 and 372.510 by the applicant, the department shall ~~{grant}~~ **:**

(a) **Grant** and issue to each applicant a separate permit for each place of business within the state.

(b) **Provide the applicant with a full, written explanation of the liability of the applicant for the collection and payment of the taxes imposed by this chapter. The explanation required by this paragraph:**

(1) **Must include the procedures for the collection and payment of the taxes that are specifically applicable to the type of business conducted by the applicant, including, without limitation and when appropriate:**

(I) **An explanation of the circumstances under which a service provided by the applicant is taxable;**

(II) **The procedures for administering exemptions; and**

(III) **The circumstances under which charges for freight are taxable.**

(2) **Is in addition to, and not in lieu of, the instructions and information required to be provided by NRS 360.2925.**

2. A permit is not assignable ~~{,}~~ and is valid only for the person in whose name it is issued and for the transaction of business at the place designated on it. It must at all times be conspicuously displayed at the place for which *it is* issued.

Sec. 32. NRS 372.660 is hereby amended to read as follows:

372.660 1. ~~{Interest}~~ *Except as otherwise provided in NRS 360.320, interest* must be paid upon any overpayment of any amount of tax at the rate of one-half of 1 percent per month from the last day of the calendar month following the period for which the overpayment was made. No refund or credit may be made of any interest imposed upon the person making the overpayment with respect to the amount being refunded or credited.

2. The interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the department that a claim may be filed or the date upon which the claim is certified to the state board of examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~{the mailing of the notice of the department's action}~~ *a final decision* upon a claim filed pursuant to this chapter ~~{,}~~ *is rendered by the Nevada tax commission*, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, *the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department*, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

Sec. 34. NRS 372.685 is hereby amended to read as follows:

372.685 If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~{, before the mailing of notice by the department of its action on the claim,}~~ consider the claim disallowed and *file an appeal with a hearing officer within 45 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada tax commission. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 45 days after the decision is rendered,* bring an action against the department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

Sec. 35. NRS 372.705 is hereby amended to read as follows:

372.705 The department may recover any refund or part of it which is erroneously made and any credit or part of it which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City *or Clark County* in the name of the State of Nevada.

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial.

Sec. 37. NRS 372.750 is hereby amended to read as follows:

372.750 1. Except as otherwise provided in this section, it is a misdemeanor for any member of the tax commission or officer, *agent* or employee of the department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular of them, set forth or disclosed in any return, or to permit any return or copy of a return, or any book containing any abstract or particulars of it to be seen or examined by any person not connected with the department.

2. The tax commission may agree with any county fair and recreation board or the governing body of any county, city or town for the continuing exchange of information concerning taxpayers.

3. The governor may, by general or special order, authorize *the* examination of the records maintained by the department under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained may not be made public except to the extent and in the manner that the order may authorize that it be made public.

4. Upon written request made by a public officer of a local government, the executive director shall furnish from the records of the department, the name and address of the owner of any seller or retailer who must file a return with the department. The request must set forth the social security number of the owner of the seller or retailer about which the request is made and contain a statement signed by the proper authority of the local government certifying that the request is made to allow the proper authority to enforce a law to recover a debt or obligation owed to the local government. The information obtained by the local government is confidential and may not be used or disclosed for any purpose other than the collection of a debt or obligation owed to that local government. The executive director may charge a reasonable fee for the cost of providing the requested information.

5. Successors, receivers, trustees, executors, administrators, assignees and guarantors, if directly interested, may be given information as to the items included in the measure and amounts of any unpaid tax or amounts of tax required to be collected, interest and penalties.

6. Relevant information may be disclosed as evidence in an appeal by the taxpayer from a determination of tax due.

7. At any time after a determination, decision or order of the executive director or other officer of the department imposing upon a person a penalty for fraud or intent to evade the tax imposed by this chapter on the sale, storage, use or other consumption of any vehicle, vessel or aircraft becomes final or is affirmed by the commission, any member of the commission or

officer, *agent* or employee of the department may publicly disclose the identity of that person and the amount of tax assessed and penalties imposed against him.

Sec. 38. NRS 374.140 is hereby amended to read as follows:

374.140 1. After compliance with NRS 374.130, 374.135 and 374.515 by the applicant, the department shall ~~grant~~:

(a) *Grant* and issue to each applicant a separate permit for each place of business within the county.

(b) *Provide the applicant with a full, written explanation of the liability of the applicant for the collection and payment of the taxes imposed by this chapter. The explanation required by this paragraph:*

(1) *Must include the procedures for the collection and payment of the taxes that are specifically applicable to the type of business conducted by the applicant, including, without limitation and when appropriate:*

(I) *An explanation of the circumstances under which a service provided by the applicant is taxable;*

(II) *The procedures for administering exemptions; and*

(III) *The circumstances under which charges for freight are taxable.*

(2) *Is in addition to, and not in lieu of, the instructions and information required to be provided by NRS 360.2925.*

2. A permit ~~{shall not be assignable, and shall be}~~ *is not assignable and* is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. ~~{It shall}~~ *A permit must* at all times be conspicuously displayed at the place for which *it* is issued.

Sec. 39. NRS 374.357 is hereby amended to read as follows:

374.357 1. A person who maintains a business or intends to locate a business in this state may apply to the commission on economic development for an abatement from the taxes imposed by this chapter on the gross receipts from the sale, and the storage, use or other consumption, of eligible machinery or equipment for use by a business which has been approved for an abatement pursuant to subsection 2.

2. The commission on economic development may approve an application for an abatement if:

(a) The goals of the business are consistent with the goals of the commission concerning industrial development and diversification;

(b) The commission determines that the abatement is a significant factor in the decision of the applicant to locate or expand a business in this state;

(c) The average hourly wage paid by the business to its employees in this state is at least equal to the average statewide industrial hourly wage as established by the employment security division of the department of employment, training and rehabilitation on July 1 of each fiscal year;

(d) The business provides a health insurance plan for its employees that includes an option for health insurance coverage for dependents of employees;

(e) The business is registered pursuant to the laws of this state or the applicant commits to obtain a valid business license and all other permits required by the county, city or town in which the business operates;

(f) The business will provide at least 10 full-time, permanent jobs in Nevada by the fourth quarter that it is in operation; and

(g) The applicant commits to maintaining his business in this state for at least 5 years.

3. An applicant shall, upon the request of the executive director of the commission on economic development, furnish to the director copies of all records necessary for the director to verify that the applicant meets the requirement of paragraph (c) of subsection 2.

4. The commission on economic development may approve an application for an abatement which does not meet the requirements of subsection 2 if the commission determines that such an approval is warranted.

5. If an application for an abatement is approved, the taxpayer is eligible for an abatement from the tax imposed by this chapter for 2 years.

6. If an application for an abatement is approved, the commission on economic development shall immediately forward a certificate of eligibility for the abatement to the Nevada tax commission.

7. If a business for which an abatement has been approved is not maintained in this state for at least 5 years after the commission on economic development approved the abatement, the person who applied for the abatement shall repay to the department the amount of the abatement that was allowed pursuant to this section before the failure of the business to comply unless the Nevada tax commission determines that the business has substantially complied with the requirements of this section. ~~{The}~~ *Except as otherwise provided in NRS 360.320 and section 2 of this act, the person who applied for the abatement shall pay interest on the amount due at the rate most recently established pursuant to NRS 99.040 for each month, or portion thereof, from the last day of the month following the period for which the payment would have been made had the abatement not been granted until the date of the actual payment of the tax.*

8. The commission on economic development shall adopt regulations which it considers necessary to carry out the provisions of this section.

9. As used in this section, unless the context otherwise requires, "eligible machinery or equipment" means machinery or equipment for which a deduction is authorized pursuant to 26 U.S.C. § 179. The term does not include:

- (a) Buildings or the structural components of buildings;
- (b) Equipment used by a public utility;
- (c) Equipment used for medical treatment;
- (d) Machinery or equipment used in mining; or
- (e) Machinery or equipment used in gaming.

Sec. 40. NRS 374.665 is hereby amended to read as follows:

374.665 1. ~~{Interest}~~ *Except as otherwise provided in NRS 360.320, interest must be paid upon any overpayment of any amount of tax at the rate of one-half of 1 percent per month from the last day of the calendar month following the period for which the overpayment was made . ~~{; but no}~~ No refund or credit may be made of any interest imposed upon the person making the overpayment with respect to the amount being refunded or credited.*

2. The interest must be paid as follows:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the department that a claim may be filed or the date upon which the claim is certified to the board of county commissioners, whichever date is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~the mailing of the notice of the department's action~~ *a final decision* upon a claim filed pursuant to this chapter ~~it is rendered by the Nevada tax commission~~, the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, *the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department*, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the county on account of alleged overpayments.

Sec. 42. NRS 374.690 is hereby amended to read as follows:

374.690 If the department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may ~~prior to the mailing of notice by the department of its action on the claim,~~ consider the claim disallowed and *file an appeal with a hearing officer within 45 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada tax commission. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 45 days after the decision is rendered,* bring an action against the department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

Sec. 43. NRS 374.755 is hereby amended to read as follows:

374.755 1. Except as otherwise provided in this section, it is a misdemeanor for any member of the Nevada tax commission or ~~official~~ *officer, agent* or employee of the department to make known in any manner whatever the business affairs, operations or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person not connected with the department.

2. The Nevada tax commission may agree with any county fair and recreation board or the governing body of any county, city or town for the continuing exchange of information concerning taxpayers.

3. The governor may, however, by general or special order, authorize *the* examination of the records maintained by the department under this chapter by other state officers, by tax officers of another state, by the Federal Government, if a reciprocal arrangement exists, or by any other person. The information so obtained pursuant to the order of the governor may not be made public except to the extent and in the manner that the order may authorize that it be made public.

4. Upon written request made by a public officer of a local government, the executive director shall furnish from the records of the department, the name and address of the owner of any seller or retailer who must file a return with the department. The request must set forth the social security number of the owner of the seller or retailer about which the request is made and contain a statement signed by the proper authority of the local government certifying that the request is made to allow the proper authority to enforce a law to recover a debt or obligation owed to the local government. The information obtained by the local government is confidential and may not be used or disclosed for any purpose other than the collection of a debt or obligation owed to that local government. The executive director may charge a reasonable fee for the cost of providing the requested information.

5. Successors, receivers, trustees, executors, administrators, assignees and guarantors, if directly interested, may be given information as to the items included in the measure and amounts of any unpaid tax or amounts of tax required to be collected, interest and penalties.

6. Relevant information may be disclosed as evidence in an appeal by the taxpayer from a determination of tax due.

7. At any time after a determination, decision or order of the executive director or other officer of the department imposing upon a person a penalty for fraud or intent to evade the tax imposed by this chapter on the sale, storage, use or other consumption of any vehicle, vessel or aircraft becomes final or is affirmed by the commission, any member of the commission or officer, *agent* or employee of the department may publicly disclose the identity of that person and the amount of tax assessed and penalties imposed against him.

Sec. 44. NRS 375A.170 is hereby amended to read as follows:

375A.170 If the return provided for in NRS 375A.150 is not filed within the time specified in that section or the extension specified in NRS 375A.155, then the personal representative shall pay, *except as otherwise provided in NRS 360.320 and section 2 of this act, and* in addition to the interest provided in NRS 375A.205, a penalty equal to 5 percent of the tax due, as finally determined, for each month or portion of a month during which that failure to file continues, not exceeding 25 percent in the aggregate, unless it is shown that there was reasonable cause for the failure to file. If a similar penalty for failure to file timely the federal estate tax return is waived, that waiver shall be deemed to constitute reasonable cause for purposes of this section.

Sec. 45. NRS 375A.195 is hereby amended to read as follows:

375A.195 If it is claimed that a deficiency has been determined in an erroneous amount, any person who is liable for the tax may ~~+~~ *appeal the determination to the Nevada tax commission pursuant to NRS 360.245. If*

the person who is liable for the tax is aggrieved by the decision of the commission on appeal, he may, within 3 years after the determination was made, bring an action against the State of Nevada in the district court having jurisdiction over the estate to have the tax modified in whole or in part.

Sec. 46. NRS 375A.205 is hereby amended to read as follows:

375A.205 1. The tax imposed by NRS 375A.100 does not bear interest if it is paid before the date on which it otherwise becomes delinquent. ~~If~~ *Except as otherwise provided in NRS 360.320 and section 2 of this act, if* the tax is paid after that date, the tax bears interest at the rate set by the executive director, from the date it became delinquent until it is paid.

2. The executive director shall set and maintain the rate of interest for late payments at the highest rate permissible pursuant to section 4 of article 10 of the Nevada constitution.

Sec. 47. NRS 375A.215 is hereby amended to read as follows:

375A.215 1. If any personal representative fails to pay any tax imposed by NRS 375A.100 for which he is liable before the date the tax becomes delinquent, he must, on motion of the department, be required by the district court having jurisdiction over the estate to execute a bond to the State of Nevada in an amount equal to twice the amount of the tax, with such sureties as the court may approve, conditioned for the payment of the tax, plus interest on the tax at the rate of interest set by the executive director pursuant to NRS 375A.205 commencing on the date the tax became delinquent, *unless otherwise provided in NRS 360.320 or section 2 of this act. The bond must be executed* within a certain time to be fixed by the court and specified in the bond.

2. The bond must be filed in the office of the clerk of the court, and a certified copy must be immediately transmitted to the department.

3. If the bond is not filed within 20 days after the date of the filing of the order requiring it, the letters of the personal representative affected must be revoked upon motion of the department.

Sec. 48. NRS 375A.225 is hereby amended to read as follows:

375A.225 Interest must be paid upon any overpayment of the tax due under NRS 375A.100 at the rate of interest set by the executive director pursuant to NRS 375A.205. ~~That~~ *Except as otherwise provided in NRS 360.320, the* interest must be allowed from the date on which payment of the tax would have become delinquent, if not paid, or the date of actual payment, whichever is later, to a date preceding the date of the refund by not more than 30 days, as determined by the department.

Sec. 49. NRS 375A.690 is hereby amended to read as follows:

375A.690 ~~If~~ *Except as otherwise provided in NRS 360.320 and section 2 of this act, if* the board determines that a decedent dies domiciled in this state, the total amount of interest and penalties for nonpayment of the tax, between the date of the election and the final determination of the board, must not exceed an amount determined by applying the rate of interest set by the executive director pursuant to NRS 375A.205 to the amount of the taxes due.

Sec. 50. NRS 375B.190 is hereby amended to read as follows:

375B.190 If the return required by NRS 375B.150 is not filed within the time specified in that section or the extension specified in NRS 375B.160, the person liable for the tax shall pay, *except as otherwise provided in NRS 360.320 and section 2 of this act*, and in addition to the interest provided in NRS 375B.250, a penalty equal to 5 percent of the tax due, as finally determined, for each month or portion of a month during which that failure to file continues, not exceeding 25 percent in the aggregate, unless it is shown that there was reasonable cause for the failure to file. If a similar penalty for failure to file timely the federal estate tax return is waived, that waiver shall be deemed to constitute reasonable cause for purposes of this section.

Sec. 51. NRS 375B.230 is hereby amended to read as follows:

375B.230 1. If it is claimed that a deficiency has been determined in an erroneous amount, any person who is liable for the tax may ~~{} appeal the determination to the Nevada tax commission pursuant to NRS 360.245. If the person who is liable for the tax is aggrieved by the decision of the commission on appeal, he may,~~ within 3 years after the determination was made, bring an action against the State of Nevada in the district court having jurisdiction over the property which was transferred to have the tax modified in whole or in part.

2. The department shall give notice of the deficiency determined, together with any penalty for failure to file a return, by personal service or by mail to the person filing the return at the address stated in the return, or, if no return is filed, to the person liable for the tax. Copies of the notice of deficiency may in the same manner be given to such other persons as the department deems advisable.

Sec. 52. NRS 375B.250 is hereby amended to read as follows:

375B.250 1. ~~{} Except as otherwise provided in NRS 360.320 and section 2 of this act,~~ if the tax is paid after the due date, the tax bears interest at the rate set by the executive director, from the due date of the return.

2. The executive director shall set and maintain the rate of interest for late payments at the highest rate permissible pursuant to section 4 of article 10 of the Nevada constitution.

Sec. 53. NRS 375B.270 is hereby amended to read as follows:

375B.270 1. If any person who is liable for the tax fails to pay any portion of the tax imposed by NRS 375B.100 on or before the date the tax is due, he must, on motion of the department, be required by the district court having jurisdiction over the generation-skipping transfer to execute a bond to the State of Nevada in an amount equal to twice the amount of the tax due, with such sureties as the court may approve, conditioned upon the payment of the tax, plus interest on the tax at the rate of interest set by the executive director pursuant to NRS 375B.250 commencing on the date the tax became due, *unless otherwise provided in NRS 360.320 and section 2 of this act. The bond must be executed within a time certain to be fixed by the court and specified in the bond.*

2. The bond must be filed in the office of the clerk of the court, and a certified copy must be immediately transmitted to the department.

Sec. 53.2. Section 17 of Assembly Bill No. 375 of this session is hereby amended to read as follows:

Sec. 17. NRS 361.570 is hereby amended to read as follows:

361.570 1. Pursuant to the notice given as provided in NRS 361.5648 and 361.565 and at the time stated in the notice, the tax receiver shall make out ~~{this certificate authorizing}~~ *a certificate that describes each property on which delinquent taxes have not been paid. The certificate authorizes* the county treasurer, as trustee for the state and county, to hold ~~{the}~~ *each* property described in the ~~{notice}~~ *certificate* for the period of 2 years after the first Monday in June of the year the certificate is dated, unless sooner redeemed.

2. The certificate must specify:

(a) The amount of delinquency ~~{}~~ *on each property*, including the amount and year of assessment;

(b) The taxes, and the penalties and costs added thereto, *on each property*, and that, except as otherwise provided in NRS 360.320 and section 2 of *Senate Bill No. 362 of this {act,} session*, interest on the taxes will be added at the rate of 10 percent per annum from the date due until paid; and

(c) The name of the owner or taxpayer ~~{}~~ *of each property*, if known.

3. The certificate must state, and it is hereby provided:

(a) That ~~{the}~~ *each property described in the certificate* may be redeemed within 2 years after ~~{its date;}~~ *the date of the certificate*; and

(b) That ~~{if not redeemed,}~~ the title to ~~{the}~~ *each property not redeemed* vests in the county for the benefit of the state and county.

4. Until the expiration of the period of redemption, ~~{the}~~ *each* property held pursuant to the certificate must be assessed annually to the county treasurer as trustee, and before the owner or his successor redeems the property, he shall also pay the county treasurer holding the certificate any additional taxes assessed and accrued against the property after the date of the certificate, together with ~~{the}~~ interest on the taxes at the rate of 10 percent per annum from the date due until paid, unless otherwise provided in NRS 360.320 or section 2 of ~~{this act}~~.

~~5. The {Senate Bill No. 362 of this session.}~~

5. A county treasurer shall take ~~{certificates}~~ *a certificate* issued to him ~~{under the provisions of}~~ *pursuant to* this section. *The county treasurer may cause the certificate to be recorded in the office of the county recorder against each property described in the certificate to provide constructive notice of the amount of delinquent taxes on each property respectively. The certificate reflects the amount of delinquent taxes due on the properties described in the certificate on the date on which the certificate was recorded, and the certificate need not be amended subsequently to indicate the repayment of any of those delinquent taxes. The recording of the certificate does not affect the statutory lien for taxes provided in NRS 361.450.*

Sec. 53.4. Section 48 of Assembly Bill No. 584 of this session is hereby amended to read as follows:

Sec. 48. NRS 360.417 is hereby amended to read as follows:

360.417 Except as otherwise provided in NRS 360.320 and section 2 of *Senate Bill No. 362 of this {act,} session*, and unless a different penalty or rate of interest is specifically provided by statute, any person who fails to pay any tax provided for in chapter 362, 364A, ~~{365,}~~ 369, 370, 372, ~~{373,}~~ 374, 377, 377A, 444A or 585 of NRS, or *the* fee provided for in NRS 482.313, ~~{or 590.700 to 590.920, inclusive,}~~ to the state or a county within the time required, shall pay a penalty of not more than 10 percent of the amount of the tax or fee which is owed, as determined by the department, in addition to the tax or fee, plus interest at the rate of 1 percent per month, or fraction of a month, from the last day of the month following the period for which the amount or any portion of the amount should have been reported until the date of payment. The amount of any penalty imposed must be based on a graduated schedule adopted by the Nevada tax commission which takes into consideration the length of time the tax or fee remained unpaid.

Sec. 53.6. Section 87 of Assembly Bill No. 584 of this session is hereby amended to read as follows:

Sec. 87. NRS 365.310 is hereby amended to read as follows:

365.310 1. The department may suspend, cancel or revoke the license of any dealer *or supplier* refusing or neglecting to comply with the provisions of this chapter.

2. If a dealer *or supplier* becomes delinquent in the payment of excise taxes as prescribed by this chapter to the extent that his liability exceeds the total amount of *the* bond *or bonds* furnished by the dealer ~~{,}~~ *or supplier*, the department shall suspend his license immediately.

3. Before revoking or canceling any license issued under this chapter, the department shall send a notice by registered or certified mail to the dealer *or supplier* at his last known address. The notice must order the dealer *or supplier* to show cause why his license should not be revoked by appearing before the department at Carson City, Nevada, or such other place in this state as may be designated by the department, at a time not less than 10 days after the mailing of the notice. The department shall allow the dealer *or supplier* an opportunity to be heard in pursuance of ~~{such}~~ *the* notice, and thereafter the department may revoke or cancel his license.

Sec. 53.8. 1. Notwithstanding the provisions of NRS 365.470, if a person properly files an appeal with the Nevada tax commission pursuant to NRS 365.460 before January 1, 2002, and the commission fails to render a final decision on the appeal before that date, the person may commence an action against the state treasurer pursuant to NRS 365.460 not later than:

(a) April 1, 2002; or

(b) Ninety days after the last day prescribed for the payment of the excise tax without a penalty, whichever occurs last.

2. The provisions of subsection 4 of section 54 of this act do not affect any actions commenced before January 1, 2002, against the state treasurer pursuant to NRS 365.460.

Sec. 54. 1. This section and sections 1 to 9, inclusive, 11 to 30, inclusive, 32 to 37, inclusive, and 39 to 53.8, inclusive, of this act become effective on July 1, 1999.

2. Section 10 of this act becomes effective at 12:01 a.m. on July 1, 1999.

3. Sections 31 and 38 of this act become effective on July 1, 2000.

4. Sections 26 and 27 of this act expire by limitation on December 31, 2001.

Senate Bill No. 372—Senator Townsend

CHAPTER 485

AN ACT relating to motor vehicles; revising the rights of dealers in new vehicles as against manufacturers, importers and distributors; and providing other matters properly relating thereto.

[Approved June 8, 1999]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 482 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 8, inclusive, of this act.

Sec. 2. 1. *In addition to other criteria provided for determining whether good cause exists for terminating, refusing to continue, modifying or replacing a franchise, or for establishing an additional dealership or relocating an existing dealership, the director shall consider the lasting nature of each affected dealer's investment. The investment includes commitments of the owner to the dealership, the value of time and effort devoted to building the business, and any real property of the owner used by the dealership whether or not held in the name of the dealership.*

2. *The sole fact that a manufacturer or distributor desires further penetration of the market does not constitute good cause to take any of the actions described in subsection 1.*

Sec. 3. *The director shall adopt regulations for the conduct of discovery preliminary to each hearing required pursuant to NRS 482.36352, 482.36354 or 482.36357. The practice so established must conform insofar as practicable to the practice established for use in the district courts pursuant to N.R.C.P. 26 to 37, inclusive.*

Sec. 4. *A manufacturer or distributor, or an agent, officer, parent, subsidiary or enterprise under common control with a manufacturer or distributor shall not own or operate a facility for the repair or maintenance of motor vehicles except:*

1. *Vehicles owned or operated by the manufacturer, distributor or a related person; or*

2. *Service required to comply with a statute or regulation or the order of a court.*

FLOOR ACTIONS

AMENDMENTS ON SECOND READING

FLOOR VOTES AND STATEMENTS

OTHER ACTIONS

3. If after recordation of the deed, the county recorder disallows an exemption that was claimed at the time the deed was recorded or through audit or otherwise determines that an additional amount of tax is due, the county recorder shall promptly notify the buyer or seller, or both, of the additional amount of tax due. In addition to the additional amount determined to be due, the county recorder shall impose a penalty of 10 percent of the additional amount due in addition to interest at the rate of 1 1/2 percent per month, or portion thereof, of the additional amount due calculated from the date of the original recordation of the deed on which the additional amount is due through the date on which the additional amount due, penalty and interest are paid to the county recorder.

4. This section does not prohibit a buyer and seller from agreeing by contract or otherwise that one party or the other will be responsible for the payment of the tax due pursuant to this chapter, but such an agreement does not affect the ability of the county recorder to collect the tax and any penalties and interest from either the buyer or the seller.

Sec. 3. This act becomes effective upon passage and approval for the purpose of adopting regulations by the department of taxation that are necessary to carry out the provisions of this act and on October 1, 1999, for all other purposes.”

Amend the title of the bill, first line, by deleting: “method of collecting” and inserting: “provisions governing the collection of”.

Senator McGinness moved the adoption of the amendment.

Remarks by Senator McGinness.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 362.

Bill read second time.

The following amendment was proposed by the Committee on Taxation:

Amendment No. 245.

Amend section 1, page 1, line 2, by deleting: “2 and 3” and inserting: “2, 3 and 3.5”.

Amend the bill as a whole by adding a new section designated sec. 3.5, following sec. 3, to read as follows:

“Sec. 3.5. *The Nevada tax commission shall adopt regulations to carry out the provisions of sections 7 and 10 of this act.*”

Amend sec. 4, page 2, by deleting lines 34 and 35 and inserting: “4.] any decision of the department that is:

(a) *Appealed to the commission by a taxpayer pursuant to this section; or*
(b) *Reviewed by the commission pursuant to this section.*”

Amend sec. 4, page 2, by deleting lines 41 and 42 and inserting:

“(a) Notice to be given to each county of any decision upon an appeal to the commission that”.

Amend sec. 4, page 3, by deleting line 12 and inserting: “accompanied by the names of the parties and the amount on appeal, if any, to”.

Amend sec. 5, page 5, line 16, by deleting "section." and inserting: "section or any applicable regulations."

Amend sec. 5, page 5, line 18, after "Title" by inserting: "or any applicable regulations."

Amend sec. 7, page 5, by deleting lines 30 through 35 and inserting: "1. ~~The executive director or his designee may waive taxes, penalties and interest owed by the taxpayer in an amount not to exceed \$5,000; and~~

2. ~~The Nevada tax commission may waive any such taxes, penalties and interest in an amount greater than \$5,000.~~ } or on an opinion of the attorney general:

(a) The department may waive any tax, penalty and interest owed by the taxpayer if the taxpayer meets the criteria adopted by regulation by the Nevada tax commission pursuant to section 3.5 of this act; and

(b) If a waiver is granted pursuant to paragraph (a), the department shall prepare and maintain on file a statement which contains:

(1) The reason for the waiver;

(2) The amount of the tax, penalty and interest owed by the taxpayer;

(3) The amount of the tax, penalty and interest waived by the department; and

(4) The facts and circumstances which led to the waiver."

Amend sec. 8, page 6, by deleting lines 10 through 20 and inserting: "~~the interest on underpayments.~~ any other reporting period within the audit period.

2. If it is determined that there is a net deficiency, any penalty imposed must be calculated based on the amount of the net deficiency.

3. If it is determined that:

(a) There is a net deficiency for a reporting period after offsetting any overpayment from any previous reporting period, any interest imposed on the net deficiency must be calculated before determining whether there is an overpayment or net deficiency for the next reporting period within the audit period.

(b) There is a net overpayment for a reporting period after offsetting any net deficiency from any previous reporting period, any interest to which the taxpayer is entitled must be calculated before determining whether there is an overpayment or net deficiency for the next reporting period within the audit period.

4. The provisions of this section do not apply if the taxpayer has submitted a report that shows taxes due and has not remitted the taxes due in a timely manner.

5. As used in this section, "reporting period" includes, without limitation, a calendar month, a calendar quarter, a calendar year and any other period for reporting."

Amend sec. 10, page 7, line 2, by deleting "department" and inserting: "Nevada tax commission".

Amend sec. 34, page 21, by deleting lines 8 through 11 and inserting: "claim disallowed and file an appeal with a hearing officer within 45 days

after the last day of the 6-month period. If the claimant is aggrieved by the decision of the hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada tax commission. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 45 days after the decision is rendered, bring an action against”.

Amend sec. 42, page 25, by deleting lines 18 through 21 and inserting: *“claim disallowed and file an appeal with a hearing officer within 45 days after the last day of the 6-month period. If the claimant is aggrieved by the decision of the hearing officer on appeal, he may, pursuant to the provisions of NRS 360.245, appeal the decision to the Nevada tax commission. If the claimant is aggrieved by the decision of the commission on appeal, he may, within 45 days after the decision is rendered, bring an action against”.*

Amend sec. 54, page 29, line 18, by deleting: “and 11 to 53,” and inserting: “11 to 30, inclusive, 32 to 37, inclusive, and 39 to 53,”.

Amend sec. 54, page 29, after line 21, by inserting:

“3. Sections 31 and 38 of this act become effective on July 1, 2000.”.

Amend the title of the bill, sixth line, after “commission;” by inserting: “requiring the department to adopt certain regulations;”.

Senator McGinness moved the adoption of the amendment.

Remarks by Senator McGinness.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 432.

Bill read second time.

The following amendment was proposed by the Committee on Natural Resources:

Amendment No. 405.

Amend the bill as a whole by deleting sections 1 through 9 and adding new sections designated sections 1 through 4, following the enacting clause, to read as follows:

“Section 1. 1. The Committee to Study Air Quality Control Programs in Clark County is hereby created. The Committee consists of:

(a) One member appointed by the Board of County Commissioners of Clark County, who shall serve as Chairman of the Committee;

(b) One member appointed by the Board of County Commissioners of Clark County to represent the fuel industry;

(c) Two members appointed by the Board of County Commissioners of Clark County to represent environmental concerns;

(d) One member appointed by the Regional Transportation Commission of Clark County;

(e) One member appointed by the Board of Trustees of the Clark County School District;

(f) One member appointed by the Board of Health of Clark County;

(g) One member appointed by the Nevada League of Cities;

Senate Bill No. 273 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 287.

Bill read third time.

Roll call on Senate Bill No. 287:

YEAS—18.

NAYS—James, Neal, Titus—3.

Senate Bill No. 287 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 318.

Bill read third time.

Remarks by Senators Carlton and McGinness.

Roll call on Senate Bill No. 318:

YEAS—21.

NAYS—None.

Senate Bill No. 318 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 349.

Bill read third time.

The following amendment was proposed by Senator McGinness:

Amendment No. 698.

Amend sec. 7, page 2, by deleting sec. 7 and inserting:

“Sec. 7. (Deleted by amendment.)”.

Amend the title of the bill, fifth and sixth lines, by deleting: “eliminating the conversion factor for liquefied petroleum gas used in the calculation of the tax on special fuel;”.

Senator McGinness moved the adoption of the amendment.

Remarks by Senator McGinness.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 362.

Bill read third time.

Roll call on Senate Bill No. 362:

YEAS—21.

NAYS—None.

Senate Bill No. 362 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 366.

Bill read third time.

SECOND READING AND AMENDMENT

Senate Bill No. 362.

Bill read second time.

The following amendment was proposed by the Committee on Taxation:

Amendment No. 945.

Amend sec. 2, page 1, line 3, after "*conducted*" by inserting: "*by the department*".

Amend sec. 3.5, page 2, by deleting line 16 and inserting: "*carry out the provisions of NRS 360.294 and 360.417.*".

Amend sec. 13, page 11, by deleting line 29 and inserting: "*City, ~~{Nevada}~~ the county of this state where the property owner resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department.*".

Amend the bill as a whole by deleting sec. 17 and adding:

"Sec. 17. (Deleted by amendment.)".

Amend sec. 23, page 17, line 22, by deleting: "*or Clark County*" and inserting: "*~~{for Clark County}~~, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,*".

Amend sec. 26, page 18, lines 25 and 26 by deleting: "*City or Clark County*" and inserting: "*City, the county of this state where the dealer resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,*".

Amend the bill as a whole by deleting sections 28 through 30 and adding:

"Secs. 28-30. (Deleted by amendment.)".

Amend sec. 33, page 21, line 26, by deleting: "*or Clark County*" and inserting: "*, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,*".

Amend sec. 41, page 25, line 39, by deleting: "*or Clark County*" and inserting: "*, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,*".

Amend the bill as a whole by adding new sections designated sections 53.2 through 53.8, following sec. 53, to read as follows:

"Sec. 53.2. Section 17 of Assembly Bill No. 375 of this session is hereby amended to read as follows:

Sec. 17. NRS 361.570 is hereby amended to read as follows:

361.570 1. Pursuant to the notice given as provided in NRS 361.5648 and 361.565 and at the time stated in the notice, the tax receiver shall make out ~~{this certificate authorizing}~~ *a certificate that describes each property on which delinquent taxes have not been paid. The certificate authorizes* the county treasurer, as trustee for the state and county, to hold ~~{the}~~ *each* property described in the ~~{notice}~~ *certificate* for the period of 2 years after the first Monday in June of the year the certificate is dated, unless sooner redeemed.

2. The certificate must specify:

(a) The amount of delinquency ~~{-}~~ *on each property*, including the amount and year of assessment;

(b) The taxes , and the penalties and costs added thereto, *on each property*, and that, except as otherwise provided in NRS 360.320 and section 2 of *Senate Bill No. 362 of this {act,} session*, interest on the taxes will be added at the rate of 10 percent per annum from the date due until paid; and

(c) The name of the owner or taxpayer ~~{-}~~ *of each property*, if known.

3. The certificate must state, and it is hereby provided:

(a) That ~~{the}~~ *each property described in the certificate* may be redeemed within 2 years after ~~{its date,} the date of the certificate~~; and

(b) That ~~{-, if not redeemed,}~~ the title to ~~{the}~~ *each property not redeemed* vests in the county for the benefit of the state and county.

4. Until the expiration of the period of redemption, ~~{the}~~ *each property* held pursuant to the certificate must be assessed annually to the county treasurer as trustee, and before the owner or his successor redeems the property, he shall also pay the county treasurer holding the certificate any additional taxes assessed and accrued against the property after the date of the certificate, together with ~~{the}~~ interest on the taxes at the rate of 10 percent per annum from the date due until paid, unless otherwise provided in NRS 360.320 or section 2 of ~~{this act.}~~

~~5. The} Senate Bill No. 362 of this session.~~

5. A county treasurer shall take ~~{certificates}~~ *a certificate* issued to him ~~{under the provisions of}~~ *pursuant to this section. The county treasurer may cause the certificate to be recorded in the office of the county recorder against each property described in the certificate to provide constructive notice of the amount of delinquent taxes on each property respectively. The certificate reflects the amount of delinquent taxes due on the properties described in the certificate on the date on which the certificate was recorded, and the certificate need not be amended subsequently to indicate the repayment of any of those delinquent taxes. The recording of the certificate does not affect the statutory lien for taxes provided in NRS 361.450.*

Sec. 53.4. Section 48 of Assembly Bill No. 584 of this session is hereby amended to read as follows:

Sec. 48. NRS 360.417 is hereby amended to read as follows:

360.417 Except as otherwise provided in NRS 360.320 and section 2 of *Senate Bill No. 362 of this {act,} session*, and unless a different penalty or rate of interest is specifically provided by statute, any person who fails to pay any tax provided for in chapter 362, 364A, ~~{365,}~~ 369, 370, 372, ~~{373,}~~ 374, 377, 377A, 444A or 585 of NRS, or *the fee provided for in NRS 482.313 , {or 590.700 to 590.920, inclusive,}* to the state or a county within the time required, shall pay a penalty of not

more than 10 percent of the amount of the tax or fee which is owed, as determined by the department, in addition to the tax or fee, plus interest at the rate of 1 percent per month, or fraction of a month, from the last day of the month following the period for which the amount or any portion of the amount should have been reported until the date of payment. The amount of any penalty imposed must be based on a graduated schedule adopted by the Nevada tax commission which takes into consideration the length of time the tax or fee remained unpaid.

Sec. 53.6. Section 87 of Assembly Bill No. 584 of this session is hereby amended to read as follows:

Sec. 87. NRS 365.310 is hereby amended to read as follows:

365.310 1. The department may suspend, cancel or revoke the license of any dealer *or supplier* refusing or neglecting to comply with the provisions of this chapter.

2. If a dealer *or supplier* becomes delinquent in the payment of excise taxes as prescribed by this chapter to the extent that his liability exceeds the total amount of *the bond or bonds* furnished by the dealer ~~{,}~~ *or supplier*, the department shall suspend his license immediately.

3. Before revoking or canceling any license issued under this chapter, the department shall send a notice by registered or certified mail to the dealer *or supplier* at his last known address. The notice must order the dealer *or supplier* to show cause why his license should not be revoked by appearing before the department at Carson City, Nevada, or such other place in this state as may be designated by the department, at a time not less than 10 days after the mailing of the notice. The department shall allow the dealer *or supplier* an opportunity to be heard in pursuance of ~~{such}~~ *the* notice, and thereafter the department may revoke or cancel his license.

Sec. 53.8. 1. Notwithstanding the provisions of NRS 365.470, if a person properly files an appeal with the Nevada tax commission pursuant to NRS 365.460 before January 1, 2002, and the commission fails to render a final decision on the appeal before that date, the person may commence an action against the state treasurer pursuant to NRS 365.460 not later than:

(a) April 1, 2002; or

(b) Ninety days after the last day prescribed for the payment of the excise tax without a penalty, whichever occurs last.

2. The provisions of subsection 4 of section 54 of this act do not affect any actions commenced before January 1, 2002, against the state treasurer pursuant to NRS 365.460.”

Amend sec. 54, page 30, line 8, by deleting “53,” and inserting “53.8.”

Amend sec. 54, page 30, after line 12, by inserting:

“4. Sections 26 and 27 of this act expire by limitation on December 31, 2001.”

Amend the title of the bill by deleting the sixth through tenth lines and inserting: “department of taxation to the Nevada tax commission; requiring

the commission to adopt certain regulations; expanding the Taxpayers' Bill of Rights; increasing the amount of taxes, penalties and interest that may be waived if a taxpayer has relied to his detriment on the advice of the department; authorizing certain actions relating to the payment of taxes to be brought in various counties; and".

Assemblyman Goldwater moved the adoption of the amendment.

Remarks by Assemblyman Goldwater.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 428.

Bill read second time.

The following amendment was proposed by the Committee on Taxation:

Amendment No. 1116.

Amend section 1, page 1, line 2, by deleting "7," and inserting "8,".

Amend the bill as a whole by renumbering sections 2 through 11 as sections 3 through 12 and adding a new section designated sec. 2, following section 1, to read as follows:

"Sec. 2. As used in this chapter, "case of wine" means 12 bottles each containing 750 milliliters of wine or an amount equal to that volume of wine."

Amend sec. 3, page 1, line 9, by deleting "100" and inserting "25".

Amend sec. 6, page 2, line 12, before "A" by inserting "1."

Amend sec. 6, page 2, line 14, by deleting "1." and inserting "(a)".

Amend sec. 6, page 2, line 16, by deleting "2." and inserting "(b)".

Amend sec. 6, page 2, between lines 17 and 18, by inserting:

"2. As used in this section, "supplier" means the brewer, distiller, manufacturer, producer, vintner or bottler of liquor."

Amend sec. 7, page 2, line 18, before "A" by inserting "1."

Amend sec. 7, page 2, line 19, by deleting "1." and inserting "(a)".

Amend sec. 7, page 2, line 21, by deleting "2." and inserting "(b)".

Amend sec. 7, page 2, between lines 22 and 23, by inserting:

"2. As used in this section, "supplier" means the brewer, distiller, manufacturer, producer, vintner or bottler of liquor."

Amend sec. 8, page 2, line 33, by deleting: "2 to 7," and inserting: "3 to 8,".

Amend sec. 9, page 2, line 36, by deleting "3" and inserting "4".

Amend sec. 10, page 3, line 21, by deleting "The" and inserting: "{The} Except as otherwise provided in subsection 3, the".

Amend sec. 10, page 3, line 32, after "3." by inserting: "The provisions of subsection 2 do not apply to a supplier, wholesaler or retailer while he is acting in his professional capacity.

4."

Amend sec. 11, page 3, line 35, by deleting: "October 1, 1999." and inserting: "the effective date of this act."

Amend the bill as a whole by adding a new section designated sec. 12, following sec. 11, to read as follows:

"Sec. 12. This act becomes effective upon passage and approval."
Assemblyman Goldwater moved the adoption of the amendment.
Remarks by Assemblyman Goldwater.
Amendment adopted.
Bill ordered reprinted, re-engrossed and to third reading.

REPORTS OF COMMITTEES

Mr. Speaker:

Your Committee on Taxation, to which was referred Senate Bill No. 521, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

DAVID E. GOLDWATER, *Chairman*

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Perkins moved that Senate Bill No. 521 be placed on the Second Reading File.

SECOND READING AND AMENDMENT

Senate Bill No. 521.

Bill read second time.

The following amendment was proposed by the Committee on Taxation:
Amendment No. 1087.

Amend sec. 2, pages 1 and 2, by deleting lines 7 through 20 on page 1 and lines 1 through 7 on page 2, and inserting: *"The discounted admission fee for residents must be offered at any time the exhibition is open to the public and admission fees are being charged."*

2. *Except as otherwise provided in subsection 5, if a taxpayer collects a fee for the exhibition of fine art otherwise exempt from taxation pursuant to NRS 361.068, the exemption pertaining to that fine art for the fiscal year must be reduced by the net revenue derived by the taxpayer for that fiscal year. The exemption pertaining to fine art for a particular fiscal year must not be reduced below zero, regardless of the amount of the net revenue derived by the taxpayer for that fiscal year."*

Amend sec. 2, page 2, line 8, by deleting "4." and inserting "3."

Amend sec. 2, page 2, between lines 13 and 14, by inserting:

"4. A taxpayer who is required to pay a tax resulting from the operation of this section may receive a credit against the tax for any donations made by the taxpayer to the state arts council, the division of museums and history dedicated trust fund established pursuant to NRS 381.0031, a museum that provides exhibits specifically related to nature or a museum that provides exhibits specifically related to children, if the taxpayer:

(a) Made the donation before the date that either statement required pursuant to subsection 3 is due; and

(b) Provides to the county assessor documentation of the donation at the time that he files the statement required pursuant to subsection 3.

5. *If a taxpayer qualifies for and avails himself of both of the exemptions from taxation provided by NRS 361.068 and 374.291, the reduction*

Senate Bill No. 104 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 302.

Bill read third time.

Remarks by Assemblywoman Chowning.

Roll call on Senate Bill No. 302:

YEAS—39.

NAYS—Marvel.

Excused—Berman, Evans—2.

Senate Bill No. 302 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 362.

Bill read third time.

Remarks by Assemblyman Goldwater.

Roll call on Senate Bill No. 362:

YEAS—40.

NAYS—None.

EXCUSED—Berman, Evans—2.

Senate Bill No. 362 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 391.

Bill read third time.

The following amendment was proposed by Assemblywoman Giunchigliani:

Amendment No. 1125.

Amend sec. 13.3. page 6, line 9, by deleting: "*October 1, 1999*," and inserting: "*July 1, 2000*,".

Amend sec. 13.3. page 6, line 13, by deleting: "*October 1, 1999*," and inserting: "*July 1, 2000*,".

Amend sec. 13.3. page 6, line 18, by deleting: "*October 1, 1999*," and inserting: "*July 1, 2000*,".

Amend sec. 13.3. page 6, line 20, by deleting: "*October 1, 1999*," and inserting: "*July 1, 2000*,".

Amend sec. 23, page 22, by deleting lines 40 through 43 and inserting:

"5. Section 13.3 of this act becomes effective on July 1, 2000."

Assemblywoman Giunchigliani moved the adoption of the amendment.

Remarks by Assemblywoman Giunchigliani.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 428.

Bill read third time.

AFFIDAVIT OF NORMAN J. AZEVEDO

1. I, Norman J. Azevedo, declare that I have personal knowledge of the matters set forth in this affidavit and can competently testify thereto if so called.
2. Exhibit 1 to the Department of Taxation's (the "Department") Motion to Dismiss is a copy of a memorandum to Bernie Anderson, Chairman of the Assembly Committee on Judiciary (the "Assembly Committee") dated May 7, 1999 entitled "Venue Sections of S.B. 362" that I authored in my capacity as Senior Deputy Attorney General (the "Venue Memorandum").
3. Exhibit 2 to the Department's Motion to Dismiss is a copy of minutes of the March 23, 1999 meeting of the Senate Committee on Taxation (the "Senate Committee"), at which I was present to answer questions regarding the venue provisions of S.B. 362 (the "Committee Minutes").
4. The Venue Memorandum and my remarks to the Senate Committee were provided in response to specific questions relating to the venue provisions in S.B. 362, *i.e.*, the amendments to existing tax refund statutes that expanded the jurisdictions in which tax refund actions could be brought. In preparing the Venue Memorandum and providing my remarks to the Senate Committee, I was not speaking on behalf of either Committee, any Member of the Legislature, the Department or the Nevada Tax Commission (the "Commission").
5. S.B. 362 did not change the remedy afforded to a taxpayer whose claim for refund of sales or use tax was denied by the Department (in the case of claims denied before the statute was amended) or the Commission (in the case of claims denied after the statute was amended). Prior to the passage of S.B. 362, NRS 372.680 provided that a taxpayer whose claim for sales or use tax refund had been denied by the *Department* may "bring an action against the department on the grounds set forth in the claim *in a court of competent jurisdiction in Carson City . . .*" After the passage of S.B. 362, NRS 372.680 provided, and continues to provide, that a taxpayer whose claim for sales or use tax refund has been denied by the *Commission* may "bring an action against the department

on the grounds set forth in the claim *in a court of competent jurisdiction in Carson City, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department . . .*” Both before and after the amendment, a taxpayer’s remedy was to “bring an action against the department.” Statutes authorizing refund actions for other taxes were similarly amended to expand the permissible venue from Carson City to Carson City, the county of residence or principal place of business of the claimant or a county in which relevant proceedings occurred.

6. As the Venue Memorandum explains, I thought these amendments were advisable because, in general, they conformed the permissible venues for tax refund actions to the venues in which petitions for judicial review must be filed under the Administrative Procedures Act (NRS 233B). For example, I began my discussion by noting that “[t]he Nevada Department of Taxation has been governed by this venue provision [NRS 233B.130(2)(b)] since its passage in 1965.” I concluded by recommending the amendments, because “[b]y having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers.” Thus, my point was simply that the *venue* provisions of existing statutes authorizing refund actions should be conformed to the existing *venue* provision in the APA.

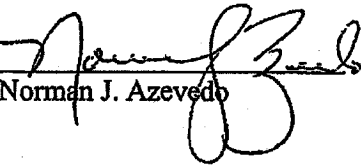
7. These amendments did not make refund actions in the district court *subject to* the APA. In both the Venue Memorandum and in my remarks to the Senate Committee, I made two statements about S.B. 362 that are cited by the Department that are not entirely complete with respect to sales and use tax claims for refund.

a. First, the Venue Memorandum states: “In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department [of] Taxation will proceed initially to an administrative hearing officer for an administrative trial.” However, S.B. 362 amended NRS 360.245(1) to require an appeal directly to the Commission first without the intermediate step of a hearing officer.

b. Second, the Venue Memorandum states that, following a final decision from the Commission, “the taxpayer may file a petition with a district court in a judicial review

proceeding." However, in the specific case of a claim for refund of sales and use tax that has been denied by the Commission, this statement would need to be modified to say: "the taxpayer must bring an action against the Department pursuant to NRS 372.680 to obtain a refund of sales and use tax previously paid."

Under penalties of perjury, I declare the foregoing to be true and correct. Executed this 8th day of May, 2009 in Carson City, Nevada.


Norman J. Azevedo



JIM GIBBONS
Governor

THOMAS R. SHEETS
Chair, Nevada Tax Commission

DINO DICIANNO
Executive Director

STATE OF NEVADA DEPARTMENT OF TAXATION

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May 29, 2009

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Re:

Use Tax Refund Requests

Dear Mr. Bartlett and Mr. Doerr,

This letter is to serve as direction with regard to the discovery disputes between the parties in this matter which arose after the Department proposed to serve a large number of subpoenas on the.

The issue in this case is whether the _____ are entitled to the use tax refunds they have requested. The sales tax Deficiency Notices issued by the Department to the _____ in March 2009 are not within in the scope of this hearing.

The burden is on the _____ to prove that they are entitled to the refunds they have requested. In other words, _____ must show that tax was not due on the transactions in question. State v. Obexer & Son, Inc., 660 P.2d 981, 99 Nev. 233 (1983) and Sparks Nuggett, Inc. v. Department of Taxation, 179 P.3d 570, ___ Nev. ___ (2008). Despite the Department's original statements that the refunds were denied because the use tax was due per NRS 372.185, NRS 372.284, NRS 372.2841, NRS 372.727, and NAC 372.350, _____ are on notice that the Department believes the transactions in question are subject to sales tax. Consequently, _____ are also on notice that the Department questions whether the transactions in question are actually complimentary meals.

_____ will either present the facts and legal authorities which conclusively establish that they are entitled to the use tax refunds as requested or they will fail to do so. The Department may present evidence in support of its denial of the use tax refunds, including facts to substantiate a theory that the transactions are not exempt from tax. NAC 372.765(5) and Sparks Nuggett, Inc. v. Department of Taxation, 179 P.3d 570, ___ Nev. ___ (2008). Consequently, the Department may present evidence that that meals in question were actually sold rather than given away as complimentary meals. However, the Department may not require extensive discovery from the _____ or use the hearing regarding the issue of the use tax refund as a discovery process to

substantiate the sales tax deficiencies which have been issued but which are not at issue in this case. In the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time.

With regard to the subpoenas requested by the Department, the request for information regarding compensation exchanged by members of the player's clubs and employees for the meals in question is within the scope of this hearing. However, requiring testimony from the Manager or Director Player Development, Programmer of slot machines, Table Games Floor Supervisor, Restaurant Cashier, Casino Host, Internal Auditor of Food and Beverage, a Slot Dept Manager, and an Employee of Human Resources, as well as all of the materials published by the on their complimentary food transactions, is burdensome and duplicative shall provide for the hearing the individuals who are most knowledgeable regarding the player's clubs and the employee meals and the complimentary meals for both groups. The request for the person most knowledgeable regarding the determination of when and how much use tax was due on the transactions in question is clearly within the scope of the hearing. However, the accounting source documents for those returns are irrelevant because the Department has not challenged the amount of use tax requested by

I would like to reschedule this matter for hearing at the earliest convenience of the parties. Originally, we had scheduled two days for this hearing. Unless you believe depositions are necessary prior to the hearing, I am available June 22 and 23, June 29 and 30, July 6, 7, 8, or July 16 and 17. Please inform me if depositions will be required or if you would like to proceed on one of the proposed dates in June or July. We will then set deadlines for the submission of exhibits, witness lists, and Prehearing Statements.

Sincerely,

/s/

Dena C. James
Administrative Law Judge
(702) 486-3347
denaj@tax.state.nv.us

DCJ/slf

cc: Gina Session, Senior Deputy Attorney General, to gsession@ag.nv.gov