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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 Carson City, and THE HONORABLE JAMES T. RUSSELL, Judge thereof, Respondents. THE STATE OF NEVADA *ex rel.* DEPARTMENT OF TAXATION Real Party in Interest	Case No. 09-0C-00016-1B Docket No. 55228

EDISON'S REPLY TO THE DEPARTMENT'S ANSWER TO THE PETITION FOR WRIT OF MANDAMUS AND CLARK COUNTY'S AMICUS CURIAE BRIEF

10-05515

TABLE OF CONTENTS

Recognizing that filing a reply brief is subject to this Court's approval, Southern California Edison ("Edison") herein responds only to the few arguments in the *Answer to Southern California Edison's Petition for Writ of Mandate* ("Answer") of the Department of Taxation ("Department") and in the *Amicus Curiae* brief of Clark County that are not already covered in Edison's *Original Petition for Writ of Mandamus* ("Petition").

INTRODUCTION

The only issue before this Court is whether a taxpayer's "action" against the Department authorized by NRS 372.680 is a *de novo* proceeding, which the Department previously acknowledged was the case (Ans. at 8:14-15, 20:13-19), or whether this action has been reduced, at some uncertain point in time between 1965 and 1999, to a judicial review of the decision of the Tax Commission. This question should be answered by the plain language of the statute. The Legislature has not amended the operative language in NRS 372.680 since it was enacted in 1955, despite having had many opportunities to do so. Until the Legislature says otherwise, a taxpayer's "action against the department" is an original *de novo* action as this Court has recognized time and again. *See Hansen-Neiderhauser, Inc. v. Nevada Tax Comm'n*, 81 Nev. 307 (1965); *State v. Obexer & Sons, Inc.*, 99 Nev. 233, 237 (1983); *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402 (1988); *Sparks Nugget, Inc. v. Nevada ex rel. Dep't of Tax'n*, 124 Nev. Adv. Rep. 15, 179 P.3d 570 (2008); *Lohse v. Nevada ex rel. Dep't of Tax'n*, Case No. CV-05-00376 (Nev. 2nd Jud. Dist., Jan. 18, 2007).

ARGUMENT

A. The Department's Statutory Construction Arguments Are Erroneous

The Department argues that when one considers the cumulative effect of legislation enacted in 1965, 1989, 1997 and 1999, "it is clear that it was the intent of the legislature that all final decisions by the Commission are subject exclusively to the [APA]." (Ans. at 4:21-27.) In effect the Department is contending that NRS 372.680 has been repealed by implication, a practice that this Court "heavily disfavor[s]" and will not even consider "unless there is no other reasonable construction of the two statutes." *Washington v. State of Nevada*, 117 Nev. 735, 739 (2001). As Edison's Petition demonstrates, NRS 372.680 does not conflict with any of the later-

enacted provisions relied upon by the Department. If anything, the Legislature's repeated failure to limit NRS 372.680 explicitly to judicial review indicates that the Legislature did *not* intend to eliminate a taxpayer's right to a trial *de novo* under NRS 372.680.

In its Answer, the Department notes that when the Legislature enacted the Administrative Procedures Act ("APA") in 1965, it did not include NRS 372.680 in a list of certain "special provisions" that "prevail over the general provisions of [NRS Chapter 233B]." From this the Department argues that the Legislature must have intended that the APA's general preference for judicial review rather than a trial *de novo* has applied to all decisions of the Commission *since 1965*, including decisions denying taxpayers' refund claims.[1] (Ans. at 4:21 - 5:14.) This argument is directly contrary to this Court's 1988 decision in *Saveway*, which considered the relationship between the APA and NRS 365.460 (authorizing a taxpayer refund action for motor fuel taxes). *Saveway* concluded that the taxpayer, who had filed a petition for judicial review, was not entitled to that remedy where the Commission had denied its refund claim because "NRS 233B.130 is specifically limited by NRS 365.460." *Saveway*, 104 Nev. at 403. After the taxpayer corrected its procedural mistake and brought an original action under NRS 365.460, this Court held that the district court then erred in conducting only a judicial review of the Commission's decision because NRS 365.460 requires a trial *de novo*. *Id.* at 404; Pet. at 12:12 - 13:121, 26:19 - 27:25.

The taxpayer's judicial remedy in NRS 372.680 is exactly analogous to NRS 365.460. The Legislature undoubtedly was just as aware of NRS 372.680 as it was of NRS 365.460 when it enacted the APA in 1965 and it did not amend either of those statutes to eliminate the taxpayer's right to file an original action.[2] *See Ronnow v. City of Las Vegas,* 57 Nev. 332, 366

[1] Under the Department's reasoning, *every* decision since 1965 by *every* non-exempt agency should have been subject *only* to judicial review under the APA — with the exception of the five sets of provisions listed in NRS 233B.039(3) — regardless of any more specific statutory provision clearly providing for a different judicial remedy. This result is clearly at odds with the settled rule of statutory construction that a specific statute "dealing expressly and in detail with a particular subject" controls over a "general provision relating only in general terms" to the subject. *See Western Realty Co. v. City of Reno*, 63 Nev. 330, 337 (1946).

[2] When the APA was enacted in 1965, NRS 372.680 provided that: "Within 90 days after the mailing of the notice of the *tax commission's* action upon a claim filed pursuant to this chapter, the claimant *may bring an action against the tax commission* on the grounds set forth in the claim[.]" *See Hansen-Neiderhauser*, 81 Nev. at 309 fn. 1 (1965) (emphasis added).

(1937) (holding that when the Legislature enacts a statute it is "presumed that the Legislature . . . acted with full knowledge of statutes already existing and relating to the same subject.").

In its Petition, Edison anticipated and answered the Department's arguments regarding other legislation enacted in 1989, 1997 and 1999. Neither the changes to the APA's general provisions regarding judicial review in 1989 nor the changes made to clarify the relationship between the Commission and the Department in 1997 alter, much less eliminate, the specific direct action remedy in NRS 372.680. And the amendments to NRS 372.680 in 1999 dealt only with proceedings before the Commission and venue in the district court.

The Department claims there is "confusion" among practitioners and courts (including this Court) on this issue (Ans. at 6:26-28 fn. 2) when it is the Department itself that has inexplicably reversed its position against the overwhelming weight of authority showing that Nevada sales or use tax refund actions are civil actions authorizing a trial *de novo*.[3] (Pet. at 3:21 - 4:1.) Significantly, the Department's newly-manufactured interpretation of the operable statute is directly contradicted by the *State Tax Appeal Systems* treatise authored by the Federation of Tax Administrators, whose membership includes the Department. This treatise contains a flowchart (a true and correct copy of which is attached as Exhibit 2) of Nevada's refund claim procedure confirming that if the taxpayer's claim is denied by the Commission and the matter proceeds to district court, the "District Court conducts a de novo trial."[4] The Department has never responded to this diagram, which Edison also submitted in briefing to the District Court. To the extent there is any uncertainty regarding the impact of the statutory amendments now relied on by the Department on the nature of a taxpayer's judicial remedy under NRS 372.680, such uncertainty must be construed in favor of Edison. *See Dep't of Tax'n v. Visual Commc'n,*

[3] The Department's Answer attaches motions to dismiss it recently filed against other taxpayers that have initiated civil actions against the Department pursuant NRS 372.680. (Ans. at 6:26-28 fn. 2.) Attached as Exhibit 1 is a true and correct copy of an opposition to the Department's motion which supports a taxpayer's right to a trial *de novo* in an action under NRS 372.680 along lines materially identical to those presented in Edison's Petition.

[4] The FTA is an organization whose members are the Tax Departments of the 50 states, the District of Columbia, Puerto Rico and New York City. *State Tax Appeal Systems* is published by the Bureau of National Affairs, Inc.

Inc., 108 Nev. 721, 725 (1992) ("Taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers.").

B. The Department's Reliance On *Mineral County* Is Misplaced

The Department mistakenly relies on *Mineral County v. State Bd. of Equalization*, 121 Nev. 533 (2005) for its claim that a "harmonious construction" of NRS 372.680 and the APA would be to treat NRS 372.680 as an "action for judicial review." (Ans. at 17:11-12.) The only issue in *Mineral County* was whether local governments that are aggrieved by a decision of the State Board of Equalization ("SBE") could file a petition for judicial review under NRS 233B.130. The SBE argued that since NRS 361.420 specifically authorizes only a taxpayer's suit against the SBE, local governments had no right to appeal such decisions. This Court rejected the SBE's argument, stating: "[E]ven though NRS 361.410(1) and NRS 361.420(2) include specific provisions concerning *taxpayer* protections, these statutes do not take precedence over the APA *under these circumstances*, as they do not expressly govern the rights of a *local government* such as Mineral County." *See Mineral County*, 121 Nev. at 536 (emphasis added). Thus, *Mineral County* actually confirms that specific provisions concerning taxpayer protections, such as NRS 372.680, *do take precedence over the APA because they expressly govern the rights of taxpayers.*

The Department further misconstrues Mineral County when it suggests that the case can be read to support the Department's interpretation of NRS 372.680. (Ans. 17:11-12.) While there are some language similarities between NRS 361.420 and NRS 372.680, the former explicitly limits a property taxpayer's district court trial to a "review [of] the record" in most circumstances.[5] NRS 372.680 contains no such restrictions on the scope of the action.

C. Administrative Res Judicata Does Not Apply

The Department argues that if NRS 372.680 authorizes a trial *de novo*, administrative res judicata would apply to bar Edison's sales or use tax refund action proceeding. (Ans. at 23:24-25.) The Department's argument rests on the false premise that a Commission decision denying a

[5] "In a suit based upon any one of the grounds mentioned in paragraphs (e), (f) and (g) of subsection 4, *the court shall conduct the trial without a jury and confine its review to the record before the State Board of Equalization*." NRS 361.420(5) (emphasis added).

taxpayer's claim for refund constitutes a *final* decision having preclusive effect. NRS 372.680(1) affords taxpayers the right to pursue a civil action against the Department within 90 days after the Commission renders its "final decision" on the taxpayer's claim for refund. Only the "[f]ailure to bring an action within the time specified" by NRS 372.680(1) "constitutes a waiver of any demand against the State on account of alleged overpayments." NRS 372.680(2). Since, in this case, Edison filed its complaint under NRS 372.680 well within the 90-day filing period, there has been no final decision having preclusive effect that would bar Edison from litigating in district court the claims denied by the Commission.

Indeed, the District Court rejected this very argument when it denied the Department's motion to dismiss Edison's complaint outright on the theory that Edison should have filed a petition for judicial review under NRS 233B.130 rather than bringing an action under NRS 372.680. The District Court denied the motion, and the Department has not sought review of that decision. Edison's timely filing of its complaint means that the decision of the Commission is not "final," and therefore the doctrine of administrative res judicata simply does not apply.

D. Clark County And The City Of Henderson Were Properly Not Named As Co-Defendants In Edison's Civil Action

The Department maintains that Clark County and the City of Henderson ("Henderson"), which intervened as parties during the proceedings before the Commission, should have been named as co-defendants in Edison's Amended Complaint, because in a petition for judicial review, Clark County and Henderson would be named as respondents pursuant to NRS 233B.130(2)(a). (Ans. at 3:4-6.) Clark County's amicus brief makes the same point. (Amicus Brief at 2:1-4.) NRS 372.680 requires a taxpayer to sue the Department as defendant, but does not require the taxpayer to name any other party as co-defendant. *See Western Realty Co. v. City of Reno*, 63 Nev. 330, 337 (1946). However, this does not prejudice either Clark County or Henderson in any way. Both entities are capable of filing motions to intervene in Edison's district court action (which they have never done).

Clark County also argues that because it is only entitled to seek judicial review of a Commission decision pursuant to NRS 233B.130, Edison as an aggrieved taxpayer should be

similarly limited. (Amicus Brief at 6:14-16.) Clark County urges symmetrical judicial remedies for taxpayers and local governments, but the Legislature has clearly provided otherwise.[6]

E. A Taxpayer's Statutory Right To A *De Novo* Trial Cannot Be Eliminated By The Department's Preference for "Judicial Economy"

The Department urges this Court to ignore a taxpayer's right to a *de novo* trial in the name of "judicial economy" and to avoid making the proceedings before the Tax Commission "meaningless." (Ans. at 14:23-16:1.) Neither argument is valid. A trial *de novo* in the district court does not make the administrative record irrelevant or inadmissible. It simply means that the court *considers* that record but without giving it any special deference. In enacting NRS 372.680, the Legislature determined that taxpayers like Edison who have duly paid their sales or use taxes and have been denied a refund are entitled to an opportunity to present their case before a district court judge. That judge, who has no affiliation with either the Department or the taxpayer, hears the evidence and applies his or her independent judgment, legal training and experience to the facts and the law. Eliminating such an important taxpayer right in the name of "judicial economy" — if it were to be done at all — is the responsibility of the Legislature and not this Court. *Saveway*, 104 Nev. at 404 (holding that, in a "suit for a tax refund", considerations of judicial economy are "best left in the hands of the state legislature.").

///

[6] If Edison had prevailed before the Commission, Clark County and Henderson would have been "entitled to seek judicial review of the decision" (NRS 360.245(7)), as they did when the Commission granted Edison's claims in 2005. NRS 360.245(7) was enacted because the Department, which would otherwise represent the interests of local governments, is precluded from seeking judicial review of Commission decisions. NRS 360.245(5); NRS 374.795. *See also* Pet. at 21:10 - 24:12.

CONCLUSION

For all the reasons cited in its Petition and this Reply, Edison respectfully urges this Court to grant its Petition and order the District Court to conduct the action pending before it as a trial *de novo* in accordance with NRS 372.680.

Dated: March 2nd, 2010

By: _____

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CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of March, 2010, I placed a copy of the foregoing in the United States Mail, postage pre-paid, addressed to:

The Honorable James T. Russell
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EXHIBIT 1

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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 OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE PROCEED PURSUANT TO NRS CHAPTER 233B

Plaintiffs SIERRA PACIFIC POWER COMPANY, INC. and NEVADA POWER COMPANY, INC., by and through their counsel John S. Bartlett, hereby submit their opposition to the defendant's motion to dismiss. This opposition is based on the pleadings and papers on file herein, and the following points and authorities.

POINTS AND AUTHORITIES

On December 8, 2009 plaintiffs filed their Complaint commencing this action in which plaintiffs are seeking to recover a refund of use taxes they each have accrued and remitted on the cost of purchasing coal used to burn in the generation of power. This action was timely filed pursuant to the provisions of NRS 372.680 and NRS 374.685 within 90 days from the date the Nevada Tax Commission denied in writing the plaintiffs' administrative claim seeking a refund of these taxes. See Complaint, ¶19.; Exhibit 1, the written decision of the Nevada Tax Commission dated October 23, 2009.

In their Complaint the plaintiffs' have alleged three causes of action. First, the plaintiffs' allege the provisions of NRS 372.270 and NRS 374.275 are facially discriminatory in violation of the Commerce Clause of the United States Constitution because the plain language of these statutes excludes minerals imported into Nevada, such as the coal purchased by plaintiffs, from the exemption from sales or use tax for the retail sale of net proceeds of mines. See Complaint, ¶¶21-27. The plain effect of NRS 372.270 and NRS 374.275 is to exempt domestically produced minerals from sales or use tax, and to tax imported minerals.

The Second Claim For Relief alleges the Department of Taxation's interpretation and application of the provisions in NRS 372.270 and NRS 374.275 is discriminatory in application and effect, also in violation of the Commerce Clause. Complaint, ¶¶ 28-32. The Third Claim For Relief alleges the Department of Taxation's interpretation and application of the provisions of NRS 372.270 and NRS 372.275 to the plaintiffs also violates the provisions of Article X, §5(1) of the Nevada Constitution. Complaint, ¶¶ 33-38. The remedy plaintiffs are seeking under all three claims for relief is restitution in the form of a full refund of all the use taxes they accrued and remitted to the Nevada Department of Taxation on their cost to purchase coal from the out of state coal mines for the purpose of generating electric power in their Nevada power plants. Complaint, ¶¶27, 32, 38.

When considering a motion to dismiss brought pursuant to NRCP 12(b)(5), the court must liberally construe the pleadings and all factual allegations are taken as true. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). The district court must determine whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. *Kaldi v. Farmers Inc. Exchange.*, 117 Nev. 273, 278, 21 P.3d 16, 19 (2001).

The primary basis for the State's motion is the claim that plaintiffs should have brought this action (or labeled this action) as a "petition for judicial review" of the final administrative decision rendered by the Nevada Tax Commission pursuant to NRS 233B.130. The State asserts that because plaintiffs filed a Complaint instead of a petition for judicial review, this Court should either dismiss the action entirely, or have it construed to be a petition for judicial review

with the scope of the Court's review limited to the parameters of NRS 233B.135. The plaintiffs believe the State's motion is without merit and should be denied, with the case to proceed as a *de novo* action for restitution, with no deference paid to the findings of fact or conclusions of law reached by the administrative tribunals on plaintiffs' refund claims.

1. The Statutory Refund Procedure.

"If a statutory procedure exists for the recovery of taxes erroneously collected, that procedure ordinarily must be followed before commencing suit in district court." *Nevada Department of Taxation v. Scotsman Manufacturing, Inc.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993). The statutory procedure for the recovery of sales or use taxes erroneously collected and remitted is found in NRS 372.630 – 372.700. The procedure starts with the requirement to file a claim for refund or credit with the Department of Taxation. NRS 372.635 states:

> Except as otherwise provided in NRS 360.235, 360.395 and 372.368:
>
> 1. No refund may be allowed unless a claim for it is filed with the Department within 3 years after the last day of the month following the close of the period for which the overpayment was made.
>
> 2. No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Department within that period, or unless the credit relates to a period for which a waiver is given pursuant to NRS 372.355.

NRS 372.645 includes the requirement the claim for refund be in writing and state the specific grounds on which the claim is based. NRS 372.650 makes it clear that failure to file a timely claim for refund acts as a waiver of the taxpayer's right to recover an overpayment of taxes. NRS 372.675 states that "no suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed." Thus, the statutory refund procedure contains the requirement to exhaust administrative remedies prior to bringing suit to recover a refund of taxes.

As alleged in the Complaint, prior to bringing suit plaintiffs timely filed claims with the Department of Taxation seeking a refund of use tax they accrued and remitted on coal they

purchased for consumption in power generation plants in the State of Nevada. See Complaint, ¶¶15-16. The Department initially denied these claims and matter was referred to an Administrative Law Judge. Complaint, ¶17. After an administrative hearing, the Administrative Law Judge issued Findings of Fact, Conclusions of Law and a Decision denying plaintiffs' refund claims. *Id.* Plaintiffs appealed to the Nevada Tax Commission, but the Commission affirmed the decision of the Administrative Law Judge. ¶18; Exhibit 1. Therefore, plaintiffs fulfilled their statutory obligation to exhaust their administrative remedies prior to filing suit in this case. Accordingly, NRS 372.680 provides:

> 1. 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 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.

NRS 372.685 describes the taxpayer as the plaintiff:

> 1. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited as follows:
>
> (a) If the judgment is for a refund of sales taxes, it must be credited on any amount of sales or use tax due from the plaintiff pursuant to this chapter.
>
> (b) If the judgment is for a refund of use taxes, it must be credited on any amount of use tax due from the plaintiff pursuant to this chapter.
>
> 2. The balance of the judgment must be refunded to the plaintiff.

As noted above, the Tax Commission's final decision on the refund claims filed by plaintiffs with the Department of Taxation was issued on October 23, 2009. Exhibit 1. This action was filed on December 8, 2009, 46 days later, well within the 90 day time period prescribed by NRS 372.680. Therefore, plaintiffs have correctly followed the prescribed statutory procedure for filing written claims for the refund of the use taxes at issue in this case,

have exhausted their administrative remedies prior to filing suit, and have filed suit within the time prescribed by the applicable statute. Accordingly, no grounds exist to dismiss this action for failure to follow the appropriate procedure.

2. This action should be treated as a *de novo* action

The true issue raised by defendant has to do with the appropriate standard under which this court is to adjudicate this action. Defendant concedes that at one time an action brought under NRS 372.680 was treated as de novo, citing *Hansen-Neiderhauser v. Nevada State Tax Commission*, 81 Nev. 307, 402 P.2d 480 (1965). See motion to dismiss, p. 4:23-26. The language of this statute as it existed in 1965, is substantively the same as exists today. As quoted in *Hansen-Neiderhauser*:

> NRS 372.680 reads: "*Action for refund: Time to sue; venue of action; waiver.*
>
> "1. Within 90 days after the mailing of the notice of the tax commission's action upon a claim filed pursuant to this chapter, the claimant may bring an action against the tax commission on the grounds set forth in the claim in a court of competent jurisdiction in Ormsby 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 action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments."

Hansen-Neiderhauser, 81 Nev. at 309, 402 P.2d at 481; *Compare*, NRS 372.680 (2010).

Defendant argues, however, that upon passage of the Administrative Procedures Act [ch. 233B of NRS] in 1965 an ambiguity was created over a taxpayer's right to a trial de novo on his action to recover a refund of taxes erroneously or illegally paid. See motion to dismiss, p. 4:20-22. Defendant points to the current version of NRS 233B.130(6)[1] which states the provisions of chapter 233B of NRS 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

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[1] Prior to 1989 NRS 233B.130 this statute read:

> Any party aggrieved by a final decision in a contested case is entitled to judicial review thereof under this chapter. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless otherwise provided by statutes. This chapter does not limit utilization of trial de novo to review a final decision where provided by statute, but this chapter provides an alternative means of review in those cases.

applies; and to NRS 233B.020(2) stating the provisions of chapter 233B of NRS are intended to supplement statutes applicable to specific agencies. Motion to dismiss, p. 3:21-24; p. 4:26-28. The Nevada Supreme Court has clarified any such ambiguity as to the nature and scope of an action brought pursuant to NRS 372.680 that may have existed after the Administrative Procedures Act was passed.

In *State of Nevada v. Obexer & Son*, 99 Nev. 233, 660 P.2d 981 (1983) the Court addressed the nature of an action brought pursuant to NRS 372.680. In *Obexer* the taxpayer first followed the statutory refund procedure outlined above and exhausted its administrative remedies by filing a claim for refund with the Department of Taxation. After its claim was denied by both the Department and the Nevada Tax Commission, the taxpayer filed suit in district court to recover a refund.

The Court first noted:

> [A]ctions to recover taxes paid are equitable in nature, and the burden of proof is on the taxpayer to show that the taxing body holds money that in equity and good conscience it has no right to retain. *El Tejon Cattle Co. v. County of San Diego*, 60 Cal.Rptr. 586, 595 (Ct.App. 1967); *Hawes v. Smith*, 169 S.E.2d 823, 824 (Ga.App. 1969). "Such would be accomplished by establishing the plaintiff's *right to the money and the defendant's possession*." 169 S.E.2d at 824 (emphasis in original). *See Estate of Kasishke v. Oklahoma Tax Comm'n*, 541 P.2d 848, 852 (Okla. 1975) (a claim for refund is one for money had and received, and taxpayer must establish that he has in fact overpaid his tax to recover.

Obexer, 99 Nev. at 237, 660 P.2d at 984. Citing NRS 372.630 and NRS 372.680 the Court then concluded "Nevada has statutes allowing taxpayers to claim and sue for refunds, thus precluding the State from asserting the common law defense of voluntary payment. *Obexer*, 99 Nev. at 237-238, 660 P.2d at 984. At the time *Obexer* was decided, the Administrative Procedures Act had been in place for almost 20 years. Yet, despite the requirement in the statutory refund procedure of NRS 372.630 – 372.720 to exhaust administrative remedies prior to filing suit, the Nevada Supreme Court had no difficulty concluding the nature of an action brought pursuant to NRS 372.680 was a *de novo* action for restitution.

The Court reaffirmed its position on the nature of a statutory remedy providing taxpayers the right to sue to recover a refund of taxes in *Saveway Super Service Stations v. Cafferata*, 104

Nev. 402, 760 P.2d 127 (1985). In that case the applicable statute provided "After payment of any excise tax under protest duly verified, served on the department and setting forth the grounds for objection to the legality of the excise tax, the dealer or supplier 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 excise tax so paid under protest." *Saveway*, 104 Nev. at 404, 760 P.2d at 128, citing NRS 365.460. Citing to its language in *Obexer*, the Court clarified "[T]he burden of proof, so articulated, certainly implies that the burden is not that of showing a lack of substantial evidence, rather, it is to support the elements of an independent action for restitution." *Saveway*, 104 Nev. at 404, 760 P.2d at 128.

Since these cases were decided the Nevada Supreme Court has continued to treat taxpayer actions for refunds filed pursuant to NRS 372.680 as original *de novo* actions for restitution. See e.g. *Kelly-Ryan, Inc. v. State of Nevada*, 110 Nev. 276, 871 P.2d 331 (1994), *Sparks Nugget, Inc. v. State ex rel. Department of Taxation*, 124 Nev. __, 179 P.3d 570, 573 (2008). The nature of a taxpayer's suit for a refund of use tax brought pursuant to NRS 372.680 was recently addressed by Judge Adams in a case filed in the Second Judicial District Court. In that case the State filed both a motion for summary judgment and a motion in limine in which it argued for a judicial review standard of review giving deference to the decision of the Department of Taxation and Nevada Tax Commission (after a hearing) denying taxpayers' refund claim. Judge Adams rejected the State's argument, concluding an action brought pursuant to NRS 372.680 constituted an original action involving genuine issues of material fact requiring a trial to resolve. See Order dated December 8, 2008, Exhibit 2 attached, p.2:13-17. Ultimately a trial took place in which evidence was received and the trial judge issued Findings of Fact, Conclusions of Law and a judgment in favor of the taxpayers awarding them a refund of taxes paid. The trial court's judgment was affirmed by the Nevada Supreme Court on the merits without comment on whether the trial court erred on the appropriate standard of review. See Exhibit 3, attached.

3. The Legislature never amended NRS 372.680

The issue raised by the State is essentially a matter of statutory construction. Questions of statutory construction are reviewed de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). The goal of statutory interpretation is to effectuate the Legislature's intent. *Savage v. Dist. Ct.*, 125 Nev. __, 200 P.3d 77, 82 (2009). If a statute's language is clear and unambiguous, this court will apply its plain language. *Leven*, 123 Nev. at 403, 168 P.3d at 715. Plain meaning may be ascertained by examining the context and language of the statute as a whole. *Redl v. Secretary of State*, 120 Nev. 75, 78, 85 P.3d 797, 799 (2004); *see also McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-651, 730 P.2d 438, 443 (1986).

The language in NRS 372.680 is clear and unambiguous, and read in conjunction with the other provisions of the statutory refund procedure, "clearly implies that the burden is not that of showing a lack of substantial evidence, rather, it is to support the elements of an independent action for restitution." *Saveway*, 104 Nev. at 404, 760 P.2d at 128. The plain language of the statutory refund procedure set forth in NRS 372.630 – 372.700 contains no restrictions or limitations on the scope of the action for restitution a taxpayer may file in district court to recover a refund of taxes other than to establish the same claims or grounds supporting the action for refund must have first been presented to the Department of Taxation in a claim for refund. There is nothing in the statutory refund procedure that references NRS 233B.130 or that states a judicial review standard exists for an action brought under NRS 372.680.

In its motion the State argues by virtue of the collective weight of certain statutory amendments enacted in 1989, 1997 and 1999 to statutes in the Administrative Procedures Act and in Chapter 360 of NRS, the Legislature somehow over time signaled its intent to either effectively repeal NRS 372.680 by making it inapplicable to refund claims, or impose a judicial review standard on actions filed by taxpayers under NRS 372.680. See motion to dismiss, pp. 8-9. A court generally avoids statutory interpretation that renders language meaningless or superfluous. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). That is precisely what the State's argument would lead to.

The State's argument might be more persuasive if in fact the Legislature had amended the statutory language in NRS 372.680 either to directly reference NRS 233B.130 as being applicable to the statutory refund procedure, or to otherwise specify a judicial review standard applied to actions brought pursuant to that statute. Obviously, the Legislature did not repeal this statute.

The State focuses on the 1999 amendment to NRS 372.680 as the seminal moment when there was a change in the statutory refund procedure to require judicial review of the administrative decision denying a taxpayer's refund claim. See ch. 484, 1999 Nev. Stat. 2495. However, the 1999 statutory amendment to NRS 372.680 cited clearly did not substantively change the prior statutory language in NRS 372.680 with respect to the scope of judicial action. *Id*[2]. Nor did this amended language create any sort of ambiguity such that resort to the legislative history to determine what the legislature intended become necessary. The Legislature has not otherwise taken the opportunity at any time before or since to amend the language in NRS 372.680 to specify that an action brought pursuant to NRS 372.680 was to be in the nature of a petition for judicial review.

Furthermore, the State's claim that 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" is just not true. As can be seen by the language of the

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[2] The applicable section of this bill reads:

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.

statute as it existed before the 1999 amendments, a taxpayer could only file suit within 90 days after receiving notice of the department's action on the refund claim. This language left it up to the Department of Taxation to formulate the procedure for taking action on a particular refund claim. This remains the case. All that changed in this regard by virtue of the 1999 amendment is to clarify that the 90 day period to file suit begins to run from the time a final decision on the refund claim is rendered by the Nevada Tax Commission. As pointed out by the State in its motion, the Department has in recent years internally changed the procedure it follows for making a decision on a taxpayer's claim for refund. However, these internal policy changes cannot and do not, in and of themselves, create a change in the scope of the judicial action a taxpayer is authorized to file in NRS 372.680. An administrative agency lacks the power to change or ignore the plain meaning of statutes it is required to follow or administer[1]. *Roberts v. State of Nevada*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988).

Since 1955 when the Sales and Use Tax Act was first enacted, it has been a requirement of the statutory refund procedure to require a taxpayer to first file a claim for refund with the Department of Taxation (or, prior to 1975, the Tax Commission) and for that claim to be denied before a suit could be filed to recover a refund. The reason for the exhaustion requirement was explained by the Court in *Hansen-Neiderhauser*.

> The purpose of the statute requiring the filing of a claim as a predicate to the commencement of suit against a government agency is to enable the agency to investigate the claim and the claimant while the occurrence is recent and the evidence available to the end that it may protect itself against spurious and unjust claims

Hansen-Neiderhauser, 81 Nev. at 311, 402 P.2d at 402. The nature of the administrative remedy offered to taxpayers by the Department and Tax Commission in considering a claim for refund filed pursuant to NRS 372.635 may have changed over the years, but until the Legislature amends NRS 372.680 to specify the nature of the action as subject to a judicial review standard, the Nevada Supreme Court's description of the action as an original *de novo* action for restitution must stand.

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[1] The statutory amendment to NRS 360.245 in 1997 cited on page 8 of the State's motion did not reference the statutory refund procedure either.

When the Legislature wants to clearly express its intent to limit a specific judicial remedy to a judicial review standard it has done so. For example, in 1995 the Legislature amended NRS 360.395 to state: "[B]efore a person may seek judicial review pursuant to NRS 233B.130 of a final order of the 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." NRS 360.395 is specifically applicable only to contested cases commenced by a taxpayer filing a petition for redetermination of a deficiency determination issued by the Department of Taxation. See NRS 360.300 – 360.395.

Another example is NRS 361.420, a statute describing a property taxpayer's remedy of bringing an action to recover a refund of property taxes alleged to have been overpaid. This statute describes a procedure in which the taxpayer must pay the contested property taxes under protest in writing, and having first been denied relief by the State board of equalization, may commence a suit in district court limited to certain specified grounds. NRS 361.420(2), (4). In this action the Court is directed to hold a "trial without a jury and confine its review to the record before the State Board of Equalization." NRS 361.420(5).

Another indicator suggesting the State is wrong in its analysis is the fact that since 1999 the Legislature has created a number of new excise taxes, particularly during the 2003 special session of the Legislature. In each of these cases, the Legislature essentially made a wholesale transfer (i.e., they copied) of the current statutory refund provisions found in NRS 372.630 – 372.700 for the sales and use tax to also govern the statutory refund procedures for these new taxes. Compare NRS 363B.140 – 363B.210 [business tax]; NRS 363A150 – 363A.220 [tax on financial institutions]; NRS 368A.250 – 368A.320 [live entertainment tax]. In none of these cases did the Legislature change the language in the statutes corresponding to the provisions of NRS 372.680 to specify a judicial review standard. In all of these new statutory refund procedures the taxpayer is described as the plaintiff.

There is no need to resort to legislative history to resolve the State's perceived ambiguity as to the proper standard of judicial discretion in an action brought pursuant to NRS 372.680 as

the Nevada Supreme Court has already interpreted the statutory language to mean an original *de novo* action for restitution of taxes allegedly overpaid. *Obexer*, 99 Nev. at 237, 660 P.2d at 984. What certain individuals may have been intending to accomplish in amending NRS 233B.130 in 1989, or in amendments in 1997 or 1999 to other statutes that are not a part of the statutory refund procedure, is neither controlling nor persuasive in the complete absence of any substantive changes made to the statutory refund procedure outlined in NRS 372.630 – 372.700 regarding the standard of judicial discretion. This court should follow the plain meaning of the current statutory language in NRS 372.680 as described by the Nevada Supreme Court, and allow this action to proceed to a trial de novo.

4. The State's claim that this action was not timely filed is without merit

In Section D (p. 9) of its motion the State argues the plaintiffs' action was not timely filed because it was filed more than 30 days after the final written decision of the Nevada Tax Commission denying plaintiffs' refund claims. To make this argument the State must, of necessity, completely ignore again the plain statutory language of NRS 372.680, cited above. NRS 233B.130 specifies that a petition for judicial review must be filed within 30 days from the date of the final decision of the administrative agency in a contested case. However, the plain language of NRS 372.680 states the action must be brought within 90 days of the final decision of the Tax Commission. Even if a judicial review standard applies to this action, the court cannot simply ignore this statutory language. Furthermore, in another portion of its motion even the State conceded that NRS 233B.020(2) states the "provisions of this chapter are intended to supplement statutes applicable to specific agencies." Motion to dismiss, p. 4:26-28. The State's argument is without merit.

5. Administrative res judicata is not applicable

In Sections E, F and G of its motion the State argues this action should be barred by the doctrines of administrative res judicata, claim preclusion, or issue preclusion, respectively. Like the argument made in Section D, these arguments rely on acceptance of the State's prior argument that this action should have been filed as a petition for judicial review within the time limits and proscriptions of NRS 233B.130. Given that the law clearly supports the plaintiffs'

position that this action was timely filed within the time limits prescribed by NRS 372.680, the State's argument for the application of administrative res judicata, claim preclusion or issue preclusion as grounds for dismissal are completely without merit.

CONCLUSION

Based on the foregoing points and authorities, the allegations of the Complaint, and the attached Exhibits, plaintiffs request this Court to deny the State's motion to dismiss this action. In addition, this Court should reject the State's claim that this action should proceed under a limited judicial review standard described in NRS 233B.135, and instead direct this action to proceed as an original action to a *de novo* trial, with no particular deference given to the decisions made by the administrative agency on the merits of plaintiffs' claims for refund.

Dated this 10th day of February, 2010

/s/ John S. Bartlett

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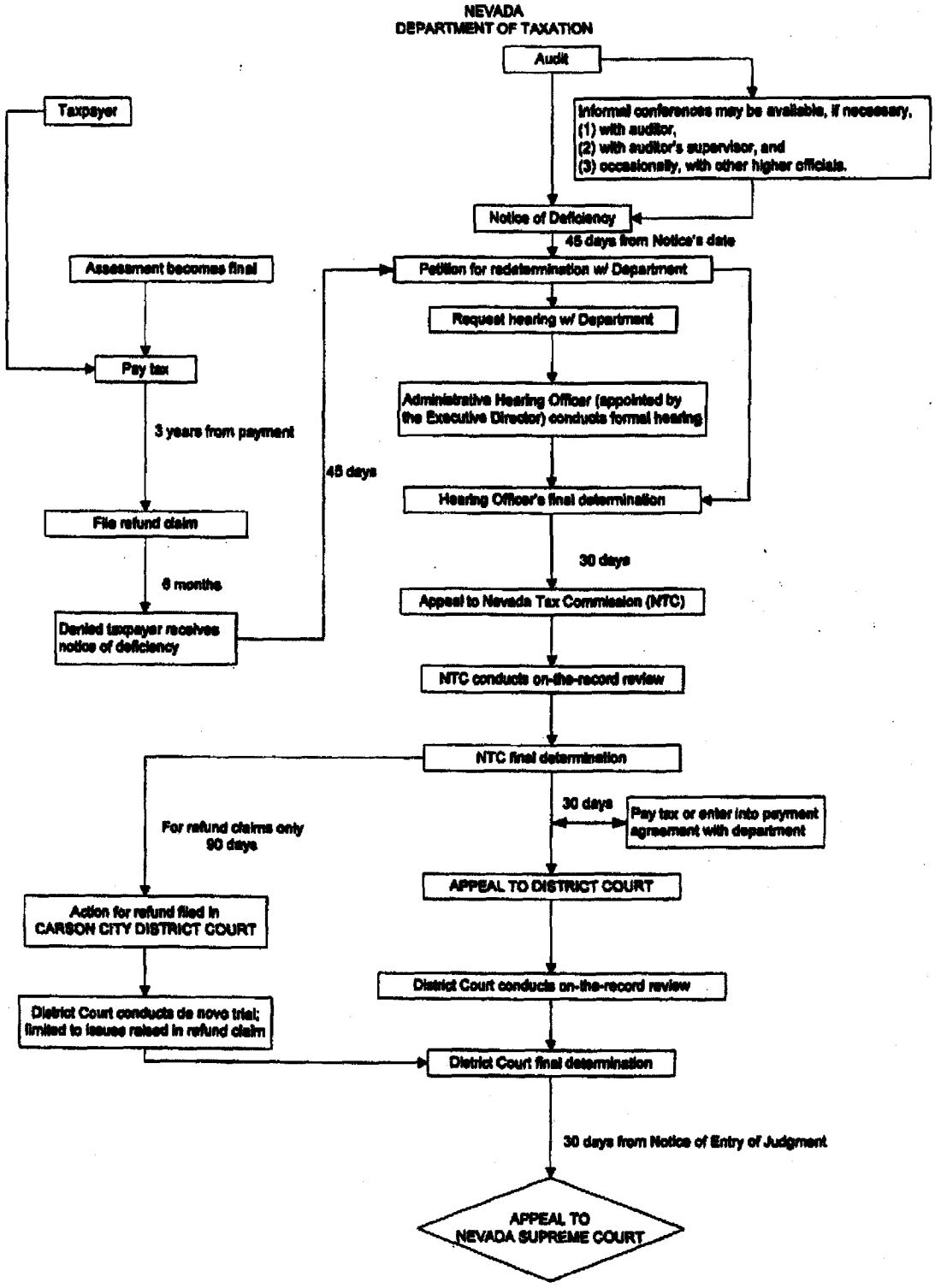
EXHIBIT 2



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