EXHIBIT 4

CASE NO. 09 OC 00016 1B

DEPT. NO. 1

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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.

THE STATE OF NEVADA, EX REL
DEPARTMENT OF TAXATION,
Defendant.
_____/

TRANSCRIPT OF PROCEEDINGS

Hearing

October 8, 2009

THE HONORABLE JAMES T. RUSSELL, DISTRICT JUDGE PRESIDING

APPEARANCES

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

NORMAN J. AZEVEDO
Attorney at Law

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

CARSON CITY, NEVADA, THURSDAY, OCTOBER 8, 2009, 9:00 A.M.

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THE COURT: Please be seated.

For the record, this is Case No. 09 0C 00016 1B, Southern California Edison versus State of Nevada Department of Taxation.

Present for Southern -- Southern California Edison is Mr. Norm Azevedo and Mr. Charles Read.

MR. READ: Good morning.

THE COURT: Present for the State of Nevada Department of Taxation is Gina Sessions.

I would note for the record that on June 30th, 2009, the Court issued an order denying the defendant State of Nevada's motion to dismiss, but at that time, as part of that order, I directed the parties to meet and confer as to how to proceed further in this particular case in regards to the issue before us today.

Obviously, you weren't able to agree; I did note from that, from your briefing schedule that you agreed to. And motions have been filed for, primarily, for an order that -- by Southern California Edison. That motion was filed for an order that plaintiff's refund action be considered as a trial de novo under NRS 372.680. And, additionally, the State of Nevada also filed its brief in

regards to that.

So, at this time, are counsel ready to proceed?

MS. SESSION: Yes.

MR. READ: We are, Your Honor.

MR. AZEVEDO: Yes, sir.

THE COURT: Okay. Mr. Read, are you going to go ahead and present it on behalf of Southern California Edison?

MR. READ: Yes. And since we both had sort of dueling motions and replies, we weren't sure how Your Honor, or the Department, might wish to proceed.

We're perfectly happy to have Ms. Sessions start, and then we'll -- we'll reply, or -- or vice versa.

MS. SESSION: I'd defer to the Court. If you'd like them to start, that would be fine.

THE COURT: Well, you're the plaintiff in the action, so I was going to go ahead and allow you to start first.

MR. READ: Very good.

All right. Thank you very much, Your Honor. Good morning.

I think that we wanted to start with, really, just a couple of basic points in terms of our position, and then, of course, reserve some opportunity for reply, depending on -- on the Department's positions.

But I think that, you know, fundamentally, our view is that the fact of a trial de novo being the appropriate approach in this case, under 372.680, is really quite clear, and that the language of 680, that Your Honor has confirmed was appropriate for our filing, makes it very clear.

And, if I may, I'd just like to approach our poster board.

THE COURT: You may.

MR. READ: And hope that everybody can see it. Get out of the way here.

But it really is clear that in the sequence that we have followed here, that the 372.680 provides a clear indication of the procedure that a taxpayer should follow in the case of a refund claim for sales and use taxes; that the, the sequence begins with the filing of the claim; that the taxpayer may not bring a -- an action in the District Court until a claim for refund is filed with the Department. The Department then must serve notice on the taxpayer before a denial of that refund. There is an alternate procedure in case the Department fails to act. And then the statute provides that a taxpayer may then appeal the Department's denial, which occurred in our case, to the Commission itself, and that then it is the Commission that makes the decision which is subject to a judicial remedy.

And, as the board indicates, the statute that has

been established and the scheme established by the Legislature for sales and use tax refund claims and the judicial remedies beyond the administrative process, which is up here, is quite clear and comprehensive, that the -- the Executive Director, and nobody else from the Department, is permitted to seek a judicial review of the Commission's decision. If the -- if the decision is favorable to the taxpayer, that is it. There is no judicial remedy available to the Department.

In the case of the other potential parties to a refund case, such as other local government, who are interested and participate, they may, if they are aggrieved by the decision of the Commission, they may proceed under 362.457. But it specifically says there that they may file a petition for judicial review of the Commission's decision.

And to contrast that with the very clear, very different language under which we are proceeding, 372.680, that if the Commission denies the taxpayer's claim for refund, which, of course, is what happened here, that the taxpayer's sole judicial remedy -- not even an option -- sole judicial remedy, is to bring an action against the Department in the District Court for the recovery of the whole, or any portion of the amount of the claim that has been disallowed.

Right here, you have the very clear distinction in

the statutory language between, in this case, the remedy available to local government parties of a -- of a petition for judicial review, which, of course, is what Ms. Session says we should be proceeding under. Contrast that with the very different language of the taxpayer.

THE COURT: Why should a taxpayer be treated any different than a local government, when both of them have the same interest in respect to the refund amounts and the amounts in issue?

MR. READ: Well --

THE COURT: Why should there be any distinction?

MR. READ: I think that --

THE COURT: I mean, other than your point in regards to the statutory arguments. But why should there be any distinction?

MR. READ: Well, I think, Your Honor, that you -- of course, I mean, that's a fair question -- although I submit it's a question that would need to be presented down the street to the Legislature -- that the Legislature clearly has indicated a difference between the position of the local governments. And I think that the fundamental distinction is that the Legislature has, not only for a sales and use tax claims, but as our papers show -- we'll briefly touch on in our argument -- a variety of other claims for refunds for, in administrative actions, not all

of them tax matters, has provided an additional safeguard to the taxpayer who is aggrieved by the administrative process, that the taxpayer, in the Legislature's wisdom, has been given an additional, a plenary relief in the form of a de novo action in the District Court.

THE COURT: Does NRS 372.680 specifically indicate there's a de novo proceeding? Doesn't it just indicate that you can go file a complaint?

MR. READ: The --

THE COURT: There's no language that says it's a de novo...

MR. READ: The words "de novo" do not appear in the statute, that is certainly correct; although, I think, as we'll show, that the way in which the courts have clearly interpreted and consistently interpreted 372.680 is to provide a de novo proceeding. That's what is meant by "bringing an action."

So, if I may, I'll leave that for the moment and -- and go on to a couple other points, including the one Your Honor has just -- has just asked about.

That the -- the indications that this language in 372.680 does mean a de novo proceeding is, is -- comes from a variety of sources beyond the -- the specific language of the statute.

I would start, for example, with the chart that we

provided in our submission to the Department's motion to dismiss, which is a chart prepared by the federal -- Federation of Tax Administrators. And these are individuals from the tax departments of the 50 states.

For Nevada, and its scheme, the chart clearly indicates -- and this is the advice provided to practitioners, and it's been in effect for -- for a number of years, indicates that in the case of a -- a refund proceeding, where we are, that the -- the chart indicates -- and this is on the detailed analysis, that after an action is filed in -- this indicates Carson City District Court, there can be filings in others, but that the District Court conducts, quote, a de novo trial, limited to the issues raised in the refund claim.

So, there is advice from the tax officials of the State of Nevada that specifically indicates a de novo proceeding.

Let me -- let me refer to the Nevada case law on the de novo point that Your Honor's asked about, because I think this is absolutely consistent, and an excellent guide in our situation.

We have extensively researched these cases and found that all of the tax refund cases brought under 372.680 have been conducted as trials de novo, and this has been regardless of whether or not there has been a hearing in the

administrative process.

And, indeed, the Department itself took this very position in its brief to -- in the opening -- in our opening brief, we quoted from the brief of the Department filed in this proceeding to the Nevada Tax Commission back in -- on the 21st of November, 2003.

"NRS 372.680 in no way purports to limit the District Court's review of the administrative record on appeal. Consequently, Edison would have an opportunity before the District Court to more fully develop the facts, if appropriate."

So, the Department itself, previously, took exactly the position we're taking, that in -- that if and when there were to be a proceeding in this court, that we would have the opportunity to, quote, develop the facts. I mean, that's clearly not a judicial review of an underlying administrative action.

THE COURT: What about Mr. Azevedo -- your co-counsel's prior statement and testimony -- Azevedo, in respect to, back when he was a deputy attorney general, in respect to the changes in the law that took place in 1999, clearly indicates that:

"In the event the taxpayer's aggrieved by the decision of the administrative hearing officer,

EXHIBIT 3

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

COMES NOW, Plaintiff Southern California Edison ("Edison"), by and through its attorneys of record, and submits the following motion for an order that this case, brought under NRS 372.680, is a trial de novo against the Nevada Department of Taxation ("Department"), to be conducted pursuant to the Nevada Rules of Civil Procedure ("NRCP") and without deference 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.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In its Order, the Court denied the Department's April 20, 2009 Motion to Dismiss ("Motion to Dismiss"). The Order went on to direct the parties "to meet and confer to resolve issues relating to the nature of the proceedings in this Court pursuant to NRS 372.680 and NRS 233B.135," and thereafter to file cross-motions on the subject if they were unable to reach agreement. Order at ¶ 3. Counsel for Edison and the Department conferred, but did not reach agreement. Therefore, the question before the Court is whether this action for refund of use taxes pursuant to NRS 372.680 and NRS 374.685[1] is, as Edison contends, an original civil action to be conducted pursuant to the NRCP and without deference to the prior administrative decision or whether, as the Department contends, Edison's refund action should proceed pursuant to NRS 233B.135 as a judicial review of the Commission's February 27, 2009 decision denying Edison's claims for refund of use taxes.

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

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

[1] NRS Chapter 372 imposes a state-wide sales and use tax which goes into the state's general fund. NRS Chapter 374 essentially duplicates the provisions of NRS Chapter 372 and imposes a state-wide county 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.

before this Court. The Department's initial brief to the Commission in this case, dated November 21, 2003, stated the law accurately: "NRS 372.680 in now [sic] 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 appropriate***." (Brief of the Nevada Department of Taxation, p. 5, ll. 23-28; attached as **Exhibit A**.) (Emphasis added.) Edison agrees with the Department's prior position in this case, which is indisputably correct. In sum, this action is a trial de novo, meaning the matter is tried to this Court and Edison is entitled to an evidentiary hearing. The parties may submit all or a portion of the record developed during the administrative process as evidence for the Court's independent consideration, but the Court is not limited to the record below and gives no deference to the Commission's decision.

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

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

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

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

The plain language of NRS 372.680 and Nevada case law interpreting that provision and other similar Nevada tax refund statutes compel the conclusion that NRS 372.680 creates an original action against the Department and does not authorize a judicial review of the Commission's decision. 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 372.680 (emphasis added).[2] The plain language of NRS 372.680 expressly authorizes only an original civil action against the Department, governed by the NRCP, not a judicial review of the legal or factual findings of the Commission. First, the NRCP define an "action" as a "civil action," which is commenced by filing a complaint in district court against the defendant. NRCP 1 & 2. Second, an "action against the department" is incompatible with language requiring judicial review of the Commission's decision. *Cf.* NRS 360.395(1) (requiring "judicial review

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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.

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

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

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

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

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

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

In the seminal case of *State v. Obexer & Sons*, Inc., 99 Nev. 233, 237 (1983), an action for a refund of sales taxes brought under NRS 372.680, the Nevada Supreme Court held: "Actions 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." Reaffirming this holding in *Saveway Super Serv. Stations, Inc. v. Cafferata*, 104 Nev. 402, 404 (1988), the Supreme Court stated that "[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." In *Obexer & Sons*, the taxpayer had received a denial of its claim for refund from the Department ***and then from the Commission***; in the district

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

In *Saveway*, the taxpayer paid fuel excise taxes and penalties assessed by the Department pursuant to NRS Chapter 365 and filed an appeal with the Commission. After receiving an adverse decision from the Commission, Saveway filed a petition for judicial review of the Commission's decision. The district court ***dismissed*** the petition and the Nevada Supreme Court ***affirmed*** because "NRS 233B.130 is specifically limited by NRS 365.460, and under NRS 365.460 Saveway's remedy was to pay the excise tax under protest and bring an action against the state treasurer in the district court[.]" *Id.* at 403-04. NRS 365.460 uses the same "may bring an action" language as is found in NRS 372.680.[3]

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

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

[3] NRS 365.460 provides: "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 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."

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

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

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

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

[4] Edison does not cite to *Lohse* as precedent, but simply as additional evidence that the Department has 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.

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

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

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

> Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 (commencing with Section 6901), the claimant may ***bring an action against the board [referring to the California State Board of Equalization] on the grounds set forth in the claim in a court of competent jurisdiction*** in any city or city and county of this state in which the Attorney 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.)

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

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

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

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

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

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

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

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

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

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

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

1. Deficiency Determination Procedure (NRS 360.300 - NRS 360.400)

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

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

[5] *See* S.B. 483 (1995) ("Purpose of Omnibus Tax Bill") ("One of the primary purposes of the bill is to continue the consolidation of those statutory provisions that pertain to the administration and collection of taxes presently existing throughout Title 32 into chapter 360. For example, chapters 372 and 374 contain statutory provisions that specify how the Department of Taxation is to make a deficiency determination 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**.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. NRS 360.245(5) Has No Application To A Refund Action Under NRS 372.680

During the hearing on the Department's Motion to Dismiss, the Court expressed concern that if it treated a taxpayer's "action against the department on the grounds set forth in the claim" provided by NRS 372.680 as authorizing a trial de novo, it would be "rendering NRS 360.245(5) meaningless." (Tr. at 17, ll. 23-24.) As explained below, NRS 360.245(5) affirms the Commission's authority over the Department in the context of tax cases at the administrative level, and in no way conflicts with NRS 372.680.

1. NRS 360.245(5) Does Not Provide a Judicial Remedy for *Any* Party and Does Not Prescribe a Standard of Review

The Legislature enacted NRS 360.245(5) in 1997 to clarify that only decisions of the Commission, as opposed to "decisions of the executive director or other officer of the department," (NRS 360.245(1)(a)), are subject to judicial review, and to expressly preclude the Department from appealing decisions of the Commission that were adverse to the Department. The plain language of the statute accomplishes the Legislature's objectives. NRS 360.245(5) states in full, as follows:

> 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.

The first sentence of NRS 360.245(5), which states that "[a] decision of the [Commission] is a final decision ***for the purposes of judicial review***," must be read in connection with NRS

360.245(1)(a), which states that "[a]ll decisions of the executive director or other officer of the department made pursuant to this Title ***are final unless appealed to the [Commission]***." (Emphases added.) These two provisions establish that a person aggrieved by an administrative decision of the Department cannot appeal the Department's decision to district court. Rather, the aggrieved person must first appeal to the Commission.[6] Furthermore, if the Department's decision becomes final because it is not appealed to the Commission pursuant to NRS 360.245(1)(a), all avenues for further appeal are closed. In sum, the first sentence of NRS 360.245(5) provides that ***only*** a decision of the Commission is subject to judicial review; ***and not*** that a decision of the Commission is ***only*** subject to judicial review.

The second sentence of NRS 360.245(5) speaks for itself, and expressly prohibits the Department from seeking judicial review of Commission decisions. Together, the two sentences of NRS 360.245(5) do no more than establish the Commission's decision as the final decision ***within the agency***. Importantly, NRS 360.245(5) neither authorizes any party to ***seek*** judicial review nor states that a final decision of the Commission is ***only*** subject to judicial review. Instead, one must consult other statutes to determine the specific judicial remedy that applies in a particular set of circumstances.

For example, NRS 233B.130(1) authorizes "any party who is identified as a party of record by an agency in an administrative proceeding and aggrieved by a final decision in a contested case . . . to judicial review of the decision." (Even this provision merely authorizes a petition for judicial review and does not state that the aggrieved party is ***only*** entitled to judicial review.) NRS 360.395 makes it clear that a taxpayer may file a petition for judicial review following the Commission's decision upholding a deficiency determination by the Department. *See* Section III.A.1, *supra*. NRS 372.680 authorizes a taxpayer to bring an action against the Department on the grounds set forth in its refund claims following the Commission's denial of its refund claims. NRS 360.245(7) authorizes a county or other local government that is a party to

[6] As discussed at length above and in Edison's Opposition Brief, S.B. 362 amended NRS 372.680 and other tax refund statutes to require denial of its refund claim from the Commission before a taxpayer can 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.

the proceeding before the Commission and aggrieved by the decision to petition for judicial review. NRS 360.245(5), of course, prohibits the Department from filing a petition in that case.

2. NRS 360.245(5) Was Enacted To Resolve a Dispute Between the Commission and the Department

NRS 360.245(5) codifies the District Court's holding in *Dep't of Tax'n v. Newmont Gold Co.* (Nev. 1st Judicial Dist., Sept. 3, 1996), attached as **Exhibit E**. In that case, the taxpayer (Newmont Gold) received a deficiency determination following a sales tax audit by the Department. The taxpayer filed a petition for redetermination and the matter was heard before a Department hearing officer. The hearing officer upheld the deficiency determination and the taxpayer appealed to the Commission. The Commission voted unanimously to reverse.

The ***Department*** filed a petition for judicial review in district court. The taxpayer filed a motion to dismiss, arguing that the Department had no standing to file a petition for judicial review because the Commission is the statutory head of the Department. The ***Department*** argued that, since "its members are not selected based upon their tax law expertise. . . . the Commission's decisions should be appealable." The district court granted the taxpayer's motion to dismiss because existing statutes "clearly established" the Commission as the head of the Department and, thus, the "Department . . . can not be aggrieved by a decision of [the Commission]."

Following the decision in *Newmont Gold*, the Legislature passed Senate Bill 374 ("S.B. 374") and Senate Bill 375 ("S.B. 375") in 1997. S.B. 374 addressed the Commission's perceived conflict of interest within the Attorney General's Office as a result of attorneys within the same agency representing both the Department and the Commission, and authorized the Commission to seek independent counsel in certain circumstances. S.B. 375 added NRS 360.245(5), prohibiting the Department from seeking judicial review of Commission decisions, and NRS 360.245(7), specifically authorizing local governments that were parties to the proceeding before the Commission to seek judicial review if they are aggrieved by the decision.

In sum, S.B. 374 and S.B. 375 resolved a turf war between the Commission and the Department, and NRS 360.245(5) has no bearing on the judicial remedy afforded to a taxpayer in a refund action.

IV. CONCLUSION

For all the reasons stated above, Edison's action in this case brought pursuant to NRS 372.680 is a trial de novo, *i.e.*, a trial that includes an evidentiary hearing, governed by the NRCP and without deference to the decision of the Commission.

Dated: August 26, 2009

By: _____

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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.

Johanna Maher

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, MOTION FOR AN ORDER THAT PLAINTIFF'S REFUND ACTION UNDER NRS 372.680 IS A TRIAL DE NOVO filed in Case No. 09 0C 00016 1B DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSON.

DATED this 28th day of August, 2009.

NORMAN J. AZEVEDO, ESQ.
Nevada Bar No. 3204
510 West Fourth Street
Carson City, NV 89703
775.883.7000
Attorney for Plaintiff

EXHIBIT 2

CERTIFIED COPY

STATE OF NEVADA

TAX COMMISSION

TELECONFERENCED OPEN MEETING

TRANSCRIPT OF PROCEEDINGS

PUBLIC MEETING

MONDAY, DECEMBER 8, 2003

CARSON CITY, NEVADA

THE BOARD:	BARBARA SMITH CAMPBELL, Chairman CANDACE EVART, Member JOHN MARVEL, Member GEORGE KELESIS, Member DAVID TURNER, Member
FOR THE DEPARTMENT:	CHUCK CHINNOCK Executive Director DINO DiCIANNO Deputy Executive Director TOM SUMMERS Deputy Executive Director ERIN FIERRO Management Assistant
FOR THE BOARD:	GREG ZUNINO Chief Deputy Attorney General DENA JAMES Deputy Attorney General
REPORTED BY:	CAPITOL REPORTERS BY: MARY E. CAMERON, RPR, CP Nevada CCR #98 410 East John Street, Ste. A Carson City, Nevada, 89706 (775) 882-5322

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RENO, NEVADA, MONDAY, DECEMBER 8, 2003, 9:12 A.M.

-oOo-

CHAIRMAN CAMPBELL: We'll call to order the noticed Nevada Tax Commission meeting for December 8 that is being videoconferenced between Desert Research Institute here in Reno and the Community College of Southern Nevada down in Las Vegas.

So that everyone knows as well, we have got a bare quorum with us today. Commissioner Kelesis is joining us via phone conference from his office and we are going to lose our quorum at twelve noon, just so everyone knows what our time line schedule is today. Mr. Chinnock.

MR. CHINNOCK: Madam Chair, with that, the first item on the agenda under the Compliance Division, item A, taxpayer's appeal from Department's denial of refund request. The first item up is Southern California Edison, and by way of introduction, we have several items here that probably need to be considered before we actually get into the hearing.

The first is we have a formal request. You notice that it is asterisked, which means under 360.247, the petitioner may request a closed hearing and I do have correspondence to that effect also.

We do have intervention requests from Clark

County, that is another issue, and the other issue here probably this morning is there has been over the weekend and late on Friday also additional motions and correspondence presented, so I'm not sure how the Commission might want to proceed with those items, Madam Chair.

CHAIRMAN CAMPBELL: Mr. Chinnock, what is the taxpayer's preference on a closed hearing?

MR. CHINNOCK: The taxpayer requested a closed hearing, both verbally and in writing.

CHAIRMAN CAMPBELL: I do realize that we have entities here that have petitioned to become interveners and become parties within this taxpayer appeal that's been noticed. I would like those parties to know that it's premature for us to recognize them at this point in time.

I think we will go into a closed hearing and go through the procedural matters first and then after that fact we'll have the Commission either decide to recognize or not recognize those petitioners.

So with that, we're going to need to have all but the parties that are involved with Southern California Edison leave the room. Mr. Summers, when that room is cleared and closed, would you let us know, please?

MR. SUMMERS: Yes, ma'am. Everyone that is not associated with the Department or Southern California Edison, we'll need you to leave the room.

CHAIRMAN CAMPBELL: And Mr. Kelesis, are you the only one present in your office there?

MEMBER KELESIS: Yes.

CHAIRMAN CAMPBELL: Thank you.

MR. SUMMERS: Madam Chair, the southern Nevada room is secure.

CHAIRMAN CAMPBELL: Thank you, Mr. Summers. Here in Reno, we are secure here. Dena James from the Attorney General's office is going to be counsel to the Commission today, and I want to first start with the correspondence that's been coming back and forth over the last several days.

MS. JAMES: Yes, Madam Chair. We do have, I understand that we have a letter from Mr. Azevedo asking the Commission to address a breach of confidentiality issue. I also understand that we have a motion from Mr. Zunino requesting that the Commission address a motion for protective order.

This Commission is not noticed to consider either one of those matters, but if the Commission does wish to consider those matters at a later date, it will need to put those on an agenda so that they can be properly noticed.

CHAIRMAN CAMPBELL: All right. With that, this is a taxpayer appeal from the Department's denial for refund request. We'll start with a brief overview from the

Department of Taxation. After we have that overview, I'd like to have -- I'd like to make a recommendation on this and Mr. Zunino, let me ask you a question before we get started.

It's my understanding this is noticed as a taxpayer's appeal but it's also supposed to be an evidentiary hearing; is that correct?

MR. ZUNINO: Yes. I can address that, Madam Chair. Initially Southern California Edison submitted a refund claim. That encompassed roughly a three-year period and there were a number of claims that were made by letter.

Initially the Department was under the impression that we were dealing with strictly a legal issue which was the characterization of this Arizona tax and the characterization of these U.S. or federal taxes that Edison was paying, but I understand that based upon briefs and evidence that Mr. Azevedo has submitted on behalf of Edison, that we do have some factual issues or some evidentiary issues that need to be resolved perhaps in the context of an evidentiary hearing.

I know further that there were concerns about having a quorum here today and concerns that those evidentiary issues would not be able to be fully developed between now and noon, so that I had anticipated a recommendation by both counsel that this matter be remanded

to a hearing so that we can develop some of these factual issues that have arisen.

So in a nutshell that's the overview.

CHAIRMAN CAMPBELL: Thank you. Who is representing the taxpayer?

MR. AZEVEDO: Madam Chair, Members of the Commission, for the record, Norm Azevedo on behalf of Southern California Edison.

CHAIRMAN CAMPBELL: Mr. Azevedo, would you concur with the Attorney General's office that this is intended to be an evidentiary hearing?

MR. AZEVEDO: Yes, ma'am.

CHAIRMAN CAMPBELL: It has been the practice in the past that the Commission not hold evidentiary hearings, that those hearings be held at the Hearing Officer level, and it would be my recommendation to this Commission that we not break with that tradition and that precedence.

So I'd like to have a little bit of discussion before we go any further in this hearing to see whether or not the Commission wants to break away from that tradition or keep with it.

MEMBER KELESIS: Madam Chair, this is George Kelesis from Las Vegas. Based upon the statements made and the practice that we have had, my position as a Commissioner is not to break away from that practice, that we remand it

to a Hearing Officer, have a proper record made for the benefit of the taxpayer as well as for the benefit of the Department, and then if it's not resolved at that level, they may bring it forward, for lack of a better word, as the typical appeals that we've heard in the past.

So I'd be prepared to make a motion to remand it to a Hearing Officer. I understand there are some time crunches. So remand it for the earliest possible date a Hearing Officer can address this matter.

CHAIRMAN CAMPBELL: Thank you, Mr. Kelesis. Here in Reno?

MEMBER MARVEL: I agree with George. I would be willing to make a second to his motion.

CHAIRMAN CAMPBELL: All right. We have a motion and second on the floor to remand this back to a Hearing Officer. Do we have any other comments from fellow Commissioners or shall I go ahead and call for the vote?

MEMBER TURNER: I agree with them.

CHAIRMAN CAMPBELL: Mr. Turner, you agree?

MEMBER TURNER: Yes.

CHAIRMAN CAMPBELL: I'll call for the vote. Mr. Kelesis?

MEMBER KELESIS: Aye.

MEMBER MARVEL: Aye.

MEMBER TURNER: Aye.

MEMBER EVART: Aye.

CHAIRMAN CAMPBELL: The Chair votes aye. The Commission is remanding this back to a Hearing Officer for an evidentiary hearing. It is also the wish of the Commission that this be done in the most expeditious and timely manner.

MEMBER TURNER: Madam Chair, I think there's something I should have on the record regarding this and I should have done it at the beginning as opposed to right now, but Nevada Power is one of the participants in the operations of the power plant in Laughlin, Nevada, and my brother serves on the board of Nevada Power/Sierra Pacific who is the parent, and I don't believe it gives me any type of conflict in hearing this.

CHAIRMAN CAMPBELL: Thank you, Mr. Turner. Ms. James, is there anything else that we need to cover?

MS. JAMES: I believe with regard to the interveners, we will need to give them some sort of notice that their petitions will not be considered because this is going to be remanded to a Hearing Officer and it would not be proper for them to participate at the Hearing Officer level.

CHAIRMAN CAMPBELL: Do we need to get permission from all parties to release that type of information to the intervenors once we go back into open session?

Exhibit 12

000448

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STATE OF NEVADA

DEPARTMENT OF TAXATION

Daimler Chrysler Services North America LLC (formerly Chrysler Financial Company) LLC)	)	Account No: 515-520-612
Petitioner	)	
V.	)	
Department of Taxation	)	FINDINGS OF FACT, CONCLUSIONS
Respondent	)	OF LAW AND DECISION

Pursuant to a petition for redetermination, an administrative hearing was held on May 30, 2001, at 10:30 AM and June 1, 2001 at 8:15 AM in Carson City, Nevada before Paul Ferrin, Hearing Officer. Appearing for the Petitioner, Daimler Chrysler Services North America (Chrysler), were David Otero, Attorney for Petitioner, Peter Larsen, Attorney for Petitioner, Mark Patterson, Attorney for Petitioner and Cheryl Flynn, Supervisor and Manager of Taxes for Chrysler. Appearing for the Department of Taxation (Department) were Katy Phillips, Supervising Auditor, Jackie Baily, Tax Administrator, Dino DiClanno, Deputy Executive Director, Darlene Barrier, Deputy Attorney General and Norman J. Azevedo, Chief Deputy Attorney General. Linda Fleischmann, Tax Division Manager and Greg Rossiter, Deputy Attorney General observed the hearing.

DISCUSSION

This case involves a request for refund made by the Petitioner for sales tax paid by retail sellers of automobiles and the subsequent default of the loan made by

Chrysler. Chrysler is requesting a refund of the portion of sales tax not paid to them by the individuals that had financed the purchase of the vehicle.

OVERVIEW OF DECISION

During the period covered by the refund request the Petitioner did not meet the definition of a "retailer" in Nevada. As the Petitioner was not a retailer, they do not meet the requirement of Nevada Revised Statutes (NRS) 372.365 (5). Even if the Petitioner was a retailer, they are not the retailer who made the sale, nor did they report it on their previous return. Having not made the sale or reported the tax, they are not the party that is eligible for a credit when their customers defaulted on the loan contracts.

The undersigned Hearing Officer having heard and considered the testimony presented and the arguments made, having reviewed and considered the exhibits admitted, and being fully advised in the premises, makes the following findings of fact, conclusions of law and decision.

FINDINGS OF FACT

1. The Department received a refund request for the period July 1, 1997, through July 31, 1999 on June 22, 2000[1] (Petitioners Exhibit 15 lists sales transactions that occurred as late as September of 1999 with dates of charge off occurring into March of 2000). Sales transactions that occurred after July 31, 1999 are excluded from the request. Any transactions that the charge off date occurred after July 31, 1999 are also excluded from this claim. (The Petitioners refund request limits the period from July 1, 1997 through July 31, 1999. Transactions that had charge off dates after December 31, 1999 must be excluded from the claim as federal tax returns were supplied only

[1] Petitioner's counsel also delivered related documents to the Department on May 11, 2000.

through December of 1999.)

2. The Attorney General's office issued opinion 2000-08 on February 7, 2000. That opinion indicated that the credit for bad debts could apply to financial institutions as assignees to installment contracts.

3. The Department began to process the refund claims in late May or early June of 1999. In late June or early July the Department was advised to stop processing the refund claims as the Attorney General's office was in the process of reviewing this type of refund claim.

4. On October 16, 2000 the Attorney Generals office sent a letter to the Department advising them that the Attorney General's Opinion numbered 2000-08 was being withdrawn. The letter also indicated that refund claims being processed by the Department should be denied.

5. On December 1, 2000, the Department denied the refund request.

6. On January 11, 2001, Petitioner timely filed a petition for redetermination and requested an oral hearing. The matter was thereafter set for contested case hearing at the mutual convenience of the parties.

7. The Petitioner is in the business of financing automobiles that have been sold to the customers of automobile retailers in Nevada. The automobile dealers enter into simple interest contracts with the purchasers of the vehicles at the time of the sale creating a security interest in the vehicle for the dealers.

8. The Petitioner, in its capacity as a financing company, pays to the automobile dealers the amount financed. At or near the time of the sale, the automobile dealers assign to Chrysler their rights, title and interest to the contracts with the purchasers of the automobiles without recourse. The Petitioner acquires the right to receive payments from the consumers and a security interest in the automobiles.

9. The automobile dealers purportedly reported the transactions as sales to the

Department and paid the sales tax. (Chrysler did not prove that the dealers have paid the taxes as required for all the contracts in question. The Petitioner argues that the Department did not controvert the testimony of Cheryl Flynn stating that the retailer paid the taxes and therefore their burden to show that the tax was paid is met. The testimony did not state that she knew for a fact that the taxes were paid, but that the procedure was for the dealer to pay the taxes. There was no testimony that stated Chrysler had checked with each of the dealers and the taxes were paid on all of the transactions at issue.)

10. If Chrysler's customers default on a loan contract, the Petitioner attempts to find the purchaser of the vehicle and have the amounts repaid. If that fails, Chrysler then attempts to repossess the vehicle. If the vehicle is repossessed, it is then sold and the proceeds are deducted from the amount owed on the financing contract. Repossession costs and auction costs are added to the amount owed on the contract. If the person or the vehicle cannot be located, Chrysler writes off the remaining amount as uncollectible.

11. The portions of the uncollectible amounts from Chrysler's financing customers are the amounts that are the basis for the refund claim. A percentage of the taxable and non-taxable portions of the contract was computed and taxable portion percentage was applied to the charged off amount of the loan to arrive at the amount subject to refund.

12. The Petitioner has filed as bad debts the amounts of uncollectible contracts on their federal income tax return. (The supporting documentation provided by the Petitioner for the write-offs for their 1998 and 1999 federal income tax returns do not match the amounts reported on the federal return. The documentation provided shows a smaller total that what was taken on the federal return. The Hearing Officer received no documentation for the year of 1997.)

13. The Petitioner also leases automobiles to individuals in Nevada. Those transactions are true leases. The taxes due on those transactions are reported to the Department on Petitioners monthly returns based upon the testimony of the Petitioner.

14. During the claim period, the Petitioner did not sell vehicles at the end of leases to lessees. If a lessee wanted to purchase the vehicle, they would take the vehicle to the retailer, where Chrysler would sell the vehicle to the dealer and the dealer would then sell the vehicle to the lessee.

15. Any finding of fact hereinafter construed to constitute a conclusion of law is hereby adopted as such to the same extent as if originally so denominated.

CONCLUSIONS OF LAW

1. The Petitioner's appeal to the undersigned Hearing Officer of the Nevada Department of Taxation was timely filed and the determination of the merits of said appeal is properly within the jurisdiction of the undersigned Hearing Officer.

2. Nevada Revised Statute (NRS) 372.365 (5) provides, " If a **retailer:**

(a) Is unable to collect all or part of the **sales price of a sale, the amount of which was included in the gross receipts reported for a previous reporting period;** and

(b) **Has taken a deduction on his federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to collect,** he is entitled to receive a credit for the amount of **sales tax paid** on account of that uncollected sales price. The credit may be used against the amount of **sales tax** that the retailer is subsequently required to pay pursuant to this chapter." (Emphasis Added) This case involves whether the Petitioner is a retailer and as such meets a portion of the requirements to be able to receive a credit for bad debts. The case also questions whether **"the amount of which was included in the gross receipts reported for a previous reporting period"** was reported by the Petitioner or required to be reported by the Petitioner. Also questioned was whether the amount taken as a deduction for bad debts on the Petitioner's federal income tax returns includes the amounts from Nevada bad debts to meet the requirement that the deduction from the federal return was taken.

The allowance of a deduction for a bad debt amounts to an exemption from the reporting of the gross receipts for a current period for amounts that had been previously reported.[2] It meets the definition of exempted in Black's Law Dictionary and has the same effect of an exemption.

As an exemption, the bad debt deduction must be strictly construed against taxpayers as noted in *Shetakis Distributing Co. v. State of Nevada, Department of Taxation*, 108 Nev. 901, 839 P.2d 1315 (1992) (Shetakis) citing *Sierra Pacific Power v. Department of Taxation*, 96 Nev. 295, 607 P.2d 1147 (1980) (Sierra Pacific).[3]

The plain reading of the bad debt statute is required by the Nevada Supreme Court in *State Industrial Ins. System v. Bokelman*, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997). That reading requires that a retailer who is unable to collect the entire amount of the sales price of a sale that has reported the tax on the sale and has taken a deduction on his federal income tax returns, may receive a credit for the amount of the sales tax paid on account of the uncollected sales price. In this case the retailer, the automobile dealer, made a sale of an automobile and received the entire amount of the sales price, including tax. The dealer purportedly reported the entire amount of the sales on his next return. The retailer, the car dealer, was able to collect the entire amount of the sales price of the property that was sold and does not require any credit for bad debts associated with the sale.

Even if the Petitioner could be determined to be a retailer by assignment[4], they have not reported any tax to the Department on any previous returns as required by the bad debt statute. If they have not filed and reported any taxes, they would not be entitled to a credit to apply to future sales taxes that may become due. The Petitioner argues that the bad debt statute does not state who had to have reported the

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[2] NRS 372.360 defines exempted as "means exempted from the computation of the amount of taxes imposed". The bad debt statute allows the credit to be used against the amount of sales tax subsequently paid. That language is creating an exemption from the subsequent taxes due. See "exempt" Black's Law Dictionary page 571 of the 6th edition dated July 1990.

[3] See also Suntrust Bank v. Johnson, 46 S.W. 3d 216 (Tenn.App.2000) "statutes granting exemption from taxation should be construed strictly against the taxpayer".

[4] The Petitioner claims to be a retailer by assignment by NRS 372.040 that defines a person and includes assignee. However, if the assignee steps into the shoes of the person who made the assignment, they would have the responsibility to report and remit the sales tax on all of the transactions that they finance. Every person that can be a seller and a retailer is not necessarily either one of those or both as is

transactions for their gross receipts, allowing anyone to apply for the refund. However, the plain reading of the statute indicates that the person who filed the return is the one that should be granted the credit. And the documentation provided to the Department for the bad debt deduction from the Petitioners federal income tax return is incomplete, as the year 1997 return information was not provided. The years of 1998 and 1999 showed charge off amounts, but that number does not equal the amount of the deduction taken. Without the complete documentation to support the entire amount taken for the bad debt deduction on the federal return, no deduction for bad debts could be allowed even if they met the other criteria as required for the deduction.

3. NAC 372.050 on Credit Sales provides, " 1. If tangible personal property is sold on credit, either under a conditional sale or lease contract or otherwise, the whole amount of the contract is taxable unless the retailer keeps adequate and complete records to show separately the sales price of the tangible personal property, and the insurance, interest, finance, carrying, and other charges made in the contract. If such records are kept by the retailer, the insurance, interest, finance, and carrying charges may be excluded from the computation of the tax.

2. **The total amount of the tax on the entire sales price in credit transactions is due on the due date of the return to be filed after the close of the reporting period in which the sale was made.**

3. No reduction in the amount of tax payable by the retailer is allowable by reason of his transfer at a discount of a conditional sale or lease contract or other evidence of indebtedness." (Emphasis Added) This regulation states that if sales are made on credit, the amount of the transaction is required to be reported by the retailer for the period that the sales were made and not when the retailer is paid for the sale, if at all. The regulation was supported by the Nevada Supreme Court in *Bing Construction Co. v. Department of Taxation*, 109 Nev.275, 849 P.2d 302 (1993) The automobile dealers who made the sale have the responsibility for reporting the tax upon the sale to the consumer. The testimony of the Petitioner indicated that if the retailer did not report the sales, Chrysler, as assignee, would not be responsible to the Department to pay the

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required to be a retailer. Just because you are a person, does mean you fit under the definition of a seller and a retailer.

taxes. NRS 372.105 requires the retailer who made the sale charge the sales tax. NRS 372.360 requires sellers to file returns. NRS 372.365 (1) requires sellers to report their gross receipts during the preceding reporting period. As Chrysler would not be required to file the returns for the car dealers, the assignment cannot extend to them to make them the retailer who is entitled to the bad debt credit for sales made by the dealers.

4. NRS 360.095 (4) provides, "**Exemptions** or waivers, where permitted by statute, must be granted: (a) Equitably among eligible taxpayers; and (b) **As sparingly as is consistent with legislative intent, to retain the broadest feasible base for the tax affected.**" (Emphasis Added) The Nevada legislature, by passing this statute has agreed with the court in Shetakis and Sierra Pacific in strictly construing exemptions to taxpayers.

5. NRS 372.055 (1) defines a retailer to include, " (a) **Every seller who makes any retail sale or sales of tangible personal property**, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others.

(b) Every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use or other consumption.

(c) Every person making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the benefit of creditors, or receiver or trustee in bankruptcy." (Emphasis Added) The Petitioner does not make any retail sales of tangible personal property in Nevada. A seller is defined in NRS 372.070 as including "every person **engaged in the business of selling tangible personal property of a kind**, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax". (Emphasis Added) The Petitioner is not in the business of selling vehicles. The vehicles are sold by the car dealerships in Nevada to the consumers. During the refund period the Petitioner did not make any retail sales in Nevada. The Petitioner argues that since the dealer who sold the vehicles is a retailer and they have been assigned the contracts of the dealers, that by assignment they are retailers. However, that argument lacks merit in that the Petitioner testified that if the retailer does not pay the tax due on the original transaction, that they would not have the responsibility to pay the tax. Since they would not have the

responsibility for the payment of the tax, they could not become the retailer by assignment.

Petitioner claims that they are a retailer in Nevada and are collecting sales tax on the true leases that they have in Nevada. However, NRS 372.060 defines a sale as **"any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. 2. "Transfer of possession"",lease," or "rental" includes only transactions found by the tax commission to be in lieu of a transfer of title, exchange or barter..."** (Emphasis Added) In Nevada true leases, as occurring with the Petitioner and their lessees, are not sales. They are not subject to sales tax as outlined in NRS 372.105.[5] They are subject to the use tax pursuant to NRS 372.185, NRS 372.170, NRS 372.240 and NAC 372.080. In leasing transactions, the lessor is the consumer of the item being leased. The lessor is putting that item of tangible personal property to use. The Nevada Tax Commission has determined that these types of transactions are subject to the use tax and are not sales subject to sales tax.

6. NRS 372.135 provides, "1. After compliance with NRS 372.125, 372.130 and 372.510 by the applicant, the department shall:

(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

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[5] NRS 372.105 provides, "For the privilege of **selling tangible personal property at retail** a tax is hereby imposed upon all retailers at the rate of 2 percent of the gross receipts of any retailer from the **sale** of all tangible personal property sold at retail in this state on or after July 1, 1955". Emphasis Added. The Petitioner testified that they do not make any retail sales in this state of the vehicles that are leased.

(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."** (Emphasis Added) The statute requires that the Department to grant and issue a permit to applicants after they have competed an application, paid the permit fee and filed security. It also states that the permit is not assignable. Chrysler is attempting to become a seller with a permit from the car dealers who have sold the vehicles. In addition, NRS 372.700 provides, "A judgment may not be rendered in favor of the plaintiff in any action brought against the department to recover any amount paid when **the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount."** (Emphasis Added) Chrysler did not pay any amount to the state for the taxes collected by the car dealers. Again, the plain reading of the statute bars the Petitioner from recovering any amounts, as they have not paid any amounts to the state.

7. NRS 372.200 provides, "The tax required to be collected by the retailer constitutes a debt owed by the retailer to this state". As the retailers, the car dealers, collected the tax, that amount was a debt to the state until they paid it. Once the dealers paid the tax, any bad debt that they may have would be subject to the provisions of NRS 372.365. As there is no obligation on the part of Chrysler to pay the debt to the state, the refund provisions are not available to them.

8. Petitioner relies on a California Board of Equalization ruling to bolster its claim here. The Petitioner also relies on *Advanced Sports Information, Inc. v. Novotnak*, 956 P.2d 806, 808-9 (Nev. 1998). In that case the court stated that if Nevada legislation is patterned after a federal statute or the law of another state, it is understood that the "courts of the adopting state usually follow the construction placed on the statute in the jurisdiction of its inception". The Petitioner also cites *Ex parte Sullivan*, 189 P.2d 338, 342 (Nev. 1948) that stated if a Nevada law is patterned after that of another state the "Nevada Legislature was presumed to have intended to adopt into the Nevada law not only the letter of the California statute so adopted, **but also its interpretation by the**

highest California Court." (Emphasis added) None of the evidence submitted by either party, nor the legislative history shows that the Nevada statute that deals with allowing credits for bad debts was molded after California. Not only is their no history to show that the Nevada bad debt statute was drafted using the California statute, but there are no cases cited from the California Supreme Court that would assist the Petitioner in assertion that the bad debt credits should apply to financial institutions.

9. Both parties have reviewed the legislative history on the adoption of the bad debt statute to determine the intent of the legislature in drafting the bill. While I see no necessity of a review of the legislative history of the bill as it's language is clear on its face, both parties have referred to it and I will review it. The Petitioner refers to Attorney General Opinion (AGO) 80-2 dated January 31, 1980 indicating that only discussion by legislators are a part of the record on review. However, the AGO cited by the Petitioner deals with reporting of Campaign Disclosure Reports. It does not indicate that the courts in determining legislative intent can review only comments made by legislators. Without any information or limitations from the courts on the issue, all comments made during the hearings on the bad debt bill must be considered.

During the discussion at the Assembly Committee on Taxation, Assemblyman John Marvel asked the lobbyist from the Nevada Retail Association, Ms. Lau, if they had developed any figures for the on uncollected debts during any one year on the original fiscal note. Ms Lau replied they adjusted the fiscal note in the amount of $3.6 million. They did it only for the retailer that sold the goods; it was not for third party credit. Mr. Marvel stated, as he understood it, the first retailer was responsible for collecting the tax and then remitting it to the Department of Taxation. Mr. Marvel asked if that was correct and was advised that was the way this was originally discussed but it had not been allowed up to this point. There was not mechanism written into the law that would allow them to do that. The bill, as it was passed last session, allowed that refund or collection process but now it would be a credit against the tax and would be due and payable immediately rather than as a refund. Mr. Marvel concurred that would be a better way to handle it.

Assemblyman Marvel asked about the fiscal note and how it was developed. After being advised of the methodology, he concurred that it was a better way to handle the bad debt credits than from the way the bill was originally passed. He was also

agreeing with the methodology of how the bad debts statute was to work, that being without third party creditors being allowed to assess the bad debt credit.

The Petitioner argues that if the legislature had wanted to exclude third party creditors, they would have changed the definitions of the words "person", "retailer" and "seller". The Department argues that if the legislature had wanted to allow the credit for bad debts to third party creditors, they would have included language in the statute that referred to financial institutions or third party creditors. There is no discussion in the legislative minutes that talks about allowing third party creditors access to the credits. The legislature, if it had wished to, could have included language that would have allowed assignees the ability to access the bad debt credits. As the legislature did not have any discussions regarding third party creditors or financial institutions, nor did they see fit to put that type of language in the bad debt statute, the Petitioners argument is not persuasive.

The Petitioner also argues that to not allow the credit to them would produce an unjust and inequitable result and would render the statute meaningless. They also contend that the Departments interpretation of the statute would not allow any party in the transactions to be allowed the credit, not even the dealers. In this case, the dealers received the full sales price of the vehicles that they sold and have no reason to request a refund of any part of the gross sales price that they received.

The legislature has the right to make a determination of whether or not any statute applies in any manner. The Department's interpretation of the statute is reasonable based upon the plain language of the statute and the legislative committee minutes.

10. The Petitioner uses Attorney General Opinion 2000-08 dated February 7, 2000 to support his position. In that opinion, third party creditors and assignees could make use of the bad debt statute. The opinion was rescinded by Attorney Generals office on October 16, 2000. The Hearing Officer cannot rely on an opinion of the Attorney General's office that was rescinded shortly after it was issued.

11. In this case the Petitioner, Chrysler, was not a retailer and therefore cannot take advantage of the credits allowed for bad debts. Even if they were a retailer, they could not afford themselves of the credit, as they are not the retailer who made the sale and was required to report the transaction to the Department. Companies that provide

loans to retailers and then have the contracts assigned to them, even if they are retailers for other transactions, cannot take credits for the bad debts of contracts that were assigned to them. They do not have the responsibility to report and pay the tax to the Department. That responsibility is that of the original retailer who made the sale to the consumer.

12. The parties have provided numerous court cases on this issue. There are cases where no credit or refund was allowed to the assignee and cases where assignees were allowed the credit or refund. The cases where the statutes are strictly construed and limit the refunds only to the original retailers are more persuasive in light of the Nevada statutes and the plain wording of the bad debt statute.

13. Any conclusion of law hereinafter construed to constitute a finding of fact is hereby adopted as such to the same extent as if originally so denominated.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petitioner's request for refund is denied.

APPEAL RIGHTS

This decision may be appealed to the Nevada Tax Commission. If the decision is appealed, the appeal must be filed with the Executive staff of the Department of Taxation within 30 days of the date after the date of service of this decision to the Petitioner.

1. Pursuant to state law, the Decision on your petition for Redetermination becomes final thirty days after service upon you unless an appeal to the Nevada Tax Commission is filed within those 30 days. Taxes, penalties, and interest, if any, assessed by the Decision are due and payable within 30 days of any revised billing

by the Department, unless an appeal is timely and properly filed. Interest continues to accrue on any amount of unpaid tax assessed by this Decision until the tax amount is paid.

2. If the Nevada Tax Commission pursuant to an appeal reverses the Decision and you have paid the contested amount, the contested amount of tax paid plus interest on that portion of the contested amount will be refunded to you.
3. All the above general information is provided to you as a matter of courtesy only. You, or your counsel, should ascertain with more particularity the regulatory or statutory requirements pertinent to your further appeal rights.

DATED this 3rd day of May 2002

FOR THE DEPARTMENT

Paul Ferrin

Hearing Officer

cc: Tax Commission Members

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the forgoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, with postage prepaid to:

Peter O. Larsen, Esq.
Akerman Senterfitt
Attorneys at Law
50 North Laura Street, Suite 2500
Jacksonville, FL 32202

Darlene Barrier, Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101

Dated at Carson City, Nevada, this 3rd day of May 2002.

Signature

as may appear proper, and not contrary to the views herein expressed.

THOMPSON, J., and BOWEN, D. J., concur.

HANSEN-NEIDERHAUSER, INC., A UTAH CORPORATION, APPELLANT, *v.* THE NEVADA STATE TAX COMMISSION, RESPONDENT.

No. 4867

May 24, 1965 402 P.2d 480

Appeal from the First Judicial District Court, Ormsby County, from judgment of Motion to Dismiss; Richard L. Waters, Jr., Judge.

Action by contracting corporation to recover sales tax alleged to have been erroneously paid on machinery and equipment. The trial court sustained a motion to dismiss. The taxpayer appealed. The Supreme Court, ZENOFF, D.J., held that letter sent by contracting corporation to state commission which gave notice that a claim was being made was sufficient to substantially comply with statute which required the filing of a claim, although the letter was not couched in the language of the technical niceties of pleadings.

Reversed.

Richard C. Minor, of Reno, for Appellant.

Harvey Dickerson, Attorney General, and *Gabe Hoffenberg*, Chief Deputy Attorney General, for Respondent.

1. LICENSES.

Letter from contracting corporation to state commission which gave notice that a claim was being made to recover sales tax, alleged to have been erroneously paid on machinery and equipment installed for use of government, was sufficient to comply with statute which provided that every claim for refund of sales tax should be in writing and should state specific grounds. NRS 372.645.

Nevada which appellant later claimed were paid erroneously and sought refund of the amounts paid. NRS 372.680.[1]

The trial court sustained a motion to dismiss without leave to further amend the appellant's amended complaint, first because it contained an allegation which did not appear specifically in the claim (NRS 372.645), and second, that the appellant was the purchaser of the materials, that the materials were parts of permanent improvements affixed to the realty, that the United States Government was not the entity taxed (thus violating its immunity) and, therefore, the appellant was by law liable for the taxes.

The first contract between appellant and AEC required appellant to install an air storage system in one of the projects at the Nevada Test Site. In the second agreement appellant agreed to "furnish all labor, material and equipment, required to do all plumbing, heating and ventilating, air-conditioning, process-piping, sewerage and sewerage systems, installation of applicable government furnished equipment and testing of air piping complete in accordance with plans and specifications. * * *"

After paying the sales tax, appellant seeking to comply with NRS 372.645 wrote the Nevada State Tax Commission for a refund stating that the taxes had been paid on the basis of an erroneous interpretation of Tax Commission Ruling 52 and that the sales tax had been paid on certain items of machinery, equipment and fixtures that had been sold for resale.

The Tax Commission rejected the claim and appellant

[1]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."

brought suit, setting forth compliance with statutory procedural requirements and further alleging the furnishing and installing of items of personalty in the performance of the two contracts. It adds, which respondent contends is not part of the claim for refund, that the "majority of said equipment was installed for the performance of a function of the purchaser not essential to the utilization of the land itself."

[Headnote 1]

We do not agree that appellant's claim for refund did not meet the requirements of NRS 372.645. That section provides, "Every claim (for refund) shall be in writing and shall state the specific grounds upon which the claim is founded."

[Headnote 2]

Although not couched in the language of the technical niceties normally set forth in complaints or petitions before a court of law, where the facts constituting the claim encompass the same basic dispute, substantial compliance with the statute requiring the filing of a claim is sufficient.[2] Cf. City of Reno v. Fields, 69 Nev.

[1]"Nevada State Commission
"Carson City, Nevada
"Gentlemen:
"Please be advised that we are holders of valid Nevada permit No. [illegible].
"A claim is herewith entered by this letter for the refund of sales tax paid in error subsequent to July 1, 1959 on the following grounds.
"1. Items of machinery and equipment were installed by this tax payer for the use of the United States Government at various locations in the State of Nevada, Use and Sales tax being paid due to an erroneous interpretation of Rule 52 of the State Tax Commission.
"2. A refund of Sales Tax is requested on certain items of machinery, equipment and fixtures upon which tax was paid, the same items having been sold for resale subsequent to July 1, 1959.
"Will you please advise any procedure desirable to your office which we may follow in obtaining a refund of taxes paid by us in error.
"Yours very truly,
"HANSEN-NIEDERHAUSER, INC.
"George Niederhauser (Signed)
"George Niederhauser
"GN/nn"

300, 250 P.2d 140 (involving a claim against a municipality arising out of tort).

[Headnote 3]

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. Thus, when the claim substantially complies with the legislative requirements, these ends are subserved. See Frasier v. Cowlitz County, 67 Wash. 312, 121 P. 459 (1912).

[Headnote 4]

Appellant further contends that Ruling 52 of the Nevada Tax Commission makes certain specific items constituting machinery and equipment exempt from sales tax.[3] Respondent argues that the items are "materials" and subject to the taxes. Whether or not the air storage system and the other items that went into the completed units are materials, thus taxable, or machine and equipment which can or cannot be removed without damage to the realty are fact issues to be resolved by evidence.

[3]"Tax Commission Ruling 52 provides in part:

"Tax does not apply to sales of machinery and equipment to contractors or subcontractors. As used herein, the term 'Machinery and Equipment' means property to which each of the following conditions apply:

"1. It is not used by the contractor in making the improvements (as distinguished from supplies and tools, such as steam shovels, cranes, trucks, and hand or power tools, actually used to perform construction work).

"2. It is either not attached to the realty or, if attached, is readily removable as a unit (as distinguished from fixtures, see below).

"3. It is installed for the purpose of performing a manufacturing operation or some other function essential to the structure itself.

"4. Title to the property passes to the United States before the contractor makes any use of it.

"Examples of machinery and equipment are: Portable machines, equipment and tools; furniture; vehicles; lathes, drills, presses, cranes, and other machines and apparatus which may be fastened to the realty, but which can be removed without damage to the structure or without substantially impairing its use."

[Headnotes 5, 6]

As before noted, the amended complaint alleged that the "majority of said equipment was installed for the performance of a function of the purchaser not essential to the utilization of the land itself." Though not artfully stated, we take the quoted language to express the plaintiff's view that the items involved were machinery and equipment and not therefore subject to tax within the intendment of Tax Commission Ruling 52. If true, a claim for relief was stated. Of course we must, for the purposes of a Rule 12(b)(5) motion, accept the charge of the complaint as true. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., D.C. Mont. (1958), 163 F.Supp. 274.

Reversed and remanded for further proceedings.

THOMPSON and BADT, JJ., concur.

GLADYS SMITH, APPELLANT, *v.* SHERWIN GARSIDE AND RAYMOND GERMAIN, DBA BONANZA PRINTERS, RESPONDENTS.

No. 4750

May 26, 1965 402 P.2d 246

Appeal from judgment of the Eighth Judicial District Court, Clark County; George E. Marshall, Judge.

Action wherein defendant moved to dismiss for want of prosecution. The lower court granted the motion, and plaintiff appealed. The Supreme Court, THOMPSON, J., held that failure of plaintiff to bring case to trial within three years after remittitur had been filed by clerk of trial court necessitated dismissal for want of prosecution although trial date prior to expiration of the three-year period had been vacated because of settlement understanding which never was consummated and case had been subsequently assigned alternate trial date beyond the three-year period, in view of failure of plaintiff to make trial court aware of the dismissal problem.

Judgment affirmed.

Exhibit 14

000470

KENNY C. GUINN
Governor
BARBARA SMITH CAMPBELL
Chair, Nevada Tax Commission
CHARLES E. CHINNOCK
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
1550 E. College Parkway
Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 687-4820 • Fax: (775) 687-5981
In-State Toll Free: 800-992-0900
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Las Vegas, Nevada 89101
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RENO OFFICE
4600 Kietzke Lane
Building O, Suite 263
Reno, Nevada 89502
Phone: (775) 688-1295
Fax: (775) 688-1303

May 16, 2003

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 465-197-254

Dear Ms. Sandler:

This letter is in response to your refund request covering the periods January 1, 2000 through December 31, 2000 for a total of $3,526,625.70. You request a refund of "use taxes" paid to the State of Arizona on your purchases of coal. You purchase the coal from Peabody Western Coal Company in Arizona. The coal is shipped to your location via pipeline, F.O.B. Destination. Peabody charges you Arizona tax of 3.437%. The coal is consumed in your Mojave Generating Station located in Clark County, Nevada.

Your refund requests are denied for the following reasons:

1) Nevada only allows credit for sales taxes legitimately paid to a state or local government outside of Nevada, Nevada Administrative Code (NAC) 372.055. Research shows that the taxes charged by Peabody are actually "severance" taxes for the removal of minerals and metals from Arizona not sales taxes. This tax is an excise tax, not a sales or use tax.

2) Nevada Revised Statute (NRS) 372.025 (3)(d), under the definition of gross receipts for Nevada sales tax purposes, excludes any tax imposed by the United States. However, this exclusion does not include any manufacturers' or importers' excise tax. The excise taxes paid to Peabody are properly included in your calculation for use taxes due Nevada.

You have petitioned the Department's denial(s) for refund for prior periods on this same issue. We are in the process of scheduling an oral hearing on the matter. We will consider this denial in the same status as your previous requests and these periods will be added to the issue(s) under petition.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us .

Sincerely,

Katy Phillips
Supervising Auditor II

000471

STATE OF NEVADA
DEPARTMENT OF TAXATION
1550 E. College Parkway
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KENNY C. GUINN
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DAVID P. PURSELL
Executive Director

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Fax: (775) 688-1303

465197254

April 10, 2003

Southern California Edison
2244 Walnut Grove Avenue
Rosemead CA 91770

Gentlemen:

Re: Nevada Sales/Use and/or Business Tax Account No: 465197254

Your request for refund/credit of sales/use or business taxes paid in the amount of $3,526,625.70 was received on or about 02/28/03.

I have forwarded your request with all accompanying documentation to a Department of Taxation auditor for further review. You will be notified of the results when the review is completed.

Please contact Katy Phillips in the Compliance Division at (775) 687-6539 should you have any questions.

Sincerely,

Jerrie L. Smith, Tax Administrator I
Administrative Services Division

JLS:js

cc: Katy Phillips
File

000472

STATE OF NEVADA
DEPARTMENT OF TAXATION
1550 E. College Parkway
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KENNY C. GUINN
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RENO OFFICE
Phone: (775) 688-1295
Fax: (775) 688-1303

December 30, 2002

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 465-197-254

Dear Ms. Sandler:

This letter is in response to your refund request covering the periods October 1, 1999 through December 31, 1999 for a total of $945,837.36. You request a refund of "use taxes" paid to the State of Arizona on your purchases of coal. You purchase the coal from Peabody Western Coal Company in Arizona. The coal is shipped to your location via pipeline, F.O.B. Destination. Peabody charges you Arizona tax of 3.437%. The coal is consumed in your Mojave Generating Station located in Clark County, Nevada.

Your refund requests are denied for the following reasons:

1) Nevada only allows credit for sales taxes legitimately paid to a state or local government outside of Nevada, Nevada Administrative Code (NAC) 372.055. Research shows that the taxes charged by Peabody are actually "severance" taxes for the removal of minerals and metals from Arizona not sales taxes. This tax is an excise tax, not a sales or use tax.

2) Nevada Revised Statute (NRS) 372.025 (3)(d), under the definition of gross receipts for Nevada sales tax purposes, excludes any tax imposed by the United States. However, this exclusion does not include any manufacturers' or importers' excise tax. The excise taxes paid to Peabody are properly included in your calculation for use taxes due Nevada.

I am enclosing a petition form and related statutes if you wish to appeal this decision. Any appeal needs to be in writing and post marked within 45 days of the date of this letter.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us .

Sincerely,

Katy Phillips
Supervising Auditor II

enclosures

000473

NRS 372.025 "Gross receipts" defined.

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the tax commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property prior to its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) Sale price of property returned by customers when the full sale price is refunded either in cash or credit; but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the tax commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

[12:397:1955]

NRS 10.085 "State" defined. "State" when applied to the different parts of the United States, includes the District of Columbia and the territories. [NRS A 1977, 181; 1985, 499]

NRS 10.095 "United States" defined. "United States" may include the District of Columbia and territories or insular possessions. [NRS A 1977, 181; 1985, 499]

NAC 372.055 Calculation of credit toward amount of use tax due for purchase outside of Nevada. (NRS 360.090, 372.725) In determining the amount of use tax that is due from a taxpayer, the department will allow a credit toward the amount due to this state in an amount equal to sales tax legitimately paid for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the department.

(Added to NAC by Tax Comm'n, eff. 8-26-96)

STATE OF NEVADA
DEPARTMENT OF TAXATION
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Phone: (775) 687-4820 · Fax: (775) 687-5981
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KENNY C GUINN
Governor

CHARLES E CHINNOCK
Executive Director

RENO OFFICE
4600 Kietzke Lane
Building O, Suite 235
Reno, Nevada 89502
Phone: 775 [illegible]
Fax: 775 [illegible]

December 17, 2002

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 465-197-254

Dear Ms. Sandler:

This letter is in response to your eight refund requests covering the periods March 1, 1998 through September 30, 1999 for a total of $4,904,490.59. You request a refund of "use taxes" paid to the State of Arizona on your purchases of coal. You purchase the coal from Peabody Western Coal Company in Arizona. The coal is shipped to your location via pipeline, F.O.B. Destination. Peabody charges you Arizona tax of 3.437%. The coal is consumed in your Mojave Generating Station, located in Clark County, Nevada.

Your refund requests are denied for the following reasons:

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I am enclosing a petition form and related statutes if you wish to appeal this decision. Any appeal needs to be in writing and post marked within 45 days of the date of this letter.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us .

Sincerely,

Katy Phillips

Katy Phillips
Supervising Auditor II

enclosures

000475

Date	Action	Document	Tab
10-27-10	Filed	Request to Submit Proposed Order Setting Aside Decision and Remanding to Tax Commission	50
10-28-10	Rec'd	County Respondents' Objection to Proposed Order Setting Aside Decision and Remanding to Tax Commission	51
11-1-10	Filed	Order Setting Aside Decision and Remanding to Tax Commission	52
11-8-10	Rec'd	Notice of Entry of Order	53
6-8-11	Filed	Motion for Stay of Proceeding	54

[illegible]
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KENNY C. GUINN
Governor

CHARLES E. CHINNOCK
Executive Director

December 17, 2002

Dolores Sandler
Edison International – Tax Dept
P O Box 800
Rosemead, CA 91770

Re: Southern California Edison Refund Requests
Account 465-197-254

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I am enclosing a petition form and related statutes if you wish to appeal this decision. Any appeal needs to be in writing and post marked within 45 days of the date of this letter.

If you have any questions, please call me at (775) 687-6539 or e-mail me at kphillip@tax.state.nv.us .

Sincerely,

Katy Phillips
Supervising Auditor II

enclosures

000475

Exhibit 15

Southern California Edison Company
Nevada Use Tax Claims

	Original Claim					Additional Tax Included in Amended Claim					
	Use Tax Accrued on AZ Tax	Use Tax Accrued on SMCRA	Use Tax Accrued on Black Lung Fees	Total Claim	Filed	Use Tax Accrued on SMCRA	Use Tax Accrued on Black Lung Fees	Use Tax Accrued on Remaining Peabody Costs	Use Tax Accrued on Transportation	Amended Claim	Filed
1998											
March	247,399.06			247,399.06	4/26/01	9,956.75	15,425.52	303,179.02	122,931.12	698,891.47	10/27/03
April	302,258.97			302,258.97	5/29/01	11,265.10	17,452.44	306,386.53	126,003.92	763,366.96	10/27/03
May	200,184.91			200,184.91	6/26/01	4,729.46	7,327.24	209,236.51	114,166.51	535,644.63	10/27/03
June	121,044.68			121,044.68	6/26/01	2,602.93	4,032.18	214,818.12	102,188.81	444,686.72	10/27/03
July	260,005.96			260,005.96	6/26/01	8,718.08	13,505.72	265,514.37	122,344.06	670,088.19	10/27/03
August	316,828.44			316,828.44	10/25/01	12,028.30	18,635.96	317,173.16	125,047.99	789,713.85	10/27/03
September	304,541.17			304,541.17	10/25/01	10,423.70	16,149.02	337,573.44	120,346.29	789,033.62	10/27/03
October	257,530.40			257,530.40	10/25/01	8,829.41	13,679.51	262,046.51	120,758.67	662,844.50	10/27/03
November	289,287.78			289,287.78	10/25/01	10,258.69	15,893.72	293,488.71	123,698.51	732,627.41	10/27/03
December	343,679.91			343,679.91	10/25/01	11,456.89	17,749.04	399,010.38	129,085.25	900,981.47	10/27/03
1999											
January	298,007.99			298,007.99	12/5/01	11,795.35	18,274.91	288,555.41	126,205.29	742,838.95	10/27/03
February	309,218.95			309,218.95	12/5/01	11,673.20	18,084.34	312,098.87	127,463.57	778,538.93	10/27/03
March	275,947.42			275,947.42	12/5/01	9,027.69	13,986.70	339,061.16	125,158.94	763,181.91	10/27/03
April	267,959.27			267,959.27	12/5/01	9,734.28	15,079.89	271,374.27	122,076.92	686,224.63	10/27/03
May	177,066.12			177,066.12	12/5/01	4,128.40	6,398.83	131,737.89	112,650.05	431,979.29	10/27/03
June	162,720.40			162,720.40	12/5/01	5,941.10	9,203.95	215,483.68	118,015.88	511,365.01	10/27/03
July	264,413.18			264,413.18	6/26/02	10,687.65	16,558.37	265,024.40	123,910.23	680,593.83	10/27/03
August	191,488.60			191,488.60	6/26/02	6,101.60	9,452.65	196,083.10	114,599.55	517,725.50	10/27/03
September	314,907.38			314,907.38	6/26/02	12,636.98	19,577.91	363,040.17	250,889.35	961,051.79	10/27/03
October	342,402.11			342,402.11	11/6/02	12,278.78	19,023.41	427,048.71	21,116.17	821,869.18	10/27/03
November	366,597.15			366,597.15	11/6/02	12,540.22	19,428.93	400,799.94	135,771.81	935,138.05	10/27/03
December	236,838.10			236,838.10	11/6/02	8,427.34	13,056.75	286,337.30	123,657.76	668,317.25	10/27/03
2000											
January	296,186.59	11,752.41	18,207.20	326,146.20	2/25/03			360,178.08	129,147.95	815,472.23	10/27/03
February	224,979.89	9,844.33	15,256.65	250,080.87	2/25/03			230,457.17	125,924.33	606,462.37	10/27/03
March	244,405.61	10,766.84	16,686.01	271,858.46	2/25/03			309,782.92	130,124.73	711,766.11	10/27/03
April	301,995.26	12,137.17	18,809.52	332,941.95	2/25/03			325,968.98	128,234.70	787,145.63	10/27/03
May	186,828.62	4,414.03	6,840.28	198,082.93	2/25/03			210,177.83	114,951.19	523,211.95	10/27/03
June	283,552.82	9,641.43	14,942.80	308,137.05	2/25/03			355,271.02	126,660.08	790,068.15	10/27/03
July	300,857.59	11,991.18	18,584.06	331,432.83	2/25/03			325,007.66	195,731.28	852,171.77	10/27/03
August	252,573.59	9,576.42	14,841.44	276,991.45	2/25/03			180,797.85	126,633.21	584,422.51	10/27/03
September	327,893.16	12,396.42	19,210.62	359,500.20	2/25/03			393,417.32	133,369.40	886,286.92	10/27/03 *
October	232,728.41	9,096.20	14,096.37	255,920.98	2/25/03			251,668.61	125,689.52	633,479.11	10/27/03 *
November	287,479.09	9,900.72	15,345.73	312,725.54	2/25/03			314,524.43	128,934.17	756,184.14	10/27/03 *
December	277,244.25	11,563.06	17,922.74	306,730.05	2/25/03			328,700.69	130,352.79	765,783.53	10/27/03 *
Total	9,067,052.83	123,080.21	190,743.42	9,380,876.46		205,241.00	317,974.99	9,991,224.21	4,303,840.00	24,199,157.56	

* Amended Claims Filed Within Three Years of Due Date of Return

000477

Exhibit 16

KENNY C. GUINN
Governor

DAVID P. PURSELL
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
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June 17, 2002

Patrick J. Sheehan, Esq.
Jones Vargas
Third Floor South
3773 Howard Hughes Parkway
Las Vegas, Nevada 89109

IN THE MATTER OF: ***ADVO, Inc.***
Account No. 185-909-984
Docket No. 41724

The Matter of ADVO, Inc. (Taxpayer) came before the Nevada Tax Commission (Commission) for hearing on May 7, 2002. This case came before the Commission pursuant to a Petition for Reconsideration of the Tax Commission's October 2001 decision.

DECISION

The Commission voted unanimously to reconsider its prior decision in this matter. The Commission also voted to uphold the Hearing Officer's decision in this matter and not remand the matter back to the hearing officer. The Commission additionally voted to overrule the Commission's prior decision on the Spiegel matter and to have the Department of Taxation initiate as soon as possible the regulation process to delineate the definition of use under the use tax statute as it relates to the distribution of printed materials within the State of Nevada.

FOR THE COMMISSION:

DINO DiCIANNO
Acting Executive Director
Nevada Department of Taxation

cc: Tax Commission Members
Elaine S. Guenaga, Senior Deputy Attorney General

Exhibit 17

000480

CHENEY LIME & CEMENT COMPANY

ALLGOOD, AL 35013
800-752-8282

PRODUCTION PROCESS

Production Facilities:

The Landmark plant has two rotary kilns. A new hydrate plant was built at Landmark in 1990 and most of the hydrate production was gradually moved from the Graystone plant to that location. (See plants for specific plant locations.)

Manufacturing Process:

At the Landmark plant high calcium limestone (calcium carbonate) is quarried, crushed, washed and screened. The sized limestone is then calcined (heated) in rotary kilns from an initial temperature of around 1750°F (954°C) to a final temperature around 1950°F (1066°C) which results in the conversion of limestone (calcium carbonate) to quicklime (calcium oxide). The final product is further screened into the various sized quicklime products that are sold. A portion of the quicklime that is produced is sent to our hydrate manufacturing plant, located adjacent to the kilns, where the quicklime is reacted with water to produce dry hydrated lime products.(calcium hydroxide). Both quicklime and hydrated lime are very important products and both are actively marketed throughout the Southeast. (For details on the chemical reactions involved in the calcination and hydration production processes see chemistry.)

Limestone Source:

The limestone that is processed at our Landmark plant near Alabaster, AL comes from the Newala ledge of Ordovician Period stone, an amorphous mineral of 96-98% calcium carbonate.

(Page End)

Top

CHENEY LIME & CEMENT COMPANY

ALLGOOD, AL 35013

800-752-8282

CHEMISTRY OF LIME

Chemical Properties:

Based on Pure Compounds

Category	Product	Chemical Name	Formula	Molecular Weight	Melting Point	Boiling Point	Decomp. Point	Dissoc. Point
LIME	Quicklime	Calcium Oxide	CaO	56.08	4658°F 2570°C	5162°F 2850°C	.	.
	Hydrated Lime	Calcium Hydroxide	$Ca(OH)_2$	40.32	.	.	1076°F 580°C	.
LIMESTONE	Limestone	Calcium Carbonate	$CaCO_3$	100.09	.	.	.	1648°F 898°C

Limestone vs Lime:

In everyday usage the terms *"limestone"* and *"lime"* are used by the general public interchangeably to mean the same material, however there are some significant differences between the two materials. Limestone is a sedimentary rock whereas lime is a manmade chemical which is produced from a sufficiently pure sedimentary rock by heating it to high temperature in a kiln. This process is referred to as *"calcining"* the limestone.

LIMESTONE: This term refers to a naturally occurring sedimentary rock which is relatively inert, except in the presence of a strong acid. With the proper purity the rock deposit can be used to produce *"lime"*, a manmade chemical. Most often, limestone is found in nature in a mixed form known as *"dolomite"*, which is a blend of calcium carbonate and magnesium carbonate in varying proportions. (In the Shelby County, AL area there are large deposits of limestone, primarily composed of calcium carbonate, which are used as the "raw material" for producing high calcium lime products.)

LIME: This term refers to either *"quicklime"*, the product that is produced by heating the limestone to its dissociation temperature, or *"hydrated lime"*, the product that is produced by the reaction of quicklime with water. (Lime in the form of high calcium quicklime, CaO readily reacts with water to form hydrated lime, which provides a pH of up to 12.454 when in an aqueous solution. Because of elemental differences between magnesium (Mg) and calcium (Ca) the compound magnesium oxide, MgO does not readily react with water at normal temperatures and pressures.

Quicklime Production:

The production of high calcium quicklime (calcium oxide) requires a large amount of heat, which is generated in the kiln environment. The quarried and sized high calcium limestone travels through a rotary kiln and is subjected to these high temperatures where the calcium carbonate begins to dissociate with the resultant formation of calcium oxide. The minimum temperature for the dissociation of calcium carbonate is 1648°F (898°C). For practical production purposes, however, the kiln temperature range is from an initial temperture of about 1750°F (954°C) to a final temperature of about 1950°F (1066°C). These temperatures can vary dependent upon the nature of the limestone being calcined.

"High Calcium" Limestone Calcination:

$$CaCO_3 + \text{Heat} \text{ ---> } CaO + CO_2$$

1750° to 1950°F

954° to 1066°C

"Dolomitic" Limestone Calcination:

$$CaCO_3 \cdot MgCO_3 + \text{Heat} \text{ ---> } CaO \cdot MgO + 2CO_2$$

Hydrated Lime Production:

High calcium quicklime readily reacts with water to form hydrated lime. The reaction is highly exothermic and the process is known as *"slaking"*. The reaction is usually carried out in a *"slaker"* (a specially designed mixer) which, through a process of rigorous mixing, makes certain that all of the quicklime has come into intimate contact with water and no unreacted quicklime remains. From a general viewpoint the hydrated lime produced can be in the form of dry hydrate, putty slurry, or "milk of lime". (At Cheney Lime we produce the dry hydrated lime that is sold in bulk or bags.) The exothermic reactions are shown below: (There are various types of slakers available on the market.)

"High Calcium" Quicklime Hydration:

$$CaO + H_2O \text{ ---> } Ca(OH)_2 + Heat$$

"Dolomitic" Quicklime Hydration:

$$CaO \cdot MgO + H_2O \text{ ---> } Ca(OH)_2 + MgO + Heat$$

Note: CaO will readily react with water under normal temperatures and pressures, whereas MgO will not.

(Page End)

Top

Celebrating 100 Years of Service

CHENEY LIME & CEMENT COMPANY

ALLGOOD, AL 35013
800-752-8282

MAIN PAGE

Quicklime and Hydrated Lime Products

Who We Are

Cheney Lime & Cement Company is an Alabama manufacturing company which was founded in 1903 in Allgood, AL. We have a long history of producing high calcium quicklime and hydrated lime products and we are committed to providing quality products and service to all of our customers.

How To Contact Us:

Our General Offices are located near our Graystone plant in Allgood, AL. We would like to welcome you to call us at any time for price quotations on your lime requirements. Also, we are pleased to offer answers to any questions you may have about the uses, handling, application and storage of lime, as well as the chemistry of lime.

What We Do

Plants: We have two manufacturing plants which produce high calcium quicklime and hydrated lime products. Our Landmark plant is our primary manufacturing facility and is located about 25 miles south of Birmingham at Alabaster, AL (Shelby County). Our Graystone Plant is located in Allgood, AL, which is about 32 miles northeast of Birmingham and 2 miles south of Oneonta (Blount County).

Process: At the Landmark plant we quarry a large deposit of calcium limestone and use the processes of calcination and hydration to chemically convert the limestone into lime. The calcination process takes place in our rotary kilns and converts the limestone into quicklime, which is then available for bulk shipment to customers by truck or rail. The hydration process

Our normal business office hours are from 8:00 a.m. to 5:00 p.m., CST, Monday through Friday.

Cheney Lime & Cement Company
General Offices
P.O. Box 160
Allgood, AL 35013

800-752-8282

205-625-3031 (fax) 205-625-3032

Email: sales@cheneylime.com

Products:
Quicklime (bulk)
Hydrated Lime (bulk & bag)

Our websited by can be accessed by:

cheneylime.com
limeproducts.com
limeindustry.com

involves taking a portion of the quicklime that has already been produced, and reacting it with enough water to produce a dry hydrated lime, which then becomes available for bulk or bag shipments to customers by truck.

Markets: Our lime products are shipped to markets throughout the Southeastern United States including such industries and businesses as *Pulp and Paper, Waste Treatment, Chemical Mfg, Water Treatment, Phosphate, Sugar, Asphalt, Steel, Power, Chemical Distributors, Tanning, Soil Stabilization, Feed & Seed Distributors, etc.*

Lime Facts: For some interesting and useful facts about lime, please enjoy viewing both the FAQ and Lime Facts pages.

(Page End)

Top

RATSON
Chemicals

Acetic Acid
Aluminium Sulfat
Coconut Shell Activated Carbon
Calcium Hypochlorite
Calcium Carbonate
Carboxy Methylcellulose
Caustic Soda Flake
Charcoal
Ethanol
Ethyl Acetate
Formic Acid
Hydrated Lime
Hydrogen Peroxide 50
Kaolin
Liquid Chlorine
Silica Sand
Sulfuric Acid

Jl. Kahuripan 7 ,Surabaya
60265-Indonesia
Telp. 62-31-5677256,
5685346,5600123
Fax: 62-31 5672467
Email : sales@ratson.com

Our Company Contact Us Mainpage

Hydrated Lime

HYDRATED LIME 's Properties:
Soft, white crystalline powder with alkaline, slightly bitter taste. Slightly soluble in water, soluble in glycerol, syrup, and acids. Insoluble in alcohol. Absorb carbon dioxide from air.

Hazard:
Skin irritant, avoid inhalaticn.

Uses:
Mortar, plasters, cements, calcium salts, causticizing soda, white wash, soil conditioner, disinfectant, water softening, purification of sugar juices, accelelator for low grade rubber compounds, petrochemicals, food additive, as buffer and neutralizing agent.

Specification:

Chemical Description

Ca (OH) 2	> 95 %
CaCO3	< 3 %
H2O Free	=< 0,6 %
SiO2	=< 0,5 %
Fe2O3	=< 0,1 %
Al2O3	=< 0.2 %

Physical Description

Density	0,5 Ton/m3
Size	7 % u m

000487

Exhibit 18

0004888

BOB MILLER
Governor

MICHAEL A. PITLOCK
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
Capitol Complex
Carson City, Nevada 89710-0003
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In-State Toll Free: 800-992-0900

Las Vegas Office
Grant Sawyer Office Building
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555 E. Washington Avenue
Las Vegas, Nevada 89101
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Fax: (702) 486-2373

Reno Office
4600 Kietzke Lane
Building O, Suite 253
Reno, Nevada 89502
Phone: (702) 688-1295
Fax: (702) 688-1303

October 10, 1996

Maryann B. Gall, Esq.
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215

Paul D. Bancroft, Esq.
Campbell, Campbell & Bancroft
50 W. Liberty Street, Suite 870
Post Office Box 3620
Reno, Nevada 89505

RE: In the Matter of Spiegel, Inc.
Docket No. 34106
Account No. 814-099-952

The appeal of Spiegel, Inc., from the Decision and Order rendered by the Administrative Hearing Officer on September 27, 1995, came on for hearing before the Nevada Tax Commission on August 21, 1996. Appearing for the appellant, Spiegel, Inc., was Maryann B. Gall, Esq., and Paul D. Bancroft, Esq.; appearing for the Department of Taxation was John S. Bartlett, Sr. Deputy Attorney General.

This case concerned the Department's assessment of use tax against Spiegel, Inc., as a result of an audit, based on the cost to Spiegel of catalogs it purchased and had distributed through the mail to Nevada residents. The catalogs were printed and mailed to Nevada residents from points outside the state.

Spiegel argued that the catalogs were not subject to Nevada use tax under state law because Spiegel did not exercise any right or power over the catalogs, nor did Spiegel otherwise use the catalogs, in Nevada, even though it did cause the catalogs to be mailed to Nevada residents from outside of Nevada. Thus, Spiegel asserted that NRS 372.185 was not applicable to an out of state distribution of catalogs into Nevada through the mail. Spiegel also argued that Nevada was barred by the Commerce Clause of the United States Constitution from imposing a use tax on Spiegel because Spiegel has no tax nexus with Nevada.

The Department argued that the hearing officer's decision upholding the use tax assessment should be upheld because the broad language of Nevada's use tax statute could be construed to include the distribution of catalogs from outside Nevada through the mail to Nevada residents as a taxable use of the catalogs by Spiegel in Nevada. The Department also asserted that Nevada had constitutional tax nexus over Spiegel insofar as the sales and use tax is concerned due to the physical presence of Spiegel Teleservice, Inc., in Nevada. Since Spiegel Teleservice, a wholly owned subsidiary of Spiegel, Inc., is directly involved in the taking of orders for Spiegel catalog merchandise sold to Nevada residents, its presence provided the nexus necessary to impose the use tax on Spiegel's beneficial use of the catalogs in Nevada.

After hearing the arguments of the parties, and considering the briefs submitted, the Commission voted unanimously to reverse the Decision and Order of the Administrative Hearing Officer on the grounds that the language in NRS 372.185 does not apply to impose a use tax on the out of state distribution of catalogs to Nevada residents through the mail.

FOR THE COMMISSION

By: Michael

MICHAEL A. PITLOCK
Executive Director
Nevada Department of Taxation

MAP/JSB/ph
cc: Tax Commission members
John S. Bartlett, Sr. DAG

CERTIFIED MAIL - 019027239

STATE OF NEVADA

DEPARTMENT OF TAXATION

Spiegel, Inc.	) Account No: 0-192-087 04 99
	) Docket No: 34106
Petitioner	)
	)
v.	)
	)
Department of Taxation	) DECISION AND ORDER
	)
Respondent	)

As the result of a timely filed petition, briefs were submitted on this matter in lieu of an oral hearing. The briefs were submitted to Janice A. Wright, Hearing Officer.

STATEMENT OF THE CASE

The Petitioner, Spiegel, Inc. (Spiegel) was represented by Attorneys Maryann B. Gall and Laura Kulwicki. Kenneth R. Zilch, Tax Manager for Spiegel, submitted an affidavit. Representing the Department of Taxation (Department) was John Bartlett, Senior Deputy Attorney General. This case involves the nonpayment of use tax on catalogs mailed from outside the State to residents of Nevada by Spiegel.

Petitioner was sent a notice of deficiency determination in the amount of $100,575.81 on November 30, 1994. That amount was comprised of $81,667.84 in tax and $18,907.97 in interest calculated through November 30, 1994. Spiegel paid $73,494.03 in tax and interest on uncontested portions of the assessment, but continued to contest the remaining $27,081.78 in use tax and inter-

est. That amount is comprised of $21,415.67 in tax and $5,666.11 in interest. No penalty was assessed in this case. This deficiency determination resulted from an audit conducted by the Department for the period from October 1, 1991 through September 30, 1994. Petitioner timely filed a petition for redetermination on December 6, 1994.

TAXPAYER'S BRIEF IN LIEU OF ORAL HEARING

The briefs submitted by the attorneys for the taxpayer explained the issue in this case, which is whether the Department may properly impose a use tax on catalogs mailed from outside the state to residents of Nevada by Spiegel, a mail order seller headquartered and principally located in Downers Grove, Illinois. Spiegel, itself, has no stores, offices, business location or physical presence in the State of Nevada and did not prepare the catalogs at issue. All of the catalogs were produced and distributed from a point outside of Nevada. The catalogs were received by residents in the State of Nevada, but that is the only connection to this state. Therefore, Spiegel requests that the deficiency determination on the catalogs be set aside.

There are three primary reasons why the Department's deficiency determination against Spiegel is invalid. First, the use tax assessment violates the Commerce Clause of the United States Constitution since Spiegel has no physical nexus in the State of Nevada. Second, even if Spiegel itself is constitutionally subject to tax by Nevada, the assessment is invalid be-

cause Spiegel does not use, consume or store the assessed catalogs in the state nor does it own the catalogs in Nevada. Finally, the assessment against Spiegel violates the Commerce Clause and the Due Process Clause of the Constitution because there is no connection between the activity being taxed (the distribution of catalogs) and the State of Nevada.

In short, the State lacks both the constitutional basis and a statutory basis to support the use tax assessment issued against Spiegel in this case. Unlike other cases of this kind, the issue presented here is not only whether the Nevada statute is broad enough to include taxation of catalogs mailed directly to Nevada residents from outside the state, but whether Nevada can constitutionally tax Spiegel at all. Finally, Spiegel contends that it is entitled to recover all attorney fees and costs relating to this matter.

The brief argues that Spiegel is a Delaware corporation with its principal place of business in Downers Grove, Illinois and has no physical presence in Nevada. Spiegel does own a separate subsidiary, Spiegel Teleservice, Inc. that operates a telemarketing bureau in Nevada. Spiegel Teleservice, Inc. is a separate corporation incorporated in 1983 under the laws of Nevada (Zilch Affid. at 40). Spiegel and Spiegel Teleservice, Inc. are separately operated and managed; each is an independent and autonomous corporation. Some telephone orders for Spiegel merchandise are received at this facility and then transmitted

electronically to Spiegel in Illinois for acceptance, processing, and fulfillment. Spiegel does not share office space or use office space at Spiegel Teleservice, Inc.

Other than taking orders, Spiegel Teleservice, Inc. performs no activities on behalf of Spiegel. Spiegel Teleservice, Inc. does not fulfill orders or make sales of Spiegel merchandise. Spiegel Teleservice, Inc. does not mail or otherwise distribute Spiegel catalogs. Employees of Spiegel Teleservice, Inc. are not involved in any way with the production, design, preparation, printing or distribution of any Spiegel catalogs.

Spiegel catalog activities have no connection with Nevada. All catalog activities took place outside the State of Nevada. The assessed catalogs were sent by third class mail to Nevada recipients. Moreover, Spiegel never took physical possession of the catalogs in Nevada. Thus it was the Nevada recipients, not Spiegel, who had complete ownership and control over the catalogs and were free to use them as they saw fit in Nevada.

The assessment violates the Commerce Clause of the United States Constitution because Spiegel has no physical presence in Nevada and, therefore, lacks substantial nexus with the state. The United States Supreme Court has spoken decisively on the issue of nexus for sales and use tax purposes. It is clear from the court's decisions that a company must first have a physical presence within the taxing state before a state may impose a sales or use tax on activities within the State or require the

company to collect sales and use tax there.

Even if it was determined that Spiegel had substantial nexus in Nevada, the assessment is invalid because Nevada's use tax statutes do not provide for the taxation of catalogs mailed to Nevada residents from outside the State. Spiegel did not store, use or consume the catalogs in Nevada, so the Department lacks the statutory basis to support the assessment against Spiegel. The Nevada tax code does not include distribution as a taxable use. Nevada's only connection with the distribution of these catalogs is the fact that some are sent to residents of Nevada. Spiegel could not store, use or consume the catalogs in Nevada because Spiegel does not own the catalogs after they leave the printing plants which are all outside the State of Nevada.

The assessment violates the Commerce Clause and the Due Process Clause of the United States Constitution because there is no nexus between Nevada and the activity subject to tax. Because substantial nexus does not exist between the taxpayer and the taxing state, or the tax activity and the taxing state, this deficiency must be set aside. In this case, every connection Spiegel had with the assessed catalogs occurred outside of Nevada. The assessment must, therefore, be set aside since there is no Nevada connection with any aspect of the preparation, production or distribution of the catalogs at issue in this case.

Spiegel is entitled to this award of the attorneys fees expended to challenge the Department unconstitutional assessment.

Spiegel is entitled to an award under recent decisions of the United States Supreme Court. Those federal laws are 42 USC Section 1983 which creates a cause of action for any person whose federal constitutional rights are deprived under color of state law and 42 USC Section 1988 which provides that attorneys fees shall be awarded to a party who prevails on any such claim. Spiegel's constitutional rights, as secured by the Commerce Clause were violated by the Department and, as a result, Spiegel is entitled to an award of its reasonable fees incurred in this matter.

In conclusion, the Department cannot cite any authority, state or federal, that sanctions the use tax assessment here. Indeed, none of the reported cases in this area involve a case like Spiegel's where:

1. The taxpayer has no physical presence in this state;

2. The taxpayer has no retail stores or corporate headquarters in the state;

3. The controlling state statute does not define taxable use to explicitly include distribution; and

4. No activity relating to the catalogs occurs from within the taxing state.

The assessment must, therefore, be set aside inasmuch as it exceeds both the Department's constitutional authority as well as its state statutory authority.

In the reply brief submitted later by the Petitioner, an ad-

ditional point was made that Spiegel's voluntary use tax registration does not create nexus for Spiegel in Nevada. The Department's contention that Spiegel's voluntary registration to collect use tax its mail order sales is sufficient to create nexus for other types of direct taxation is erroneous. Spiegel did not submit to Nevada's jurisdiction for use tax purposes, nor did it concede that it had nexus with the State. The Department cannot use Spiegel's voluntary registration to collect tax as a bootstrap to create nexus sufficient to support the direct use tax assessment in this case.

DEPARTMENT'S BRIEF IN LIEU OF ORAL HEARING

Mr. Bartlett's brief explained that this case concerns the Department's determination that use tax is due from Spiegel on the cost of catalogs that it mailed to residents of Nevada from out of state locations. First, Spiegel is registered with the Department of Taxation as a retailer of tangible personal property and filed monthly sales and use tax returns and has been registered since August 4, 1983. It's Account Number 0-192-087 04 99. Spiegel collects and reports on its sale of tangible personal property through its mail order activities to residents in Nevada.

The issue in this case is whether Spiegel is liable for use tax itself on its distribution and use of its catalogs in Nevada. In this context, the state contends that one of the grounds for concluding that tax nexus exists is the presence of Spiegel's

property in Nevada, e.g., the catalogs, themselves.

Another physical connection between Spiegel and Nevada is the conceded presence of Spiegel Teleservice, Inc. in Nevada. The business activities of Spiegel Teleservice, Inc. can easily be seen as that of a local agent of Spiegel in the State of Nevada with respect to its catalog sales. While Spiegel Teleservice, Inc. is involved in taking Spiegel catalog sales orders from the customers in other states, in addition to Nevada, its physical presence in Nevada, and intimate involvement in the sales activities of Spiegel in Nevada are sufficient to bring Spiegel within the taxing jurisdiction of the state, at least as to the sales and use tax. Spiegel's argument that Nevada lacks the requisite tax nexus over it for purposes of the use tax should be rejected. Spiegel has been collecting and remitting use tax on its Nevada catalog sales for over 10 years. Having submitted to the jurisdiction of the state to comply with the Sales and Use Tax Law, Spiegel should not be allowed to retroactively avoid the application of that law to its business activities on the grounds of a lack of nexus.

Under Nevada law, use tax applies to catalogs shipped by mail into Nevada. The Department's position has been that where a Nevada retailer acquires catalogs and other similar advertising material out of state and causes these items to be shipped or mailed into Nevada directly to the retailers customers or prospective customers, a taxable use of those catalogs has

occurred in Nevada and the retailer owes use tax on its cost to purchase the catalogs.

Case law from other jurisdictions supports the Department's construction of the term "use." In the case, MacNamara vs. D. H. Holmes Company, Ltd. 505 Sec 2nd 102 (La. App. 1987) involved a Louisiana retailer who purchased catalogs from printers located outside the state and had the printer mail them to addresses in Louisiana. The court noted that under Louisiana statutes, use was defined as the exercise of any right or power over tangible personal property incident to ownership including consumption, distribution and storage. The court also noted that the retailer utilized the catalogs in the hands of its prospective customers to increase sales and increase its name recognition. Thus, the court determined that the act of causing the catalogs to be distributed within the state for these purposes constituted a taxable use of the catalogs by the retailer. The United States Supreme Court had no trouble accepting this construction of state law in its Commerce Clause analysis in that case.

There can be no question that had Spiegel purchased and mailed the catalogs in Nevada, sales tax clearly would have been applied. Similarly, had Spiegel charged a recipient for its catalogs, it would have been required to collect tax on the gross receipts from that sale. It is anomalous to conclude that Spiegel can avoid any tax on these catalogs simply because it gives them away.

There is nexus between the activity being taxed and Nevada. In this case, the Department is applying a use tax to the catalogs due to Spiegel's use of the catalogs in Nevada. The use tax is being applied due to the business use of the catalogs in Nevada by Spiegel and because Spiegel otherwise has nexus with Nevada. Spiegel asserts that it is entitled to recover attorney's fees under 42 USC 1988. In the recent decision in National Private Truck Counsel, Inc., vs. Oklahoma Tax Commission _____ US _____ Slip Op 94-688 (June 19, 1995) the Supreme Court ruled that taxpayers are not entitled to declaratory or injunctive relief under 42 USC 1983 or attorneys fees under 42 USC 1988, where the taxpayer is challenging a state tax assessment and the state provides an adequate state law remedy to the taxpayer. This result is based on a strong policy of the federal courts in refusing to interfere with a state's authority to operate its taxing system.

Nevada provides aggrieved taxpayers with a plain, speedy and adequate state law remedy in which to challenge state use tax determinations through this instant administrative proceeding, as well as the appeals available to the taxpayer to the Nevada Tax Commission and the State courts by judicial review. Refunds are available for taxpayers that prevail after they pay the disputed tax, therefore, attorneys fees are not available under 42 USC Sec 1988 even if Petitioner prevails in this case.

DISCUSSION

The issue in this case is whether or not the Department may properly assess use tax on the cost to Spiegel of catalogs that it mails to residents of Nevada from out of state locations. Spiegel has asserted three reasons why it does not owe use tax on these catalogs. First, under the Commerce Clause analysis, Spiegel alleges that Nevada does not have the requisite nexus with Spiegel to impose a use tax Spiegel. Second, Spiegel alleges that it does not use, store or otherwise consume the catalogs and Nevada, when it sends them to Nevada residents through the U. S. mail from out of state. Third, under the Commerce Clause and Due Process Clause analysis, Spiegel claims that there is no connection between the activity being taxed in Nevada precluding the assessment of the tax in this case.

The Department has argued that Spiegel Teleservice, Inc. acts essentially as an agent by taking the orders and transmitting those orders to Spiegel for the completion of the sale of tangible personal property. The distribution of catalogs constitutes a use in Nevada. This can be clearly seen when compared to a sale transaction. Had the catalogs been purchased and mailed in Nevada, a sales tax would clearly been due. A complimentary use tax is assessed on the same transactions which would have been taxable if they occurred in Nevada, according to NRS 372.185. The Department has argued that nexus exists between the activity being taxed and Nevada. The use tax is applied due to a

business use of the catalogs in Nevada. Finally, the Department has argued that no attorney fees under 42 USC Sec 1988, in a state administrative action are allowed.

An examination of the statutes provides the answer to these issues. NRS 372.185 imposes an excise tax on the storage, use or other consumption of tangible personal property in Nevada. The statute goes on to state that the 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. If the catalogs had been acquired in a transaction within Nevada, a sales tax would have been assessed. Since that taxable transaction in Nevada would have been assessed a sales tax, it is now necessary to look at the out of state transaction to determine if it has changed the nature of the transaction such that it would be exempt from the use tax. The facts in this case indicate that the transaction is not materially changed merely because the out of state printing and production of the catalogs occurs. Those catalogs are produced outside the State of Nevada and are mailed to residents of the State of Nevada. That means that the tax would have been imposed because it is the same type of transaction that would have been subject to Nevada sales tax had it occurred in Nevada.

The excise tax is imposed on that transaction because it does represent a use of the catalogs by Spiegel. While Spiegel has argued that it obtains no use from those catalogs that

argument does not hold true when you examine the nature of the term use. In a nontechnical sense, the use of a thing means that one may have some manner of benefit thereof. That means that Spiegel would be able to obtain a utility, advantage or a production of a benefit. The benefit that is obtained by Spiegel from its catalogs is that potential customers are able to see pictures of the tangible personal property and are provided information regarding that item. Based on that information, they are able to make a determination as to whether or not they choose to purchase the item. If they choose to purchase the item, the may phone Spiegel Teleservice, Inc. Spiegel Teleservice, Inc. is located in Nevada. They will take the information over the phone from the customer to complete the sales transaction. Without those services provided, there can be no conclusion of a sale, so the use or benefit received by Spiegel from its catalogs is the customer can see the merchandise, find out about it and make the decision as to whether or not they want to purchase it. If they choose to purchase that, they are going to contact Spiegel Teleservice, Inc. to provide them the information to complete the transaction. Without the catalog, there could be no sale since Spiegel maintains no retail establishments. Therefore, there is a benefit to Spiegel from the use of those catalogs. That use is what is being taxed by the Department.

The Department is taxing the paper and ink cost of producing those catalogs that are shipped into Nevada to residents of the

State of Nevada. The use, according to NRS 372.185, is taxable because it is a business benefit obtained by Spiegel through the use of the catalogs being sent to Nevada residents. Otherwise, no sales from Nevada residents could occur, since Spiegel has no other way of informing its customers as to what merchandise it has available for sale. That element of use is a benefit sufficient to create the taxable transaction required under NRS 372.185.

Spiegel owns a separate subsidiary, Spiegel Teleservice, Inc. that operates a telemarketing bureau in Nevada. Spiegel Teleservice, Inc. is a separate entity incorporated in 1983 under the laws of Nevada. Because it is a separate corporation, Spiegel has argued that it is not liable for any of the activities of Spiegel Teleservice, Inc. That subsidiary operates independently of Spiegel and, therefore, Spiegel does not have nexus in the State of Nevada. However, an examination of the function of Spiegel Teleservice, Inc. shows that it is an integral part of the activity of completing the sale for Spiegel. Even though Spiegel has argued that Spiegel Teleservice, Inc. is not viewed as a local agent in Nevada, it is clear to see that Spiegel Teleservice, Inc. takes the catalog sales order from customers and provides that information to Spiegel in Illinois, in order to complete the sale. If Spiegel Teleservice, Inc. was not providing that information, no sale could be completed. Spiegel Teleservice, Inc. is located in Nevada and performs that

function for Spiegel. Spiegel Teleservice, Inc. has a physical presence in this state and is involved in the sales activity, since Spiegel could not complete the sale without the information provided by Spiegel Teleservice, Inc. Nexus is established because Spiegel Teleservice, Inc. located in Nevada provides the information to Spiegel which allows Spiegel to sell the items of tangible personal property to its customer. That creates the nexus which causes the activity of providing catalogs to Nevada residents subject to use tax in Nevada.

Spiegel has argued that there is no nexus between the activity being taxed and Nevada, however, the use tax is being assessed by the Department due to the business use of the catalog. The catalogs allow the customer to view the item of tangible personal property and receive information regarding that item. That then allows the customer to make the decision to purchase the item. That use tax is being applied to the activity of the catalog providing the information to the customer in Nevada. For that reason, there is nexus between the activity being taxed, which is the producing of the catalogs and the State of Nevada.

Spiegel has argued that attorney fees are due it under 42 USC Sec 1988. The Department has argued that attorney fees are not available under 42 USC Sec 1988. Since Nevada does provide taxpayers within a state administrative remedy in which to challenge state use tax determinations and there is a provision

for refund after a petitioner pays a disputed tax, there can be no attorney fees granted in this case. The recent Supreme Court decision, National Private Truck Counsel, Inc., vs. Oklahoma Tax Commission clearly ruled that taxpayers are not entitled to declaratory or injunctive relief where a state tax assessment is challenged and the state provides an adequate state law remedy to the taxpayer. The remedies provided to the taxpayer are clearly explained in the statutes and provide adequate opportunity to challenge the determinations made by the Department. In addition, refunds are available for any taxpayer prevailing in a case after they pay the disputed tax. That provision is explained in NRS 372.635. For that reason, attorney fees cannot be granted to Spiegel under 42 USC Sec 1988.

FINDINGS OF FACT

1. The Petitioner is a registered retailer of tangible personal property in Nevada.

2. The Petitioner registered with the Department in 1983 and files monthly sales and use tax returns.

3. The Department conducted an audit of the Petitioner's records resulting in a deficiency determination comprised of tax and interest for the period from October 1, 1991 through September 30, 1994.

CONCLUSIONS OF LAW

1. NRS 372.185 imposes an excise tax on the storage, use or other consumption in this state of tangible personal property.

That 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 the state. If Spiegel had provided catalogs in the State of Nevada to its customers, it would have been charged tax on those transactions. Since the catalogs were produced and distributed from outside the State, a use tax is assessed pursuant to that same provision.

The distribution of Spiegel's catalogs constitutes a taxable use in Nevada, because the sales tax would have applied if the Petitioner had purchased and mailed the catalogs in Nevada. Since the catalogs were produced and distributed from outside the State of Nevada, NRS 372.185 requires the assessment of use tax on those transactions.

2. Spiegel Teleservice, Inc. is a wholly owned subsidiary of Spiegel operating in Nevada. It functions as a telemarketing bureau in Nevada and receives telephone orders from customers for Spiegel merchandise that are transmitted to Spiegel in Illinois. Spiegel Teleservice, Inc. functions by taking orders from the customers and is intimately involved in the sales activities of Spiegel in Nevada. If Spiegel Teleservice, Inc. did not take the catalog sales orders from the customers, Spiegel would not have information sufficient to complete the sale. For that reason, Spiegel Teleservice, Inc. provides the physical presence in the state and, further, services to provide Spiegel with a requisite nexus required for the assessment of the use tax.

3. Nexus exists between the activity being taxed and Nevada because the use tax is applied due to the business use of catalogs in Nevada. The catalogs serve to provide a utility or benefit to Spiegel. The benefit derived by Spiegel is that they allow the customers to obtain the necessary information in order to make the taxable transaction occur, which is the sale. Without that use of the catalog, Spiegel would not be able to complete the sale. Therefore, the business use is subject to the tax because Spiegel has received the benefit of the use of the catalogs to its customers in Nevada.

4. No attorneys fees can be awarded under 42 USC Sec 1988. Because the state administrative action provides an adequate remedy for the taxpayer. Nevada does provide its taxpayers with opportunity to challenge determinations and receive refunds, should the taxpayer prevail. Therefore, attorney fees are not available under 42 USC Sec 1988.

5. NRS 360.417 requires interest to be due on any underpayment of tax pursuant to Chapter 372 at a rate of 1.5 percent per month from the date due until the date of payment. Since Spiegel failed to remit the use tax on a timely basis, the state was unable to earn interest on that amount. Therefore, Spiegel is liable to reimburse the state for that loss by remitting interest on the deficiency determination.

ORDER

Upon the basis of the foregoing Findings of Fact and Conclu-

sions of Law, it is ORDERED that the Petitioner pay tax and interest on the revised amount for the catalogs for the period from October 1, 1991 through September 30, 1994. The Department shall issue a revised billing in accordance with this decision within not more than 30 days. That amount is due within 30 days of the Petitioner's receipt of that billing. Any unpetitioned portions of this deficiency are affirmed. This decision may be appealed within 20 days of the date of service to the Petitioner.

Done this 27 day of September, 1995.

FOR THE DEPARTMENT:

Janice A. Wright

Janice A. Wright
Deputy Executive Director
Hearing Officer

JAW:law

cc: Nevada Tax Commission Members

STATE OF NEVADA
DEPARTMENT OF TAXATION
CARSON CITY
NEVADA

Exhibit 6

000391

Senate Bill No. 362–Senator O'Connell

CHAPTER.....

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.

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 ~~[so]~~ 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 ~~[.~~

~~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 ~~[In]~~

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. ~~[If]~~ *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 ~~[,]~~ ***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. ~~[If]~~ ***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 ~~[his 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.

Exhibit 7

Azevedo & Guenaga

www.nevadataxlawyers.com

Norman J. Azevedo, Esq.
Elaine S. Guenaga, Esq.

338 California Avenue
Reno, Nevada 89509
775-329-6770
775-329-6825 (fax)

July 14, 2003

Greg Zunino, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89710

Via Facsimile
684-1108

Re: Southern California Edison (SCE) Refund Requests

Dear Greg:

I have recently been retained by SCE to assist in processing the administrative claims for refund previously filed by the taxpayer with the Nevada Department of Taxation. In reviewing the previous correspondence between the Nevada Department of Taxation and SCE, I was unable to determine what procedural process was being suggested by the Department for SCE to follow. Based upon my review, I am unclear under what legal authority the Department is intending to proceed to have the evidentiary hearing in this matter.

I have attached a copy of a recent Nevada Supreme Court decision rendered addressing taxpayer's claims for refunds in the context of a sales and use tax case. See Brent Corbridge, D.M.D. vs. The Nevada Department of Taxation, Case No. 38867. In light of the burdens imposed upon taxpayers by our Nevada Supreme Court, SCE respectfully requests a written explanation of the hearing process (evidentiary or otherwise) that will allow SCE to address the Department's denial of its refund claim dated December 17, 2002. *See* NRS 360.291(j) and NRS 360.2935.

Due to the time constraints imposed on SCE in your July 2, 2003 correspondence, your prompt response to this request would be greatly appreciated.

Sincerely,

NORMAN J. AZEVEDO, ESQ.

NJA/ra

cc: Dolores Sandler, SCE Tax Manager (Fax: 626.302.4973)

Exhibit 8

000422

Account No: 465197254

Docket No:

STATE OF NEVADA
DEPARTMENT OF TAXATION

IN THE MATTER OF)
)
Southern California)
)
Edison Company)

Amount: $ 10,713,717.59

Date of Deficiency Determinations: December 17 & 30, 2002

IMPORTANT

If you disagree with all or any portion of the attached Notice of Deficiency or Credit Determination, the law requires you to file a timely petition for re-determination with the Department of Taxation. Failure to file a timely petition for redetermination by the due date specified will result in the determination becoming final, with no right of appeal or refund!

In filling out this petition, you must state specifically each and every ground upon which you are contesting the deficiency determination. The deadline for filing this petition is set forth on the attached Notice of Deficiency or Credit. If you have questions on the date on which this petition is due, please contact the Department. Failure to specify the grounds for your petition will result in the petition being summarily denied. The Department will review your petition and any information provided to substantiate the grounds listed in contesting the deficiency determination, and make any adjustments to the deficiency determination that the Department deems justified. If there is still a disagreement, and you have requested an evidentiary hearing before an administrative officer, then you will be notified of the date and time of that hearing. If you have not requested a hearing, then the Department will make its ruling based upon the evidence presented and notify you thereof.

Any adverse decision from the administrative hearing officer may be appealed to the Nevada Tax Commission. An adverse decision from the Tax Commission may be appealed to the District Court.

PETITION FOR REDTERMINATION

The undersigned petitions for re-determination of all or part of the Department's deficiency determination and understands that in the absence of specific information, this petition will be denied. The petitioner alleges that the determination is erroneous for the following reasons (continue on reverse side if necessary):

SEE ATTACHMENT

AMOUNT PETITIONED: $ 10,713,717.59

CHECK ONE: ( ) An oral hearing is not requested.
(X) An oral hearing before the hearing authority is requested.

Dated: January 31, 2003

Petitioner: Southern California Edison Company

By: P. D. B.

Paul D. Bancroft, Paul D. Bancroft & Associates
4713 E. Camp Lowell Drive, Tucson, AZ 85712

NOT VALID UNLESS SIGNED

Southern California Edison
Account No. 465197254

ATTACHMENT TO PETITION FOR REDETERMINATION

Petitioner appeals from the Department's denial of its timely filed claims for refund of use tax paid on coal purchased from Peabody Coal Company ("Peabody") from March 1, 1998 through December 31, 1999. During this period, Petitioner made purchases of coal from Peabody for use at its Mohave Generating Station in Clark County. Petitioner paid use tax in the amount of $10,713,717.59 on these purchases. Petitioner is entitled to a refund of use tax, for the following reasons.

1. Petitioner's purchases of coal from Peabody were subject to Arizona transaction privilege tax in the amount of $4,904,490.59. Peabody passed those taxes on to Petitioner as a percentage addition to the sales price of the coal. Petitioner is entitled to a credit against Nevada's use tax for the taxes paid in Arizona. NAC § 372.055.

2. The imposition of a Nevada use tax in this case, with no adjustment for taxes paid in other jurisdictions, results in taxation by multiple states and places a burden on interstate commerce in violation of U.S. Const. Art. 1, § 8, cl. 3.

3. Petitioner's purchases of coal from Peabody were subject to taxes imposed by the United States. Specifically, the taxes imposed by the Surface Mining Control & Reclamation Act of 1977 and the Black Lung Benefits Revenue Act of 1977. Peabody passed these taxes on to Petitioner as separately stated items on its invoice for the sale of the coal. The amount of these taxes should not be included in gross receipts subject to Nevada's use tax. NRS § 372.025. Petitioner is entitled to a refund of the use tax, in the approximate amount of $523,217, which is attributable to the inclusion of these taxes in the measure of the use tax.

4. The commerce clause, U.S. Const. Art. I, § 8, cl. 3, prevents a state from taxing Petitioner's consumption of coal purchased from Peabody in Arizona more heavily than if the transaction had occurred entirely within the state. Had the coal been mined in Nevada, the subsequent sale and use by Petitioner would be exempt from Nevada's sales and use tax. NRS § 372.270. Yet, because the coal was mined outside Nevada, its subsequent sale to and use by Petitioner has been subjected to Nevada's use tax. This disparate treatment is prohibited by the commerce clause, and therefore, Petitioner's use of the coal is exempt from tax pursuant to NRS § 372.265.

Petitioner's claims for refund were denied by letters dated December 17, 2002 and December 30, 2002.

An oral hearing is requested. Petitioner reserves the right to present additional evidence, arguments and grounds to support its claims for refund.

Exhibit 9

000425

KENNY C. GUINN
Governor
BARBARA SMITH CAMPBELL
Chair, Nevada Tax Commission
CHARLES E. CHINNOCK
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
1550 E. College Parkway
Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 687-4820 • Fax: (775) 687-5981
In-State Toll Free: 800-992-0900
Web Site: http://tax.state.nv.us

LAS VEGAS OFFICE
Grant Sawyer Office Building
Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300
Fax: (702) 486-2373

RENO OFFICE
4600 Kietzke Lane
Building O, Suite 263
Reno, Nevada 89502
Phone: (775) 688-1295
Fax: (775) 688-1303

May 28, 2003

James M. Susa, Esq.
Paul D. Bancroft & Associates
4713 E. Camp Lowell Drive
Tucson, AZ 85712

Name of Party: Southern California Edison
Account Number: 465-197-254

Dear Mr. Susa:

The petition for redetermination that you filed with the Department of Taxation has been assigned to me. I will be the hearing officer that will render a decision on the issues you have raised in your petition. You have requested a hearing, which will be set at a later date.

In order to assist me in rendering a decision, a joint pre-hearing statement signed by either you or your representative and the Department must be submitted to me on or before **July 14, 2003.** This statement must contain the following information:

1. A statement of the issues which have not been resolved and which will be presented to me for a decision. If the dispute centers on the taxation of specific transactions, please attach a schedule to the pre-hearing statement that describes the nature of each transaction at issue, the measure and amount of the tax at issue, and the legal issue pertaining to that transaction. Issues not raised in the pre-hearing statement will not be considered.

2. A statement of the issues that have been resolved.

3. A statement of all uncontested facts.

4. A list of the exhibits that each party expects to introduce into evidence at the hearing, and any objections thereto. Affidavits are to be included under this section. All exhibits are to be pre-marked for the record.

5. A list of applicable statute and regulation cites that pertain to the petition for redetermination.

6. A list of all witnesses that each party expects to call upon to provide testimony at the hearing, including the order of witnesses and the estimated time necessary for each witness.

7. A statement as to whether post-hearing briefs will be submitted by the parties. Note that if the parties agree to present pos- hearing briefs, oral argument at the hearing will be limited to a brief summation of the legal arguments to be made in the briefs.

8. A statement of the estimated time that is needed to conduct the hearing.

If the parties are unable to agree on the contents of a pre-hearing statement, then each party may submit separate pre-hearing statements. No extension of the time to file pre-hearing statements will be granted without a written motion or stipulation requesting additional time. This motion or stipulation must be filed before the time for filing the pre-hearing statement has expired and show good cause for an extension of time. Failure to file a pre-hearing statement within the time required would result in the immediate scheduling and notice of a hearing for which a continuance will not be granted.

Once the pre-hearing statement is filed, a hearing date will be immediately scheduled with at least 10 days prior written notice to the parties. Each party is entitled to one continuance of the hearing date absent a showing of compelling circumstances by the non-requesting party why the continuance should not be granted. The written request must be delivered five (5) days prior to the scheduled hearing date. The requesting party will not be granted additional continuances without a showing of compelling circumstances.

The parties are encouraged to resolve as many issues as possible prior to the hearing. On or before the time for filing pre-hearing statements, all exhibits and other relevant documents are to be exchanged by the parties. Pre-hearing discovery of relevant facts and documents is encouraged.

When the parties choose to submit post hearing briefs, the briefs will be submitted in the following order: (1) petitioner; (2) Department; (3) a short reply brief by petitioner limited to addressing points made by the Department. The hearing officer will establish the timing of the briefing schedule at the hearing.

Please be advised that NRS 233B.126 precludes communication between the hearing officer and a party to a contested matter, directly or indirectly, regarding issues of law or fact, unless all parties are provided notice and an opportunity to participate in the communication. Accordingly, written communications must be served upon all parties and verbal communications must include all parties.

Sincerely,

Paul Ferrin, Hearing Officer
Executive Division, Department of Taxation
775-687-6480

cc: Karen Crandall, Supervising Auditor
Executive Division, Department of Taxation

Greg Zunino, Senior Deputy Attorney General
Office of the Attorney General

Linda Fleischmann, Tax Division Manager
Compliance Division, Department of Taxation

Exhibit 10

KENNY C. GUINN
Governor
BARBARA SMITH CAMPBELL
Chair, Nevada Tax Commission
CHARLES E. CHINNOCK
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
1550 E. College Parkway
Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 687-4820 • Fax: (775) 687-5981
In-State Toll Free: 800-992-0900
Web Site: http://tax.state.nv.us

LAS VEGAS OFFICE
Grant Sawyer Office Building
Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300
Fax: (702) 486-2373

RENO OFFICE
4600 Kietzke Lane
Building O, Suite 263
Reno, Nevada 89502
Phone: (775) 688-1295
Fax: (775) 688-1303

July 2, 2003

James M Susa, CPA, Esq.
Paul D. Bancroft & Associates
4713 East Camp Lowell Drive
Tucson AZ 85712

RE: Southern California Edison (Refund Request)
Account Number 465-197-254

Dear Mr. Susa:

On May 15, 2003, I acknowledged the Petition for Redetermination on the denial of the request for refund and referred the matter to an oral hearing. Pursuant to Nevada Revised Statute (NRS) 360.245.1 (a), this matter should be referred to the Nevada Tax Commission. Please accept this letter as your notice the case will be redirected to the Nevada Tax Commission pursuant to NRS 360.245. I apologize for any inconvenience this may have caused.

At the present time we do not have a date for the next Nevada Tax Commission meeting. As soon as a date for the meeting is set, we will advise you. Hearings will be conducted in accordance with the State Administrative Procedures Act, NRS 233B and the Nevada Administrative Code, NAC 360 and may be closed to the public at your request. NAC 360.175 requires that a brief, or an explanation of the areas you disagree with be filed with us setting forth the points relied upon in your appeal and authorities in support thereof. **The brief or explanation is to be filed by August 1, 2003.**

The Commission requires that any materials in the support of an appeal must be received **in the office of the Department at least 14 days prior to the scheduled meeting** to allow the Department and the Commission an opportunity for review. The Commission further indicated that if the material is not received within this time frame, appeals may be postponed until the next meeting. Please send us any material you wish considered as soon as possible.

If you have any questions, please contact me at 775-687-6658.

Sincerely,

Karen Crandall

Karen Crandall, Supervising Auditor
Executive Division

cc: District
Linda Fleischmann, Tax Division Manager
Joshua J. Hicks, Deputy Attorney General
Paul Ferrin, Hearing Officer

Exhibit 11

attorney-fees-as-damages issue is appropriate in this case. Accordingly, we reverse that portion of the district court's judgment awarding attorney fees and remand this case to the district court to conduct an evidentiary hearing. Nonetheless, we reiterate that in future cases, this method is not appropriate for litigating attorney fees as damages. When attorney fees are alleged as damages, they must be specifically pleaded and proven by competent evidence at trial, just as any other element of damages.

CONCLUSION

The record contains substantial evidence supporting the district court's decision concerning title to the easterly 150 feet of lot 39 and the five "open area" lots within Sky Ranch Estates II. However, the district court erred in awarding attorney fees as damages without an evidentiary hearing. Accordingly, we affirm that portion of the district court's judgment concerning title to the real property, we reverse that portion of the judgment awarding $74,567.00 in attorney fees, and we remand this case to the district court to conduct a hearing to determine whether attorney fees were proximately caused by the conduct of SVA, and if so, the amount of attorney fees incurred incident to obtaining title to the real property in this case.

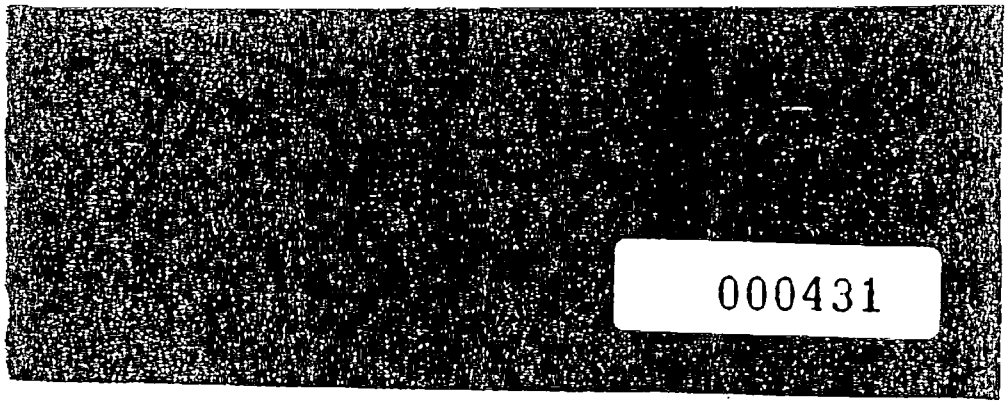
NEVADA TAX COMMISSION; DEPARTMENT OF TAXATION, THE STATE OF NEVADA, APPELLANTS, *v.* NEVADA CEMENT COMPANY, RESPONDENT.

No. 33178

December 12, 2001 36 P.3d 418

Appeal from a district court order granting a petition for judicial review and reversing a decision of the Nevada Tax Commission that certain parts of machinery and equipment used by respondent are not exempt from the sales and use tax. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Taxpayer, a manufacturer of cement, sought judicial review of Tax Commission's denial of claim for refund of sales or use taxes paid for steel grinding balls, steel kiln chains, kiln bricks, and castable materials purchased by taxpayer. The district court reversed. Commission appealed. The supreme court, 117 Nev. 877, 8 P.3d 147 (2000), reversed and remanded. Taxpayer filed a petition for rehearing. The supreme court held that: (1) taxpayer's manufacturing equipment was subject to a primary-purpose test, and (2) equipment was not exempt from sales and use taxation under sale-for-resale exemption.



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PARTMENT OF TAXA-
VADA, APPELLANTS, v.
RESPONDENT.

36 P.3d 418

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)m sales and use taxation

Former opinion withdrawn; reversed and remanded on rehearing.

Frankie Sue Del Papa, Attorney General, and *Elaine S. Guenaga*, Senior Deputy Attorney General, Carson City, for Appellants.

Paul D. Bancroft, Incline Village, for Respondent.

1. TAXATION.
   Taxpayer's manufacturing equipment that was purchased for primary purpose of use in manufacturing of cement was subject to a primary-purpose test, rather than a physical-ingredient test in determining whether it was subject to sales and use tax, although equipment, by disintegrating during the manufacturing process, had a dual purpose of contributing to ingredients of final cement product. NRS 372.050, 372.080.
2. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court's review of an administrative decision is identical to that of the district court.
3. ADMINISTRATIVE LAW AND PROCEDURE; STATUTES.
   Questions of law, including the administrative construction of statutes, are subject to independent appellate review.
4. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court will not substitute its judgment for that of the agency on a question of fact.
5. ADMINISTRATIVE LAW AND PROCEDURE.
   An agency's factual determinations will be upheld if supported by substantial evidence.
6. TAXATION.
   Equipment purchased for use in manufacturing of cement was taxable as a retail sale under the primary-purpose test and was not exempt from sales and use taxation under sale-for-resale exemption, although equipment, by disintegrating during the manufacturing process, contributed to final cement product. NRS 372.050, 372.080.
7. TAXATION.
   The use tax is a way for Nevada to tax transactions outside the state that would otherwise escape sales taxation. NRS 372.010 et seq.
8. STATUTES.
   When statutes are ambiguous, the supreme court looks to the legislature's intent, and construes them in line with what reason and public policy indicate.
9. TAXATION.
   In determining whether manufacturing equipment is taxable under the primary purpose test, if the property is purchased primarily for incorporation into the final product, it is not taxable, despite the fact that some portion may assist the manufacturing process. NRS 372.050, 372.080.
10. TAXATION.
    In determining whether manufacturing equipment is taxable under the primary purpose test, if the property is purchased primarily to aid the manufacturing process, it is taxable, despite the fact that some portion becomes a part of the finished product. NRS 372.050, 372.080.

11. STATUTES.

Interpretation by the agency charged with administering a statute is persuasive, and great deference should be given to that interpretation if it is within the language of the statute.

Before YOUNG, AGOSTI and LEAVITT, JJ.

OPINION ON REHEARING

Per Curiam:

On September 15, 2000, we issued an opinion reversing the district court's order and remanding this matter to the district court.[1] Subsequently, respondent Nevada Cement Company filed a petition for rehearing, and we directed a response from the Nevada Tax Commission. We have reviewed the parties' submissions, and we conclude that rehearing is warranted to clarify our statement of the primary-purpose test, used to determine whether certain manufacturing equipment is subject to a sales and use tax. We further conclude that rehearing is not warranted on the other grounds asserted by Nevada Cement. Accordingly, we grant rehearing in part, withdraw our prior opinion and issue this opinion in its place.

In this appeal, we consider whether certain equipment purchased by Nevada Cement for use in manufacturing cement, but which also contributes necessary ingredients to the cement, is subject to taxation as a retail sale, or is exempt from taxation as a sale for resale. In determining the equipment's taxability, one must look to its primary purpose. Because Nevada Cement purchased the equipment primarily for use in manufacturing the cement, it was subject to taxation as a retail sale.

FACTS

Nevada Cement manufactures and sells cement. Cement manufacturing involves the crushing and mixing together of various ingredients in an abrasive and heat-intensive process. The ingredients include limestone, clay, iron and gypsum. Throughout the manufacturing process, measurements are taken to evaluate and regulate the amounts and proportions of these ingredients in the product.

The manufacturing process begins when limestone, clay and iron are crushed into a raw mix. The raw mix is then heated in a kiln to temperatures over 2,000 degrees. The extreme heat is dis-

[1]*State, Tax Comm'n v. Nevada Cement Co.*, 116 Nev. 877, 8 P.3d 147 (2000).

ed with administering a statute is
be given to that interpretation if

JJ.

EHEARING

ed an opinion reversing the
g this matter to the district
vada Cement Company filed
rected a response from the
eviewed the parties' submis-
g is warranted to clarify our
t, used to determine whether
ubject to a sales and use tax.
s not warranted on the other
ent. Accordingly, we grant
opinion and issue this opin-

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gredients to the cement, is
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Co., 116 Nev. 877, 8 P.3d 147

tributed throughout the mix by a kiln chain. A chemical reaction causes some of the mix to liquefy, and the raw mix then becomes "clinker," which is a rock-like substance. The clinker is cooled, then mixed with gypsum and crushed into a fine powder, which is the finished product.

Nevada Cement purchased many pieces of equipment for manufacturing cement, four of which are relevant here: (1) steel grinding balls used for crushing; (2) steel kiln chains used for distributing heat; (3) kiln bricks used to line the kiln and protect it from the intensive heat; and (4) castable materials used to protect the passageways through which the manufactured product passes.

Because the manufacturing process is so hot and abrasive, this equipment gradually disintegrates over time, as pieces of the equipment flake off and become incorporated into the finished cement product. The portion of the equipment that does not completely disintegrate into the raw mix is eventually removed, crushed and introduced back into the mix. The equipment's gradual disintegration is inevitable, but taken into account; because the equipment is composed of iron, less iron is added to the raw mix at the outset. The wearing down of the various parts adds just under one percent of the total iron needed in the manufacturing process.

Thus, the equipment has a dual purpose: (1) use in manufacturing the cement by crushing, distributing heat, and protecting the kiln and passageways; and (2) contribution of ingredients to the final cement product. This dual purpose is important for determining the equipment's taxability. Generally, sales and use taxes are imposed on tangible personal property sold at retail.[2] In contrast, no tax is imposed on tangible personal property that is sold for resale.[3] The purpose of the sale-for-resale tax exemption is to prevent taxes on intermediate purchases, and to ensure that only the final sale to the customer gets taxed.[4]

Here, Nevada Cement initially paid either sales or use tax on the equipment it purchased. Nevada Cement later requested a refund, but the Nevada Department of Taxation denied the request. Nevada Cement then filed a petition for redetermination. According to Nevada Cement, because the equipment disintegrated during the manufacturing process and eventually became incorporated into the finished cement product which is sold, the equipment was purchased in part for resale, and thus was tax

[2]*See* NRS 372.105; NRS 372.185(1).

[3]*See* NRS 372.050; NRS 372.075; NRS 372.185(2).

[4]Jerome R. Hellerstein & Walter Hellerstein, *State and Local Taxation* 697 (6th ed. 1997).

exempt. Nevada Cement's refund claim included the four pieces of equipment at issue here, which were wholly consumed in the manufacturing process, as well as seven other pieces of equipment that were only substantially consumed. The matter proceeded to an administrative hearing, after which the Department hearing officer denied the entire refund claim. On administrative appeal, the Commission upheld the hearing officer's decision and denied the refund claim. The Commission determined that the equipment was subject to tax as a retail sale because it was purchased for the purpose of manufacturing and producing the cement.

Nevada Cement then filed a petition for judicial review with the district court. In its petition, Nevada Cement pursued a refund for only the four items wholly consumed in the process: steel grinding balls, steel kiln chain, kiln brick, and castables. The district court granted the petition and reversed the Commission's decision. In the district court's view, the administrative decisions erroneously adopted a primary-purpose test. The district court applied a physical-ingredient test and concluded that the equipment contributed significantly to the final cement product that was resold. Consequently, the court concluded that the equipment was tax exempt and granted Nevada Cement's refund claim. The Commission then appealed.

DISCUSSION

[Headnotes 1-6]

This court's review of an administrative decision is identical to that of the district court.[5] Questions of law, including the administrative construction of statutes, are subject to independent appellate review.[6] Conversely, this court will not substitute its judgment for that of the agency on a question of fact.[7] An agency's factual determinations will be upheld if supported by substantial evidence.[8]

[Headnote 7]

The sales and use taxes at issue in this case are codified under Nevada's Sales and Use Tax Act, NRS Chapter 372. A sales or use tax must be paid on all tangible personal property "sold at retail."[9] Specifically, the sales tax is imposed on "the sale of all

[5]*See SIIS v. Engel*, 114 Nev. 1372, 1374, 971 P.2d 793, 795 (1998).

[6]*Id.*

[7]*See* NRS 233B.135(3); *Campbell v. State, Dep't of Taxation*, 109 Nev. 512, 515, 853 P.2d 717, 719 (1993).

[8]*See Bing Constr. v. State, Dep't of Taxation*, 109 Nev. 275, 278, 849 P.2d 302, 304 (1993).

[9]NRS 372.105; NRS 372.185.

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tangible personal property sold at retail in this state."[10] The use tax is the complement to the sales tax, and is imposed on "the storage, use or other consumption in this state of tangible personal property . . . which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this state."[11] Generally, the use tax is "a way for Nevada to tax transactions outside the state that would otherwise escape sales taxation."[12]

In contrast to a retail sale, items that are sold for resale are tax exempt. These items are purchased for the purpose of being resold. More specifically, no sales tax applies to property purchased for resale in the regular course of business. This sale-for-resale exemption from the sales tax is found under the definition of "retail sale" in NRS 372.050, which provides that a retail sale is "a sale for any purpose other than resale in the regular course of business of tangible personal property."

The sale-for-resale exemption also applies to the use tax. The use tax is imposed on property "acquired out of state in a transaction that would have been a taxable sale if it had occurred within this state."[13] Thus, to determine whether a transaction would have been a taxable sale within this state, one must look to the applicable sales tax statutes and the definition of "retail sale" under NRS 372.050. In addition, no use tax applies to property stored in this state for the purpose of sale in the regular course of business.[14]

Nevada Cement's liability for taxes on the equipment depends upon whether its purchase constituted a retail sale or a sale for resale. If the equipment had been purchased for the sole purpose of use in manufacturing the cement, it would be a retail sale subject to taxation. If, on the other hand, the equipment had been purchased for the sole purpose of reselling it, the transaction would be a sale-for-resale, and tax exempt. But the tax issue is not so simple when considering the dual purpose items at issue here. Nevada Cement's equipment not only aids in manufacturing the cement, but also contributes necessary ingredients to the final cement product, which is resold. This dual purpose led to the parties' dispute over whether a physical-ingredient test or a primary-purpose test should apply under the tax statutes.

Nevada Cement contends that the district court properly applied

[10]NRS 372.105.

[11]NRS 372.185(1) and (2).

[12]*State, Dep't Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 280, 871 P.2d 331, 334 (1994); *see also* 85 C.J.S. *Taxation* § 1992 (2001).

[13]NRS 372.185(2).

[14]NRS 372.075.

a physical-ingredient test to determine that the items at issue in this case are tax exempt. Nevada Cement argues that under a physical-ingredient test, when an item becomes a physical ingredient or a component of the finished product, it is a sale for resale, and is excluded from taxation. Under Nevada Cement's test, the degree of incorporation is irrelevant. Property is tax exempt as long as some portion, no matter how insignificant, is incorporated into the finished product.

In support of a physical-ingredient test, Nevada Cement does not focus on the retail sale statute, NRS 372.050. Instead, Nevada Cement asserts that NRS 372.080, a specific use tax exemption for exported property, clearly states the test. NRS 372.080 exempts from use taxation personal property acquired outside of Nevada[15] and thereafter kept or retained in Nevada for the purpose of "being processed, fabricated or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state."

Nevada Cement also cites to a 1955 opinion by the Attorney General[16] ("Opinion 74") that examined the definition of "storage" and "use" in NRS 372.080 to determine whether use of scrap iron in the Nevada portion of a multi-state mining process was excluded from Nevada's use tax. In that case, some of the iron was absorbed into the copper precipitates, which were then transported outside Nevada for further refining.[17] Opinion 74 concluded that the iron was excluded from the use tax because the iron remained incorporated in the product while it was undergoing processing in Nevada.[18]

The Commission relies on NRS 372.050(1), which defines "retail sale" as "a sale for any purpose other than resale in the regular course of business of tangible personal property." As explained above, this provision exempts sales-for-resale from the sales and use tax. The Commission argues that the language of NRS 372.050 sets forth a primary-purpose test, under which one must look to the primary purpose of the sale. According to the Commission, all sales for *any* purpose other than resale are subject to sales and use tax. Accordingly, the Commission argues that if any purpose of a dual-purpose item is not resale, the sales and use tax apply under a primary-purpose test. We note that the Commission essentially asks us to apply a sole-purpose test, rather than a primary-purpose test.

[15]A use tax is imposed on property acquired out of state. NRS 372.185(2).

[16]55-74 Op. Att'y Gen. 180 (1955).

[17]*Id.*

[18]*Id.* at 182.

lar course of business in the form of tangible personal property."[22] In *Kaiser Steel*, the court considered whether materials purchased to aid in steel manufacturing, but which also became components of the finished product, were taxable as a retail sale. The materials were first used in the steel manufacturing process, and then formed a by-product called "slag," which Kaiser sold. The question was whether the materials were purchased for a purpose other than resale (that is, to aid in manufacturing steel) and thus subject to tax, or were purchased for the purpose of resale in the form of slag, and thus tax exempt.[23]

In adopting a primary-purpose test, the *Kaiser Steel* court held that one must look to the primary purpose of the purchase in determining whether a sale is taxable.[24] The court upheld as reasonable the State Board of Equalization's determination that Kaiser purchased the materials primarily for the purpose of manufacturing steel, and thus concluded that the materials were subject to the tax.[25]

[Headnotes 9, 10]

Thus, in determining whether manufacturing equipment is taxable under NRS 372.050 and NRS 372.080, one must consider the equipment's primary purpose. If the property is purchased primarily to aid the manufacturing process, it is taxable, despite the fact that some portion becomes a part of the finished product. Conversely, if the property is purchased primarily for incorporation into the final product, it is not taxable, despite the fact that some portion may assist the manufacturing process.[26] The district court erred by applying a physical-ingredient test and by allowing a tax exemption.

[Headnote 11]

Our decision finds support in the Department's tax regulation pertaining to property used in manufacturing. We have previously stated that the interpretation by the agency charged with administering a statute is persuasive, and that great deference should be given to that interpretation if it is within the language of the

[22]*Id.* § 6007.

[23]593 P.2d at 865-66.

[24]*Id.* at 866.

[25]*Id.* at 868-69. The *Kaiser Steel* court recognized that the California State Board of Equalization has permitted tax apportionment "if the purchaser can establish what portion he is using for the exempt purpose and what portion for the nonexempt purpose," although apportionment was not applicable in that case. *Id.* at 869. We need not consider a tax apportionment argument in the present case, however, because it was not raised by the parties.

[26]*Id.* at 867.

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statute.[27] NAC 372.370(1) states that a tax applies to the sale of tangible personal property purchased "for the purpose of use in manufacturing, producing, or processing tangible personal property and not for the purpose of physically incorporating it into the manufactured article to be sold." Subsection (2) of that regulation states that a tax does not apply to the sale of tangible personal property purchased "for the purpose of incorporating it into the manufactured article to be sold." NAC 372.370 focuses on the purpose for which property is purchased. The requirement that the purpose be "primary" is implicit. NAC 372.370 is therefore consistent with NRS 372.050, and sets forth a primary-purpose test.

In so holding, we reject Nevada Cement's additional contention that the Department has historically followed a physical-ingredient test, and has only recently adopted a primary-purpose test in these proceedings. Nevada Cement argues that this change in policy constitutes rulemaking in violation of the Nevada Administrative Procedures Act, which requires notice and public hearing for all proposed regulations or amendments to existing regulations.[28] The Department did not engage in rulemaking; it simply determined how the relevant statutes operated in a specific context.[29] Moreover, because this court independently reviews the relevant statutory provisions, the Department's position is not controlling.

We note that NRS 372.080 is a very specific use tax statute applying only in limited factual circumstances. In particular, as a use tax, it only applies to property purchased outside of this state.[30] Further, it applies to property that is merely stored or processed into other property within Nevada, and is then exported. Here, the record does not indicate the extent to which Nevada Cement either purchased its equipment outside the state or exported its cement. However, under either NRS 372.080 or NRS 372.050, Nevada Cement's equipment is subject to a primary-purpose test.

Under a primary-purpose test, the equipment is taxable as a retail sale. The Department's hearing officer determined that Nevada Cement failed to provide sufficient evidence that it purchased the equipment primarily for the purpose of physically incorporating it into the finished product. The Commission found

[27]*See Collins Discount Liquors v. State of Nevada*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990); *Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986).

[28]*See* NRS 233B.060.

[29]*See K-Mart Corporation v. SIIS*, 101 Nev. 12, 16-17, 693 P.2d 562, 565 (1985).

[30]*See* NRS 372.185.

that the equipment was purchased for the purpose of use in manufacturing, producing or processing tangible personal property. These administrative factual determinations are supported by substantial evidence.

The record demonstrates that Nevada Cement purchased the equipment for the primary purpose of use in manufacturing, and not for the primary purpose of contributing ingredients to the final product. While Nevada Cement accounted for the equipment's contribution of iron to the cement, that contribution was only a secondary purpose. The equipment's gradual disintegration and incorporation into the cement was an unavoidable consequence of the abrasive and heat-intensive manufacturing process. Accordingly, Nevada Cement was not entitled to a tax refund, and the district court erred in granting the refund claim.

CONCLUSION

The primary-purpose test is the proper test to analyze proposed exemptions under NRS 372.050 and NRS 372.080, and the district court erred in applying the physical-ingredient test. Additionally, the record contains substantial evidence to support the Commission's determination that Nevada Cement purchased the equipment for the primary purpose of using it in manufacturing; therefore, the purchase was a retail sale subject to taxation. Accordingly, we reverse the order of the district court holding that Nevada Cement is entitled to a refund and remand this matter to the district court with instructions to reinstate the Commission's decision.

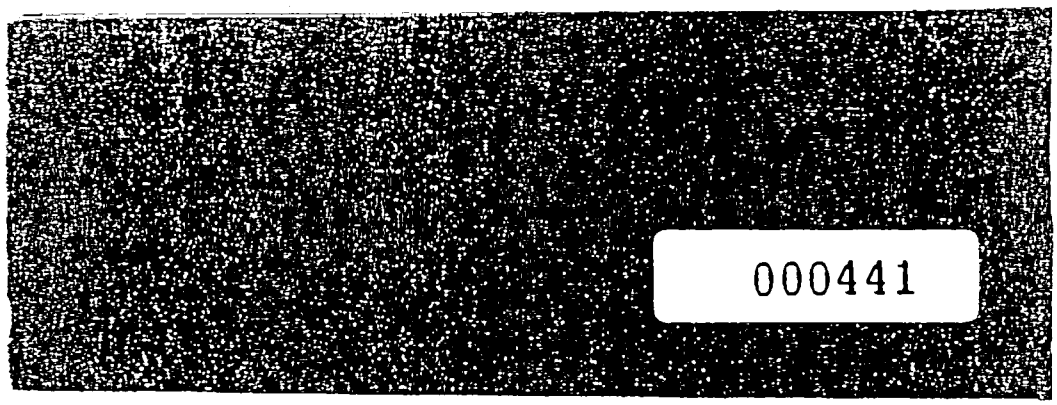
CHARLES LEE RANDOLPH, APPELLANT, v. THE STATE OF NEVADA, RESPONDENT.

No. 36080

December 14, 2001 36 P.3d 424

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, first-degree kidnapping with use of a deadly weapon, and first-degree murder with use of a deadly weapon and from a sentence of death. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Defendant was convicted in the district court of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with the use of a deadly weapon, first-degree kidnapping



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BOB MILLER
Governor

MICHAEL A. PITLOCK
Executive Director

April 23, 1997

David S. McElroy, Esq.
Marshall, Hill, Chastise & de Lipkau
300 Holcomb Professional Center
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Reno, Nevada 89505

IN THE MATTER OF:
Nevada Cement Company
Docket No. 39243
Account No: 509-309-060

The matter of Nevada Cement Company's appeal from the Decision and Order rendered by the administrative hearing officer on October 18, 1996, came on for hearing before the Nevada Tax Commission on March 13, 1997. The appellant Nevada Cement Company was represented by David S. McElroy, Esq.; the Department was represented by John Bartlett, Senior Deputy Attorney General.

This case was before the Commission pursuant to a petition for re-determination filed on March 21, 1996, by appellant Nevada Cement Company seeking refund or credit of sales tax paid on equipment used in the manufacturing of Portland Cement. The amount at issue is $149,793.05 plus interest for a three year period commencing with the 4th quarter of 1992 through the 4th quarter of 1995. The issue on appeal to the Commission is whether Nevada Cement's purchase of this equipment is exempt from the sales tax under NRS 372.155 and NAC 372.370(2), which provide an exemption from sales tax for items which are purchased for resale.

DECISION

After reviewing the record on appeal and the briefs of the parties, and after hearing the oral argument of the parties, the Commission voted unanimously to affirm the Decision and Order rendered by the hearing officer on the grounds that the evidence showed that the equipment was purchased for the purpose of use in manufacturing, producing or processing of tangible personal property and therefore, the sales transactions were subject to the tax under NAC 372.370(1) and NRS 372.155.

FOR THE COMMISSION:

Michael A. Pitlock
Executive Director

cc: Gerald Rodrigue
Dino DiCianno
John Bartlett, SDAG
Tax Commission Members

CERTIFIED MAIL - Z 387 224 202

STATE OF NEVADA

DEPARTMENT OF TAXATION

Nevada Cement	)	Account No: 509-309-060
Petitioner	)	Docket No: 39243
V.	)	
Department of Taxation	)	FINDINGS OF FACT, CONCLUSIONS
Respondent	)	OF LAW AND DECISION

Pursuant to a petition for redetermination, this matter came on for administrative hearing on August 19, 1996, at 1:30 p.m. in Reno, Nevada before Dino DiCianno, Hearing Officer. Appearing for the Petitioner, Nevada Cement, was Mr. David S. Maleroy - attorney for the petitioner, Mr. John Bremner - Vice President Administration, Mr. Robert Condon -Controller and Mr. John Dixon - Plant Manager. Appearing for the Department of Taxation (Department) was Ms. Joeby Barham - Supervising Auditor and Mr. John Bartlett - Senior Deputy Attorney General. A court reporter was present for the petitioner.

The undersigned Hearing Officer having heard and considered the testimony presented and the arguments made, having reviewed and considered the exhibits admitted, and being fully advised in the premises, makes the following findings of fact, conclusions of law and decision.

FINDINGS OF FACT

1. The Department conducted an audit of the Petitioner's records for the period August 1, 1992, through August 31, 1995, and sent the Petitioner a notice of deficiency determination for $38,496.23 on February 29, 1996. This amount was composed of $29,505.93 in tax and $8,990.60 in interest.

2. On March 21, 1996, Petitioner timely filed a petition for redetermination and

requested an oral hearing. The matter was thereafter set for contested case hearing at the mutual convenience of the parties.

3. The Petitioner is a registered retailer in the business of manufacturing and selling portland cement.

4. The Department revised the audit deficiency on March 21, 1996 and subsequently mailed it to the Petitioner on June 13, 1996. The revised notice of deficiency for the period August 1, 1992, through August 31, 1995 is composed of $4,297.27 in tax and $1,581.15 in interest. The Department agreed to delete the portion of the audit with respect to sales tax on transportation charges.

5. The issue here, as presented by the Petitioner, is a claim for a credit or refund of sales tax paid for equipment purchases during the audit period. The Department denied the refund claim of sales tax paid on ingredients or component materials used in the manufacturing of portland cement.

6. The Department's position is that the materials (i.e., steel hammers, grinding balls, castables, cyclone thimbles and tipping valves, feed shelf, kiln chain, kiln brick, kiln nose castings/rear seals, steel grates, side castings, high temperature stainless steel castings, clinker hammers and steel liners) do not become an integral part of the finished product. In addition, they were not purchased with the intent that they become a part of the finished product (i.e., portland cement).

7. The Petitioner's position is that all of the items listed above, during the normal course of business, whether partially or wholly used or consumed in the manufacturing process, become a component or ingredient of the finished product (i.e., portland cement); and therefore should be exempt under NAC 372.370. The Petitioner also contends that, as the items wear away during the manufacturing process, they contribute to the iron content of the finished cement. The iron component can be identified in the finished cement and the total iron component exceeds the iron added

as a separate raw material.

8. The Petitioner also cites Nevada Attorney General's Opinion No. 74 dated June 24, 1955; State v. Southern Craft Corp., 243 Ala. 223, 8 So. 2d 886 (Ala. 1942); State v. U.S. Steel, 206 So. 2d 358 (Ala. 1968); and Bullock v. Lone Star Industries, Inc., 584 S.W. 2d 386 (Tex. Civ. App. - Waco 1979) as further support for the exempt nature of the items aforementioned.

9. The Petitioner provided as Exhibit One photographs of the tangible personal property as identified in subsection 6.

10. Any finding of fact hereinafter construed to constitute a conclusion of law is hereby adopted as such to the same extent as if originally so denominated.

CONCLUSIONS OF LAW

1. The Petitioner's appeal to the undersigned Hearing Officer of the Nevada Department of Taxation was timely filed and that the determination of the merits of said appeal is properly within the jurisdiction of the undersigned Hearing Officer.

2. NRS 372 is the statutory chapter controlling sales and use taxes on the taxability of tangible personal property.

3. NRS 372.185 imposes an excise tax on the storage, use or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this sate.

4. NRS 372.080 states that "'storage' and 'use' do not include the keeping retaining, or exercising any right or power over tangible personal property ... for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state." As stated in Nevada Attorney General's Opinion No. 74 dated June 24, 1955: "there is little doubt as to the intention of the Legislature. It did not intend that any agency, comprising tangible personal property,

which by any circumstance, and however remote, when used or employed in the process of manufacturing the finished product, should be exempt from the provisions of the Sales and Use Tax Act of 1955."

5. NAC 372.370 (1) states that the tax applies to the sale of tangible personal property to persons who purchase it for the purpose of use in manufacturing, producing, or processing tangible personal property and not for the purpose of physically incorporating it into the manufactured article to be sold. Section 2 of NAC 372.370 goes on to state that the tax does not apply to sales of tangible personal property to persons who purchase it for the purpose of incorporating it into the manufactured article to be sold. The Petitioner did not provide sufficient evidence to substantiate that the purchase of the equipment in question was primarily for the purpose of incorporating it into the finished product to be sold.

6. NRS 372.265 states " 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, tangible personal property the gross receipts from the sale of which, or storage, use or other consumption of which, this state is prohibited from taxing under the Constitution or laws of the United States or under the constitution of this state. There is no specific statutory or state constitutional authority to construe an exemption for the tangible personal property in question used in the manufacturing process by the Petitioner. While the court cases cited by the Petitioner provide a compelling argument, the decisions rendered within them were hinged on the fact the individual states so affected had specific statutory exemptions in place to deal with tangible personal property consumed in a manufacturing process.

7. The case of Sierra Pacific Power Company v. Department of Taxation, 96 Nv 295, P 2d 1147 (1980) concluded that exemptions must be strictly construed. Therefore, the Petitioner is liable for the tax on the equipment in question.

8. Any conclusion of law hereinafter construed to constitute a finding of fact is hereby adopted as such to the same extent as if originally so denominated.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the PETITIONER pay tax and interest for the period August 1, 1992, through August 31, 1995 and the claim for a credit or refund of sales tax paid for equipment purchases during that audit period is denied. The Department shall issue a revised billing in accordance with this decision within not more than 30 days. That amount is due within 30 days of the Petitioner's receipt of that billing. Any portions of this deficiency which have not been petitioned are affirmed. This decision may be appealed within 30 days of the date of service to the Petitioner.

DATED this 18th day of October, 1996.

FOR THE DEPARTMENT

Dino DiCianno

Deputy Executive Director

Hearing Officer

cc: Tax Commission Members

EXHIBIT 1

STATE OF NEVADA

NEVADA TAX COMMISSION

SOUTHERN CALIFORNIA EDISON,

Petitioner,

vs.

DEPARTMENT OF TAXATION,

Respondent.

Account No.: 465-197-254

PETITIONER'S BRIEF IN SUPPORT OF CLAIMS FOR REFUND

COMES NOW, Petitioner, Southern California Edison (hereinafter referred to as "Edison"), by and through its counsel of record, Norman J. Azevedo, Esq., hereby submits its Brief in support of Claims for Refund for consideration by the Nevada Tax Commission (hereinafter referred to as "Commission") as follows:

I. Introduction

Attached as Exhibit 1 to this Brief is a copy of Edison's Pre-hearing Statement, as requested by the Nevada Department of Taxation (hereinafter referred to as "Department"), which incorporates all relevant facts for the Commission's consideration. Along with the Pre-hearing Statement, Edison has also submitted two binders of supporting documents, which the Attorney General has indicated he will supply to the Commission for its consideration at the upcoming December 8, 2003 hearing. *See* Exhibit 3.

On November 14, 2003, Edison and the Department met to discuss the upcoming hearing before the Commission. Edison specifically requested the Department to delineate the hearing process for the December 8, 2003 before the Commission, pursuant to NRS 360.291(6) & (9). *See* Exhibit 2.

On November 17, 2003, Edison's legal counsel received a letter from the Office of the Attorney General, in its capacity as counsel to the Department, delineating the hearing process and advising that Edison's amended claims for refund were untimely and that consequently, documentary evidence submitted on November 10th with the exception of the materials submitted

in connection with its original claims, may be irrelevant. *See* Exhibit 3. The Department's counsel further stated that the Department would be submitting a pre-hearing brief and encouraged Edison to do the same.

Edison will clearly show that the claims for refund as amended were both timely filed and filed in compliance with Nevada law. Edison will further show that as a matter of fact and law, an overpayment of tax has occurred and Edison is entitled to a refund. Edison will address the procedural requirements of its claims for refund first, and then second, address the substance of the claims for refund.

II. Procedure

The November 17, 2003 correspondence from the Office of Attorney General on behalf of the Department delineates four points for Edison's consideration which are as follows:

1) The Office of the Attorney General advocates Edison to place this matter before the district court given the nature of Edison's constitutional claims.

2) The Office of the Attorney General suggests that Edison is not entitled to an evidentiary hearing before the Commission or the Department to address the Department's denial of Edison's claims for refund.

3) Edison is time barred from amending its claim for refunds.

4) The Office of the Attorney General's delineation of the hearing process suggests that Edison should not have relied on written representations of the Department.

Edison will show that all of the points raised by the Attorney General have been previously adjudicated or legislated in a manner that directly contradict the conclusions reached by the Attorney General in the November 17, 2003 correspondence.

Moreover, Edison will show that the Department has directed Edison to follow three separate and distinctly different processes to address Edison's claims for refund. The first two processes in which Edison was instructed to pursue its refund claim contemplated Edison being able to participate in an evidentiary hearing. Only upon receipt of the November 17, 2003 letter from the Attorney General did Edison become aware that an evidentiary hearing may not now be available.

Edison is required by law to seek relief from
the Commission prior to commencing a district court action

The Attorney General has instructed Edison that in order to pursue a constitutional claim, it may be advantageous for Edison to place this matter before the district court, thereby alluding to Edison to bypass the Commission. *See* Footnote 1, page 2 of the November 17, 2003 letter from the Attorney General. As a matter of law, the Attorney General's statement in this regard is erroneous. The Attorney General intimates that since Edison's claims have constitutional aspects, those claims should properly be considered by a district court as opposed to the Commission. The issue of whether the Commission should consider constitutional claims has previously been addressed by the district court.

Attached as Exhibit 4 is a copy of *Goodman Oil Company vs. State of Nevada, Dept. of Taxation*, Case No. 98-10370A, First Judicial District Court, November 17, 1999. In this case, the District Court Judge specifically commented on the legal advice given to the Commission by its then counsel. Specifically, legal counsel to the Commission advised the Commission that the Commission was legally barred from considering constitutional issues and those types of claims can only be considered by the district courts and, if necessary, the Nevada Supreme Court. On page 4 of the *Goodman* decision, the district court found this advice by the Attorney General to be clearly erroneous indicating that the Commission should address constitutional claims brought before them. In light of this judicial decision, the Attorney General's suggested directive to Edison to pursue its constitutional claims in furtherance of its refund in court, prior to seeking a final decision of the Commission, is misplaced because of the reasoning delineated in the *Goodman* decision.

Moreover, Senate Bill 362 from the 1999 Session of the Nevada Legislature specifically addressed the administrative process that taxpayers must follow in addressing claims for refund before the Commission. Prior to the passage of S.B. 362, a taxpayer whose claim for refund was denied by the Department was required to proceed directly to district court in lieu of proceeding to the Commission for an administrative hearing. *See* Exhibit 5: Copy of Senate Committee minutes discussing S.B. 362 and specifically, the Taxpayers' Bill of Rights. Page 4 of the

minutes state that "In some instances businesses found that 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 position advocated by the Attorney General that Edison should proceed directly to district court contradicts the stated reason for this legislative change to Nevada's Taxpayers' Bill of Rights. *See* Exhibit 6: Copy of S.B. 362. Sections 33 and 34 of S.B. 362 delineate the change promulgated by the Nevada Legislature in 1999 to add the requirement that prior to any taxpayer proceeding to district court on a claim for refund, that the taxpayer must first obtain a "final decision" of the Commission. *See* Section 33 of the Minutes in Exhibit 5. Thus, it is clear that all taxpayers must obtain a final decision of the Commission before proceeding to district court, irrespective of whether the claim for refund is factual, legal or constitutional in nature. The tax policy justification for requiring taxpayers to obtain a final decision of the Commission prior to proceeding to district court is premised upon the fundamental premise in Nevada tax law that taxpayers exhaust its administrative remedies first, before proceeding to court. It is through the exhaustion of the administrative remedies that many of taxpayer's cases are resolved without requiring the need to seek judicial intervention.

Edison is as a matter of law entitled to an evidentiary hearing before the Nevada Tax Commission

The Attorney General's Office suggests that Edison is not entitled to an evidentiary hearing. The Attorney General stated in the November 17, 2003 correspondence that a taxpayer who has a claim for refund denied by the Department is not entitled to an evidentiary hearing before the Commission or its designated hearing officer.[1] The Attorney General's position is based upon its reading of NRS 372.685. The Attorney General's position in this regard is not

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[1] Edison had been requesting how it was to proceed in an evidentiary hearing since July 14, 2003. *See* Exhibit 7. Only upon receipt of the November 17, 2003 correspondence did Edison become aware that the ability to have an evidentiary hearing was made by the Department in the event the Department determined that a factual dispute exists. The Attorney General's statements in this regard are inconsistent with the express provisions of chapter 233B of the Nevada Revised Statutes.

only erroneous as a matter of law, but also contradicts the previously stated position of the Attorney General's client in this case, the Department.

The Department had previously informed Edison, in writing, that it would be entitled to an administrative evidentiary hearing, as follows: The Department sent Edison a Petition for Redetermination form with the denial letters. The Department directed Edison to submit the petition form to dispute the Department's denial of Edison's claims for refund. The petition form provided by the Department to Edison expressly entitled Edison to an evidentiary hearing. *See* Exhibit 8. Again on May 28, 2003, the administrative hearing officer assigned to the case from the Department sent Edison's legal counsel a letter and again afforded Edison the legal right to an evidentiary hearing. *See* Exhibit 9. Finally, on July 2, 2003, a Supervising Auditor sent legal counsel for Edison a letter "redirecting the case" to the Commission and representing to Edison that the hearing before the Commission will be conducted in accordance with chapter 233B of the Nevada Revised Statutes. *See* Exhibit 10.

NRS 233B.032 defines contested cases to be "...a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed."

The December 8, 2003 hearing before the Commission in which Edison will be addressing the denial of its refund claims is a hearing which will address the legal rights of Edison regarding its claims for refund and ultimately, Edison's entitlement to return of its monies. Accordingly, the December 8, 2003 hearing before the Commission is a contested case pursuant to NRS 233B.032. The parties participating in a "contested case" are entitled to submit evidence pursuant to NRS 233B.123.[2] Thus Edison is entitled to an evidentiary hearing before

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[2] NRS 233B.123 Evidence. In contested cases:
1. Irrelevant, immaterial or unduly repetitious evidence must be excluded. Evidence may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and must be noted in the record. Subject to the requirements of this subsection, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

the Commission.

Chapter 233B of the Nevada Revised Statutes governs hearings before the Commission and affords taxpayers evidentiary hearings when taxpayers are addressing their tax matters before the Department. Edison has expended much effort and resources preparing for the evidentiary hearing that Edison is now told it will not have by the Attorney General.

The Taxpayers' Bill of Rights provides all the taxpayers in the State of Nevada to consistency of treatment. *See* NRS 360.291(1). Edison will submit to the Commission two examples wherein the Department had previously afforded taxpayers who were disputing a denial of their claim for refund an administrative evidentiary hearing, the same evidentiary hearing which the Attorney General is seeking to deny Edison. As such, the Attorney General's desire in this regard is violative of the Taxpayers' Bill of Rights. *See* Exhibit 11: Copy of *State, Tax Comm'n v. Nevada Cement Co.*, 117 Nev. 960, 36 P.3d 418 (2001). Edison has highlighted for the Commission's convenience the relevant portions of that opinion that illustrate that Nevada Cement, the taxpayer, was afforded both an evidentiary hearing before an administrative hearing officer as well as a modified evidentiary hearing before the Commission. *See* NAC 360.175(5). It begs the question why that taxpayer is entitled to two evidentiary administrative hearings and Edison is being denied even one evidentiary administrative hearing. Clearly, the Nevada Taxpayers' Bill of Rights requires the Department to treat taxpayers in a consistent fashion and as the *Nevada Cement* decision illustrates, Edison is being treated both inconsistently and inappropriately.

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2. Documentary evidence may be received in the form of authenticated copies or excerpts, if the original is not readily available. Upon request, parties must be given an opportunity to compare the copy with the original.

3. Every witness shall declare, by oath or affirmation, that he will testify truthfully.

4. Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination, impeach any witness, regardless of which party first called him to testify, and rebut the evidence against him.

5. Notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the specialized knowledge of the agency. Parties must be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they must be afforded an opportunity to contest the material so noticed. The experience, technical competence and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

In addition, attached as Exhibit 12 is a copy of a recent administrative hearing officer decision in the matter of *Daimler Chrysler Services North America vs. Department of Taxation*, Nevada Tax Commission Decision dated May 3, 2003. As illustrated in that decision, the taxpayer was also afforded an administrative evidentiary hearing before an administrative hearing officer and then, ultimately, the matter proceeded to the Commission, and then to district court. Again, the taxpayer was provided, as is appropriate, an administrative evidentiary hearing before a hearing officer.

Finally, what is most troubling about the Attorney General's position of denying Edison an evidentiary hearing is that the Attorney General is not even familiar with the facts of Edison's case currently before the Department. The Attorney General, in the November 17, 2003 letter, states "The statutory process for resolving claims for refund does not include an evidentiary hearing unless (a) the Department fails to mail notice of action on a claim within 6 months after the claim is filed." The Attorney General did not review the procedural history of this case as the first two claims for refund filed by Edison did not receive a denial letter from the Department until after the expiration of the 6-month window referenced above.[3] Thus, even if the Attorney General's legal interpretation is correct, which Edison adamantly disputes Edison is entitled to an evidentiary hearing based on the Attorney General's interpretation of the applicable legal authority.

Edison timely filed its claims for refund
and properly amended its claims for refund

The Attorney General takes the position that NRS 372.645 and NAC 360.480 prohibit Edison from submitting evidence to support its claims for refund and does not permit a taxpayer from amending its claims for refund. The Attorney General's interpretation is that a taxpayer must submit all evidence and delineate all grounds upon which a claim for refund is based at the time of the first submission of the claims for refund. The Attorney General further claims that

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[3] The Department, upon receipt for each claim for refund, did represent to Edison that the matter was going to be referred to audit and that Edison would be "notified" of the results upon completion of the audit. The audit, even though commenced, was never performed or completed and thus, no notification has ever been sent to Edison.

in the event a taxpayer attempts to submit evidence after submission of a claim for refund or attempts to amend a claim for refund, the taxpayer is forever precluded from submitting additional evidence or additional grounds for the claim and is prohibited from amending their claims for refund. This position of the Attorney General is in direct contradiction to *Hansen-Neiderhauser v. Nev. Tax Comm'n*, 81 Nev. 307, 402 P.2d 480 (1965), and the Nevada Revised Statutes. The Nevada Supreme Court in *Hansen-Neiderhauser* has specifically interpreted NRS 372.645. *See* Exhibit 13.

The Department directed Edison to file a petition for redetermination within 45 days after the Department denied Edison's claims for refund. *See* Exhibit 14. The Department provided Edison with the form to submit its petition for redetermination. *See* Exhibit 8. Edison filed the petition as directed by the Department. The duties and obligations of the Department and taxpayers regarding petitions for redeterminations are governed by NRS 360.360 through NRS 360.400. Specifically relevant to this position taken by the Attorney General is NRS 360.380, which reads, "[t]he department may decrease or increase the amount of the determination before it becomes final, but the amount may be increased only if a claim for the increase is asserted by the department at or before the hearing."

Thus, a determination can be increased or decreased by the Department at any point prior to receipt of a final decision. In this case, Edison has never received a final decision as Edison has never been afforded a hearing. Moreover, the claims as originally filed by Edison were timely. As such, there exists no procedural obstacle for Edison to amend its claims for refund to either increase or decrease the amount of the Department's determination. The petition process, as delineated in statute, contemplates the exchange of information between the taxpayer and the Department and the possibility for an increase or decrease of a previous determination rendered by the Department. Only upon the rendering of a final decision does the ability of the Department to increase or decrease a previous determination cease. Moreover, the statutory process that the Department directed Edison to pursue expressly permits the increasing or decreasing of the Department's determination. For the Attorney General to allege that Edison is time barred or otherwise precluded from amending its claim for refund is, at best, misleading as

the Nevada Legislature has afforded every other taxpayer the ability and right to seek an increase or decrease of a determination of the Department, at any time, prior to the rendering of a final decision. This statutory right applies to Edison.

As is the case in Edison's claims for refund, the State in *Hansen-Neiderhauser* took the position that since the taxpayer failed to specifically delineate a ground for relief, the taxpayer was precluded from raising that issue in the subsequent district court proceeding. The Nevada Supreme Court rejected this overly-narrow view of NRS 372.645. The Nevada Supreme Court, in *Hansen*, set forth the standard in interpreting NRS 372.645. The Supreme Court decided that a taxpayer satisfies his obligation in filing an administrative claim for refund when the taxpayer states in the claim for refund " the facts constituting the claim encompass the same basic dispute, substantial compliance with the statute requiring the claim is sufficient." In *Hansen*, the Court explained the rational for its interpretation of NRS 372.645. The Court stated:

> 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. Thus, when the claim substantially complies with the legislative requirements, these ends are subserved. See *Frasier vs. Cowlitz County*, 67 Wash. 312, 121P.459 (1912).

Based on the foregoing analysis, the rationale for the administrative claim for refund and the delineation of the grounds therein is to allow the government to investigate the claim while the claim is recent to avoid spurious and unjust claims. In Edison's case, the Department commenced an audit which was purportedly to verify [investigate] the claims for refund filed but the Department failed to conclude the audit. The Department had the opportunity to investigate, seek information related to, and verify the claims for refund submitted by Edison and chose not to do so. It is unconscionable for the Department to now allege that Edison has failed to adhere to the procedural requirements for filing a claim for refund when the Department has failed to comply with the obligations imposed upon them by the Commission and the Nevada Legislature.

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Edison, a taxpayer in the State of Nevada, should have the right to rely on the express statutory procedures that they were directed to pursue by the Department. The Attorney General[4] is offering to the Commission, and Edison, a new and novel interpretation of the procedures that a taxpayer must comply with in order to pursue a claim for refund. Edison must be able to rely on NRS 360.380, as does every other taxpayer in the State. In the event the Commission is desirous of changing 4 years of established precedent, then it would be necessary to regulate the "new process" prior to imposing the new requirements on taxpayers. This would give all taxpayers notice of the new procedures they must follow to pursue a claim for refund.

In the event the Commission deems the Department's suggestion that Edison's claims were untimely filed, Edison requests the Commission decide on the substantive merit of its timely-filed amended claims. *See* Exhibit 15: Claims for Refund schedule provided by Edison.

Edison has a right to rely on the written correspondence sent to it by the Department

The Department has made a variety of representations to Edison, in writing, and based upon these representations, Edison has relied and submitted amended claims for refund and prepared for an upcoming evidentiary hearing before the Commission. In its November 17, 2003 correspondence, the Attorney General fails to address either directly or indirectly the fact that Edison has been repeatedly told over the last 2½ years how to proceed in pursuing its refund claims and now that Edison has followed the directives of the Department, they are now being punished for following the Department's directives. NRS 360.294 makes it abundantly clear that taxpayers have the right to rely on the written representation of the Department. In the event that a taxpayer does rely on the written directives of the Department, then such reliance should not act to prejudice the taxpayer. Specifically, the last legislative change to the Taxpayers' Bill of Rights which occurred as a result of S.B. 362, amended NRS 360.294 to give an express delineation that taxpayers should not be harmed for relying upon written directives from the

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[4] The Attorney General references the Nevada Rules of Civil Procedure to substantiate its new and novel interpretation of the claim for refund procedures. The rules of civil procedure are clearly inapplicable in this case and no reliance should be placed upon them. Conversely, the Attorney General should have relied upon the existing Nevada precedent directly on point.

Department. The Attorney General is asking this Commission to punish Edison for following the procedures set out for Edison by the Department.

Conclusion to the procedural issues raised by the Department

Edison has complied with every request of the Department in pursuing its claims for refund. As a result of Edison's compliance with the Department's requests, Edison is now being told, for the first time after 2½ years that its claims for refund are defective. As shown above, every point raised by the Attorney General, is erroneous either as a matter of a previous adjudication or a previous legislative act. Accordingly, there is no procedural bar, albeit time or otherwise, that precludes the Commission from considering Edison's amended claims for refund.

What is most concerning to Edison is the absence of any reference to the Taxpayers' Bill of Rights provision which directly addresses the procedural issues raised by the Attorney General. Specifically, NRS 360.2935 establishes that once it is determined a taxpayer has overpaid his taxes, then the taxpayer is entitled to a refund of the overpayment, with interest. In Nevada, the Taxpayers' Bill of Rights preclude the Department from interpreting any portion of Title 32 in a manner inconsistent with the rights afforded to taxpayers under the Taxpayers' Bill of Rights. The procedural issues raised by the Attorney General in this case are intended to deny Edison the right to a refund that was afforded to it under the Taxpayers' Bill of Rights.

The Commission has previously seen a very similar posture by the Department in a refund case before the Commission. In the *Newmont* case, that taxpayer was subjected to similar procedural maneuvering by the Department in an attempt to deny the taxpayer a refund of monies and the payment of interest. The Commission rejected the procedural maneuvering by the Department, based upon the express provisions of the Taxpayers' Bill of Rights. As was done in the *Newmont* case, the Commission should reject the novel interpretation of the claim for refund procedures being offered by the Attorney General.

III. The Substantive Basis for Edison's Claims for Refund

Edison's claims for refund are primarily based on three separate grounds:

1. The coal consumed at the Mohave Plant is exempt from the imposition of the use tax because the coal would be subject to the net proceeds of mine

tax had it been extracted from a mine located within the State of Nevada.

2. Edison's accrual of use tax on the payments to Peabody Coal Company (hereinafter referred to as "Peabody") for the indemnification for the taxes imposed on Peabody is misplaced because the taxes are not tangible personal property nor should the reimbursement for those taxes be included in the measure for the use tax.

3. If coal consumed at the Mohave Plant is exempt from the imposition of the use tax, the transportation charged related thereto are also exempt. Additionally, Edison's accrual of use tax on the payments to Black Mesa Pipeline, Inc. (hereinafter referred to as "Black Mesa") for the indemnification for the taxes imposed on Black Mesa is misplaced because the taxes are not tangible personal property nor should the reimbursement for those taxes be included in the measure for the use tax.

Given the fact that the Attorney General has indicated in its November 17, 2003 correspondence that it intends to raise a variety of procedural issues, Edison is only addressing the substantive issues below.

The coal consumed at the Mohave Plant is exempt from taxation pursuant to NRS 372.270

Edison purchases coal from Peabody who extracts the coal from a mine located in the State of Arizona. The coal is extracted from the Mohave dedicated area, which is on land that belongs to the Navajo Nation and Hopi Tribe. After extraction, the coal is deposited into a pipeline and then transported 273 miles from the mine site to the Mohave Plant located in Nevada. Water is added to the coal mine in order to transport it through the pipeline. Once the coal reaches the plant site, the water is extracted from the coal by centrifuging then milling the coal to dry it. The mineral is then consumed by Edison by burning the coal in the Mohave Plant to generate electricity. The extracted water is used in the plant's circulating water system for cooling purposes.

The initial inquiry to determine whether the coal is subject to the imposition of use tax is

to determine whether, if the coal was purchased in the State of Nevada, that coal be subject to the imposition of the sales tax. Specifically, NRS 372.185(2) provides "[t]he [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." This statute establishes the complimentary nature of the sales and use tax as prescribed in the State of Nevada. Moreover, this statute determines which transactions are subject to the imposition of use tax. The Commission has previously addressed the complimentary nature of the sales and use tax and has affirmed the application of NRS 372.185(2).[5] *See* Exhibit 16: Copy of *In the Matter of Advo, Inc.*, Nevada Tax Commission Decision dated June 17, 2002, which addresses the distribution of printing materials. Thus, the first inquiry that Edison is required to make is if the coal was purchased from a miner in the State of Nevada, would Edison have been charged sales tax on its purchase of the coal by Peabody? The answer to this question is simply "no."

NRS 372.270 provides that "[t]here 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." Coal is a mineral as defined in NRS 362.010(2) [hydrocarbon]. Moreover, NRS 362.010(1) defines a mine to include coal mines. Clearly, coal is subject to the imposition of the tax on proceeds of minerals imposed by chapter 362 of the NRS.

The Executive Director of the Department acknowledged during our November 14, 2003 meeting that coal and coal mines are subject to the imposition of the tax imposed pursuant to chapter 362 of the NRS. Edison has supplied documentation to the Commission that coal has in fact been mined in Nevada.

The express language of NRS 372.270 exempts from the imposition of both the sales and use tax gross proceeds which would be subject to the taxes levied pursuant to chapter 362 of the NRS. Thus, by the express terms of NRS 372.270, the coal consumed by Edison at the Mohave

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[5] For purposes of this Brief, Edison will only refer to chapter 372 of the NRS even though NRS 374 of the Local School Support Tax also directly impacts the refund claims filed by Edison. In the event the statutes are identical between NRS 372 and NRS 374, no reference to NRS 374 will be made in this Brief in order to facilitate a less cumbersome document. In the event that a different statutory provision exists between chapter 372 and chapter 374 it will be so noted.

Plant is exempt from the imposition of the use tax imposed by virtue of chapters 372 and 374 of the Nevada Revised Statutes.[6] Edison requested at the November 14, 2003 meeting with the Department why NRS 372.270 is inapplicable and the Department offered no response as to why Edison's analysis in this regard is erroneous as a matter of law or fact. Edison must construe the Department's silence as an admission that the coal consumed is in fact exempt under NRS 372.270.

Any interpretation offered by the Department that the coal consumed at the Mohave Plant would be subject to the imposition of the use tax would run afoul of NRS 372.185(2). The Department has offered that only minerals extracted from Nevada mines are exempt under NRS 372.270. This interpretation offered by the Attorney General adds words to the statute that are not present. First, NRS 372.270 exempts minerals from the imposition of the sales tax and the use tax. The use tax is applicable to purchases of tangible personal property which are purchased out of state and then are subsequently used in the State of Nevada. *See* NRS 372.185(2). To accept the Attorney General's interpretation of NRS 372.270 that this exemption is only applicable to minerals mined in the State of Nevada would result in the express provisions of NRS 372.270 that provides for a use tax exemption to never occur. Moreover, the position of the Attorney General that NRS 372.270 is only applicable to minerals mined in Nevada creates a legally and constitutionally impermissible imbalance in the complementary nature of the sales and use tax. The Attorney General's interpretation would eliminate the complementary nature of the sales and use tax and would, in effect, be eliminated as applied to the consumption of minerals in the State of Nevada. Moreover, this type of interpretation would put consumers like Edison in the situation that they would only be subject to the use tax if they were to purchase the

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[6] The Attorney General has argued that the coal being consumed by Edison is a mine by-product as opposed to a mineral. Mine By-products do not qualify for the exemption provided in NRS 372.270 The purported authority for the Attorney General's position is AGO 72 (June 22, 1955). The Attorney General states that since hydrated lime cannot avail itself of the exemption found in NRS 372.270, the coal being consumed by Edison at the Mohave Plant is similary not able to utilize the exemption found in NRS 372.270 because the coal was transported through the pipeline with water. The Attorney General referred to the coal as hydrated coal. The Attorney General does not understand the process in making hydrated lime and the difference between lime and hydrated lime. Attached as Exhibit 17 is information addressing the process of manufacturing lime into hydrated lime. As set forth in Exhibit 17, the process of turning lime into hydrated lime is a manufacturing process. The sole purpose of putting water in the pipeline with the coal is to transport the coal. In fact, the water actually lessens the combustible nature of the coal.

materials from an out-of-state miner. The Commission noted in *Advo, Inc.*, that the sales and use tax are, in fact, intended to be complementary. In that case, the Commission had previously determined that *In the Matter of Spiegel, Inc.*, Docket No. 41724 (June 17, 2002) that the distribution of printed materials did not constitute a taxable use within the State of Nevada. *See* Exhibit 18. The impact of that decision was that only Nevada based retailers were to collect the sales tax while a consumer who purchased the printed materials outside the state was required to accrue the use tax. The complimentary nature of the sales and use tax was out of balance. The Commission recognized this in the *Advo, Inc.* decision and reversed its prior ruling in this regard. Based on these decisions of the Commission, Edison is entitled to exempt the coal consumed at the Mohave Plant.

Edison should not have accrued use tax
on the taxes reimbursed to Peabody

Alternatively, Edison accrued use tax on the taxes reimbursed to Peabody as a result of extraction of the coal for the mine site. Again, referring to NRS 372.185(2), the first determination that the Commission will need to make is whether the reimbursement of taxes would be subject to the imposition of the sales tax if the reimbursement were to occur in the State of Nevada. Edison reimburses Peabody for the following taxes:

1) The Arizona Transaction Privilege Tax;
2) The State of Arizona Ad Valorem Tax;
3) The Possessory Interest Tax (PIT) levied by the Navajo Nation;
4) The Business Activity Tax (BAT) imposed by the Navajo Nation;[7]
5) Black Lung Fees imposed by the Federal Government; and
6) Fees attributable to the Surface Mining Control & Reclamation Act of 1977 (SMCRA) paid to the Federal Government.

The sales tax is only imposed upon the sale of items of tangible personal property. *See*

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[7] The Attorney General states that since there is similar tax to the net proceeds of mines tax being imposed outside the State of Nevada, that no violation of the Commerce Clause could occur. This statement is incorrect as the BAT tax functions in a manner identical to the net proceeds of mines tax except the BAT tax permits less deductions.

NRS 372.060. Tangible personal property is defined as "any personal property which can be seen weighed, measured, felt or touched, or which is any manner perceptible to the senses." *See* NRS 372.085. Taxes are not tangible personal property as defined by NRS 372.085. Thus, the reimbursement for the transactions in issue is not subject to the imposition of the sales and use tax as the reimbursement in question does not constitute a sale as that term is defined in NRS 372.060.

In its denial letter to Edison, the Department stated that accrual of the use tax "on excise taxes paid to Peabody are properly included in your calculation for use taxes due Nevada." *See* Exhibit 14. The Department relied upon the definition of gross receipts contained in NRS 372.025.[8] A review of NRS 372.025 indicates that statute delineates the measure applicable to sales tax. The express language of NRS 372.025 does not indicate that it is in anyway applicable to the measure for the use tax. The measure for the use tax is the acquisition cost of the item of

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[8] NRS 372.025 "Gross receipts" defined.

1. "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold. However, in accordance with such rules and regulations as the Tax Commission may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.

(b) The cost of the materials used, labor or service cost, interest paid, losses or any other expense.

(c) The cost of transportation of the property prior to its sale to the purchaser.

2. The total amount of the sale or lease or rental price includes all of the following:

(a) Any services that are a part of the sale.

(b) All receipts, cash, credits and property of any kind.

(c) Any amount for which credit is allowed by the seller to the purchaser.

3. "Gross receipts" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) Sale price of property returned by customers when the full sale price is refunded either in cash or credit; but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The price received for labor or services used in installing or applying the property sold.

(d) The amount of any tax (not including, however, any manufacturers' or importers' excise tax) imposed by the United States upon or with respect to retail sales, whether imposed upon the retailer or the consumer.

4. For purposes of the sales tax, if the retailers establish to the satisfaction of the Tax Commission that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

tangible personal property. Moreover, there are a variety of regulatory applications where taxes paid are specifically excluded from either the acquisition costs of an item of personal property or, in the alternative, in the determination of the value of minerals being subjected to the imposition of the net proceeds of mines tax. *See* NAC 361. 134 and NAC 362.050(2)(e). Again, these regulatory references indicate that it has been the tax policy of this state, as determined by the Commission, that taxes are not to be accrued on taxes previously paid to the State of Nevada or any other state. The Department has represented to Edison that it must accrue use tax on all other taxes paid to other states and Indian Nations.[9]

The Attorney General argues in its brief that absent a exclusion contained in NRS 372.025, that all monies expended by a taxpayer in a contract in which tangible personal property is acquired is subject to the imposition of the use tax. The Attorney General fails to address the regulation of the Commission which directly rebuts the statements of the Attorney General. In 1968, the Commission addressed the issue of the measure of the sales tax in credit transactions. Specifically, NAC 372.050 acknowledges that the measure subject to the imposition of the sales tax/use tax does not include all charges imposed in the contract. In fact, provided the charges are separately stated, only the charges attributable to the acquisition of the item of tangible personal property is subject to the imposition of the tax. NAC 372.050 provides as follows:

> 1. If tangible personal property is sold on credit, either under a conditional sale or lease contract or otherwise, the whole amount of the contract is taxable unless the retailer keeps adequate and complete records to show separately the sales price of the tangible personal property, and the insurance, interest, finance, carrying, and other charges made in the contract. If such records are kept by the retailer, the insurance, interest, finance, and carrying charges may be excluded from the computation of the tax.
> 2. The total amount of the tax on the entire sales price in credit transactions is due on the due date of the return to be filed after the close of the reporting period in which the sale was made.

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[9] The Attorney General argues that because there is no express exclusion set forth in NRS 372.025 [Definition of Gross Receipts] for taxes paid to other jurisdictions, that no such deduction should be permitted. The Attorney General's analysis is premised upon the concept that the sales and use tax is in fact complementary and thus, the measure of the use tax should be the equivalent to the sales tax. The Attorney General offers no authority for this proposition. Moreover, the Attorney General as to the application of the exemption statute in question, NRS 372.270, rejects the complementary nature of the sales and use tax. The Attorney General's arguments are facially inconsistent. The Attorney General also fails to reconcile NAC 372.055 which provides an entire exclusion from the use tax when a taxpayer remits an excise tax to another jurisdiction. There exists no exclusion from the express language of NRS 372.025 in this regard.

3. No reduction in the amount of tax payable by the retailer is allowable by reason of his transfer at a discount of a conditional sale or lease contract or other evidence of indebtedness.
[Tax Comm'n, Combined Sales and Use Tax Ruling No. 35, eff. 3-1-68]

The contract between Edison and Peabody is a credit transaction. The amended coal supply agreement in Section11 addresses the billing and credit aspects of this contractual relationship between Edison and Peabody. In fact, Edison is charged interest and has remitted use tax on the interest charges. The charges for the taxes reimbursed by Edison to Peabody are the specific charges contemplated in NAC 372.050. Edison separately stated the charges for the taxes as is required by NAC 372.050.

The reference to the definition of gross receipts in the Department's denial letter is instructive. The Department is offering that the sales and use tax is complimentary in nature and that the measure of the use tax is to be determined by looking to the definition of gross receipts. In the event that the Department is correct, then the coal is exempt because NRS 372.270 is applicable. Either way, the consumption of coal consumed at the Mohave Plant is exempt from the imposition of use tax.

IV. CONCLUSION

Edison has timely and properly filed administrative claims for refund. Edison has adhered to the directives of the Department in pursuing its claims for refund. The Department is seeking to admonish Edison for complying with the Department's directives. The Taxpayers' Bill of Rights was promulgated by the Nevada Legislature to preclude this type of treatment of taxpayers by the Department.

The sales and use tax law is, by its very nature, intended to be complimentary. The Department's interpretation of the use tax law, as applied to the consumption of the coal at the Mohave Plant, ignores this complimentary nature of Nevada sales and use tax. Edison is being punished for purchasing the coal from a miner in Arizona, as opposed to purchasing the coal from a miner in Nevada. This result of the Department's interpretation of the use tax statutes in Nevada not only runs afoul of the express provisions of chapter 372 of the NRS itself, but also violates the constitutional principles delineated in the Commerce Clause of the United States.

Based on the foregoing Brief, papers on file and claims previously filed, Edison respectfully requests refund of its monies previously paid, including interest, pursuant to NRS 360.2935. Edison also respectfully requests an order from the Commission indicating that Edison can stop accruing use tax on future purchases of coal. *See* NRS 233B.120.

Edison respectfully requests the ability to file a post hearing brief after the conclusion of the December 8, 2003 hearing in which Edison can address in detail the substantive issues underlying its claims for refund.

DATED this 24th day of November, 2003.

NORMAN J. AZEVEDO, ESQ.
338 California Avenue
Reno, NV 89509
775.329.6770
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2003, I caused a hand-delivered copy of the foregoing to be delivered to the following, via Reno-Carson Messenger Service:

Gregory Zunino, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89710

Rhonda Azevedo

Based on the foregoing Brief, papers on file and claims previously filed, Edison respectfully requests refund of its monies previously paid, including interest, pursuant to NRS 360.2935. Edison also respectfully requests an order from the Commission indicating that Edison can stop accruing use tax on future purchases of coal. *See* NRS 233B.120.

Edison respectfully requests the ability to file a post hearing brief after the conclusion of the December 8, 2003 hearing in which Edison can address in detail the substantive issues underlying its claims for refund.

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Gregory Zunino, Esq.
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89710

Rhonda Azevedo

Exhibit 1

STATE OF NEVADA

NEVADA TAX COMMISSION

SOUTHERN CALIFORNIA EDISON, Petitioner, vs. DEPARTMENT OF TAXATION, Respondent.	Account No.: 465-197-254 **PETITIONER'S PRE-HEARING STATEMENT**

COMES NOW, Petitioner, Southern California Edison (hereinafter referred to as "Edison"), by and through its counsel of record, Norman J. Azevedo, Esq., and pursuant to a request of the Nevada Tax Commission, hereby submits its Pre-Hearing Statement as follows:

ISSUES FOR CONSIDERATION BY NEVADA TAX COMMISSION

1) Whether the mining operator, Peabody Coal Company (hereinafter referred to as "Peabody"), would be required to collect a sales tax on the coal if the coal had been mined in Nevada and then sold to Edison for consumption at the Mohave Plant. .

2) Whether Edison is required to accrue use tax on the coal consumed (burned) at the Mohave Plant, pursuant to NRS 372.185(2).

3) Whether the exemption applicable to the sale of net proceeds of mines found at NRS 372.270 and NRS 374.275 is applicable to the consumption of coal at the Mohave Plant.

4) In the event that the coal is subject to the imposition of use tax, then what amount of monies remitted by Edison to the mining operator are subject to the imposition of use tax.

   a) Whether Edison is required to accrue use tax on the monies remitted to the mining operation for the payment of taxes levied on or as a result of the extraction of the coal from the mine.

b) Whether Edison is required to accrue use tax on monies paid for royalties.

c) Whether Edison is required to accrue use tax on the transportation charges for shipping (freight) the coal through the pipeline.

I. Substantive Statement of Facts

Southern California Edison Company[1] is a public utility, which provides electric service in Central and Southern California. Edison owns and operates various generating plants, including its 56% undivided interest in the Mohave Plant which is located in Clark County.

The Mohave Plant consists of two generating units, which produce electricity sufficient to energize about 1.5 million homes. Coal is the primary fuel used for electric generation at the Mohave Plant. Edison has contracted with Peabody to supply Edison with sufficient coal to provide fuel to the Mohave Plant.[2] Peabody has been providing coal to the Mohave Plant since November 1, 1970. The coal is mined from the Black Mesa Mine, which is located in northeast Arizona in the Mohave Dedicated Area as reflected in the Map attached as Exhibit 1. The mine is on lands which belong to the Navajo Nation and the Hopi Tribe. Peabody has agreed to provide the Mohave Plant with at least 400,000 tons of coal per month during the duration of the Mohave Project Coal Supply Agreement.

After extraction, the coal is deposited into a 273-mile-long pipeline operated by Black Mesa Pipeline, Inc. (hereinafter referred to as "Black Mesa") for delivery to the Mohave Plant in

---

[1] Edison is the operator of the Mohave Plant, which is jointly owned by Edison, Nevada Power Company, Salt River Project Agricultural Improvement and Power District and the Department of Water and Power of the City of Los Angeles. The relationship of the parties is governed by the Mohave Project Plant Site Conveyance and Co-Tenancy Agreement. Reference to Edison in this Statement of Facts will refer to all associates referred to above. *See* Exhibit 3.

[2] The supply of coal between Peabody and Edison is currently governed by the Amended Mohave Project Coal Supply Agreement dated May 26, 1976. There was a predecessor agreement to the Amended Mohave Project Coal Supply Agreement and it was the Mohave Project Coal Supply Agreement dated January 6, 1967. For purposes of this statement of facts, all references to a coal supply agreement will be to Amended Coal Supply Agreement and not its predecessor. *See* Exhibit 2.

Clark County, Nevada. Water is added to the coal to create a slurry, which is the manner in which the coal is transported from the mine site and delivered at the receiving facilities at the Mohave Plant. After being deposited into the pipeline at the Black Mesa Mine, the coal takes 2½ days to be transported through the pipeline to arrive at the Mohave Plant. Upon arrival at the Mohave Plant, the coal slurry is run through a centrifuge and the water is removed. After removal of the water, the coal is dried and then the coal is burned in the generating units to create electricity.

In the Amended Coal Supply Agreement, Peabody and Edison agreed to the relative duties and obligations of the parties' signatory to the agreement. Edison agreed in Section 6.02 of the Amended Coal Supply Agreement to pay all sales, use, production and severance taxes imposed upon the coal. Edison has honored their obligation in this regard.

Edison's acquisition cost for the coal is also governed by the Amended Coal Supply Agreement. Edison has historically accrued Nevada use tax on the total acquisition cost of the coal from Peabody. Included in the total acquisition costs of the coal are taxes paid to the Federal Government, the State of Arizona and the Navajo Nation Tribal Government. Thus, Edison has accrued use tax on these taxes.

As previously stated in a draft joint pre-hearing statement, a statement was made that "no mines within the State of Nevada produce coal." *See* Exhibit 4. Coal, as a matter of fact, which is considered a mineral for purposes of the net proceeds of mines tax, is a mineral which has been mined in the State of Nevada. *See* Exhibit 5.

The calculation of the cost of the coal and a delineation of the taxes paid by Edison are discussed in detail below in Sections III and IV of this statement of facts.

II. Procedural Facts

Edison filed administrative claims for refund of use tax paid for the period of March, 1998 thru December, 2000. *See* Exhibit 6. Edison filed the refund claims over time as delineated in Exhibit 7.

In response to the original claims for refund filed by Edison, the Nevada Department of Taxation (hereinafter referred to as the "Department") notified Edison that an audit was to be

performed to review the claim for refund submitted by Edison. *See* Exhibit 6. The Department notified Edison of their intent to conduct an audit in a letter sent to Edison dated May 15, 2001. Each time Edison would file a claim for refund for a different period of time, the Department would respond by sending a letter indicating that the respective claim for refund would be sent to audit for further review. *See* Exhibit 6.

The first audit of Edison commenced in the early part of June, 2001, for the audit period March, 1998 thru February, 2001. Edison provided the auditor with the requested information. Edison never heard back from the Department or the auditor regarding this audit. No specific requests were made by the auditor regarding the claims filed by Edison.

In response to Edison's claims for refund, the Department indicated that the request for refund, with all accompanying documents, had been forwarded to the audit staff for their review. Although the Department indicated that it would notify Edison as to when the audit was completed, Edison never received a report of audit results from the Department. *See* Exhibit 6. Moreover, no oral audit results have ever been communicated by the Department to Edison for their consideration.

By two letters dated December 17, 2002 and December 30, 2002, the Department denied Edison's all claims for refund by Edison and represented to Edison that in the event Edison desired to appeal the Department's denial, that Edison should file a petition for redetermination within 45 days of the date of that letter. *See* Exhibit 9.

The Department, in its denial letters, set forth two reasons why Edison's claims for refund were denied. The first reason provided by the Department for denial of Edison's claims for refund was that the credit for taxes paid out of state [Arizona] delineated in NAC 372.055 was not applicable because the Arizona tax in issue was an excise tax.

The second reason for the denial of Edison's claim for refund was that the definition of Gross Receipts at NRS 372.025(3)(d) only excludes taxes imposed by the United States Government. In the two denial letters provided by the Department, no further explanation was provided by the Department for the denial of Edison's claims for refund nor was there any indication that the results of an audit by the Department was the basis for the denial of Edison's

claims for refund.

Edison, in response to the Department's direction in this regard, filed a Petition for Redetermination on January 31, 2003. *See* Exhibit 10. In the Petition for Redetermination, Edison set forth its preliminary grounds for refund and reserved the right to further supplement the grounds for refund. *See* Exhibit 10.

On May 15, 2003, the Department acknowledged timely filing of the Petition for Redetermination and referred the matter to a hearing officer. *See* Exhibit 11. On July 2, 2003, the Department changed the process which Edison was to pursue and "redirected" the case to the Nevada Tax Commission for a hearing pursuant to NRS 360.245(1)(a). *See* Exhibit 12. There were no orders entered by either the administrative hearing officer or the Nevada Tax Commission ordering the case to be transferred from a hearing officer to the Nevada Tax Commission.

On or about September 8, 2003, the Department notified Edison via a telephone call that it would be subject to an audit for the period August, 2000 thru July, 2003, which partially overlapped with the previous audit cycle. Edison requested an audit confirmation, and was provided a letter by the Department on October 15, 2003. *See* Exhibit 13. On October 22, 2003, the Department terminated the second audit scheduled for October 20, 2003. *See* Exhibit 14.

On October 22, 2003, the senior deputy attorney general transmitted a letter to counsel for Edison. In that correspondence, the deputy attorney general requested the preparation of a joint pre-hearing statement which would include a statement of facts.

On October 27, 2003, Edison filed amended claims for refund relating to the periods of time referenced in Exhibit 15.

Edison has vigilantly pursued their refund claims for the last 2 ½ years with no delays being attributable to Edison.

III. Acquisition Cost of the Coal

The Amended Coal Supply Agreement clearly delineates how the cost for the coal provided by Peabody is to be remitted by Edison.

The Amended Coal Supply Agreement provides that Edison agrees to remit monies to

Peabody for the coal as set forth based upon a formula, which is subject to adjustment for fluctuation in variable costs. Edison has agreed and is paying a combined sum for the coal. The combined sum paid by Edison for the coal and the price of its transportation through the coal slurry pipeline from the mine site to the Mohave Plant is the "mine price." Upon execution of the Amended Coal Supply Agreement, the mine price for the coal was $3.798 per ton. This initial mine price took into account the various costs, including but not limited to, labor, materials and supplies, ad valorem taxes, royalties and capital investment. *See* Exhibit 2 at Section 8.

IV. Taxes Reimbursed by Edison Under the Agreement

In addition to the acquisition cost of the coal, Edison has agreed to pay and has paid a variety of different taxes imposed on Peabody by various different taxing agencies. Peabody has remitted taxes, which Edison has reimbursed them for, to the following Governments:[3]

1) The Federal Government;
2) The State Of Arizona; and
3) Northern Navajo Tribal Council.

Edison has paid Peabody the monies attributable to the imposition of the following taxes:

1) The Arizona Transaction Privilege Tax;[4]
2) The State of Arizona Ad Valorem Tax;
3) The Possessory Interest Tax (PIT) levied by the Navajo Nation;
4) The Business Activity Tax (BAT) imposed by the Navajo Nation;
5) Black Lung Fees imposed by the Federal Government; and
6) Fees attributable to the Surface Mining Control & Reclamation Act of 1977 (SMCRA) paid to the Federal Government.

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[3] The list of governments does not include the State of Nevada because all of taxes remitted to these respective governments were subject to the imposition of use tax by Edison.

[4] In the denial letters dated December 17, 2001 and December 30, 2002, the Department references the Arizona Severance Tax which is an erroneous reference.

All monies paid by Edison to Peabody which were attributable to these taxes were included by Edison as part of the measure subject to the imposition of the Nevada use tax.

In addition, Peabody has entered into an agreement with Black Mesa for the delivery of the coal through the pipeline, which Edison consented to as a third-party beneficiary. *See* Exhibit 16. Edison has accrued a use tax on the delivery charges attributable to the transportation of the coal through the pipeline. The agreement entered into between Peabody and Black Mesa is the Amended Coal Slurry Pipeline Agreement dated May 26, 1976, (herein referred to as the "pipeline agreement").[5] The agreement requires Edison to pay a monthly charge plus a commodity charge per ton. The commodity charge is also subject to adjustment for changes in variable costs, such as labor, material, electricity and ad valorem taxes.

Upon execution of the agreement, the monthly charge was $707,086 and the commodity charge was .215 per ton.

Edison is also contractually obligated to reimburse Black Mesa for all ad valorem taxes and other taxes imposed by governmental bodies, including the PIT and the BAT levied by the Navajo Nation. *See* Exhibit 17 (at page 29) and Exhibit 17.

DATED this 24TH day of November, 2003.

NORMAN J. AZEVEDO, ESQ.
338 California Avenue
Reno, NV 89509
775.329.6770
775.329.6825 (fax)
Attorney for Petitioner

[5] Pursuant to Section 7 of the pipeline agreement, Edison may be billed by Black Mesa for the transportation of the coal.

Exhibit 2

Norman J. Azevedo
Attorney at Law

775.329.6770
775.329.6825 (fax)

www.nevadataxlawyers.com

338 California Avenue
Reno, Nevada 89509

November 16, 2003

Charles Chinnock, Executive Director
State of Nevada Department of Taxation
1550 E. College Parkway, Suite 115
Carson City, NV 89706-7937

Via Facsimile
687.5981

Re: Southern California Edison

Dear Chuck:

This letter is intended to confirm our conversations of Friday, November 14, 2003. Southern California Edison (hereinafter "Edison") requested the Department of Taxation to delineate the hearing process for the upcoming hearing before the Nevada Tax Commission. Edison requested this information pursuant to NRS 360.291(6). Since there are no regulations that govern evidentiary hearings before the Nevada Tax Commission, you offered to send a letter on Monday, November 17, 2003, delineating the process that Edison will be required to adhere to on December 8, 2003.

Specifically, in your letter you agreed to address when the Department of Taxation will file their "Pre-hearing Statement,"[1] how and when Edison will submit their evidence for the Nevada Tax Commission's consideration, whether and when Edison will receive the Department's evidence, what evidentiary standard Edison will be subjected to determine admissibility of their submissions, whether a pre-hearing or post-hearing brief will be required, when the briefs, if any, will be due and how long Edison will have for the hearing.

The Department of Taxation also requested whether Edison would agree to a remand of the case back to a hearing officer. I will to convey to Edison your offer in this regard; however, as I had indicated to you, since Edison was told on July 17, 2003 that the matter would go to the Nevada Tax Commission, we have been preparing for that hearing and have expended much time and effort. To remand the case to a hearing officer would be to again "redirect" the case. This time the case would be redirected away from the Nevada Tax Commission back to a hearing

[1]Edison would like to file a Joint Pre-hearing Statement with the Department of Taxation. At our meeting, the Department of Taxation indicated a desire to file two separate pre-hearing statements in lieu of a "Joint" statement. Edison remains desirous to file a Joint Pre-hearing Statement with the Department of Taxation.

officer. Edison's refund claims were originally assigned to a hearing officer prior to the Department of Taxation redirecting the case the first time away from the hearing officer to the Nevada Tax Commission. Edison's concern in this regard is that this matter has been delayed for almost 2½ years.

I look forward to hearing form you Monday, November 17, 2003.

Sincerely,

NORMAN J. AZEVEDO, ESQ.

NJA/ra

cc: Beth LaCour, Edison International (Via Fax: 626.302.4973)

Exhibit 3

000368

BRIAN SANDOVAL
Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson Street
Carson City, Nevada 89701-4717
Telephone (775) 684-1100
Fax (775) 684-1108
ag.state.nv.us
E-Mail: aginfo@ag.state.nv.us

ANN WILKINSON
Assistant Attorney General

November 17, 2003

Norman J. Azevedo, Esq.
338 California Avenue
Reno, Nevada 89509

Re: Southern California Edison (Edison)

Dr. Mr. Azevedo:

You have asked that the Department delineate the hearing process for the upcoming hearing before the Nevada Tax Commission. I am responding in my capacity as counsel to the Department.

Please note that in order to initiate a claim for a refund, a taxpayer must submit a written claim stating "the specific grounds upon which the claim is founded." NRS 372.645. The claim must be accompanied by: "(a) A statement setting forth the amount of the claim; (b) A statement setting forth all grounds upon which the claim is based; (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.

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 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 include 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.

The statutory process, as described above, establishes an abbreviated process for addressing refund claims. It does not contemplate an evidentiary hearing unless a claim for refund is based upon disputed facts.[1] When Edison initially presented the documentation to substantiate its claims for refund, Edison did not indicate that it would be raising claims for a refund of taxes paid on transportation charges, or taxes paid on state, local and/or tribal taxes. Please see Tab 6 of the materials that you provided on November 10, 2003. Consequently, the Department had no reason to believe that there would be any factual disputes.

On November 10, 2003, you provided additional documentary evidence -- evidence that Edison did not provide with its initial claims for refund. Edison's initial claims for refund sought credit for the Arizona Transactions Privilege Tax, and a recomputation of the tax liability based upon taxes or fees paid to the federal government. See Tab 6. Edison's additional evidence appears to relate to claims that are barred by the statute of limitations. More specifically, it appears to relate to Edison's recent claims: (1) that its consumption of coal in Nevada is exempt from taxation (a claim first raised by Paul Bancroft on January 31, 2003); and (2) that the measure of the tax, if applicable, should exclude transportation charges and various state, local and tribal taxes (a claim first raised by you on October 27, 2003).

Please be advised that upon the advice of counsel, the Department will take the position that the foregoing claims are time-barred by the statute of limitation. Consequently, the documentary evidence that you submitted on November 10, with the exception of the materials submitted by Edison in connection with its original claims, may be irrelevant depending upon how the Commission decides the statute of limitations issue.

The Department will supply the members of the Commission with all of the materials that you provided, including the materials deemed above to be potentially irrelevant. This will occur well in advance of the hearing. The Department will prepare a prehearing brief wherein it will delineate the issues as the Department views them, and then set forth its arguments. The Department anticipates that it will serve you with its brief by November 21, 2003. The Department would urge you to submit a brief on behalf of Edison, but will not wait to receive a brief from you before preparing its own brief.

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[1] Please note that unlike NRS 361.420, NRS 372.680 does not limit the taxpayer to a review of the administrative record on appeal. Consequently, the failure to conduct an evidentiary hearing at the administrative level does not prejudice the taxpayer at the district court level. Quite frankly, given the nature of Edison's constitutional claims, it may be advantageous for Edison to place this matter before the district court as quickly as possible.

If the Commission resolves the statute of limitations issue in favor of Edison, you should be prepared to direct the members of the Commission to the documentary evidence that you wish them to consider. However, it may be prudent at that point to request that the Commission remand the matter to the Department's audit staff so that the Department may review and render an initial determination on Edison's so-called "amended" claims.

If you are dissatisfied with the above process, I recommend that you raise an objection in your brief to the Commission. I don't see the need for an additional exchange of correspondence on this matter.

Sincerely,

BRIAN SANDOVAL
Attorney General

GREGORY L. ZUNINO
Senior Deputy Attorney General

cc. Chuck Chinnock
Josh Hicks

Exhibit 4

000372

Case No. 98-01370A

Dept. No. I

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

GOODMAN OIL COMPANY, an Idaho corporation,

Petitioner,

vs.

STATE OF NEVADA, DEPARTMENT OF TAXATION, and NEVADA TAX COMMISSION,

Respondents.

ORDER

The above-captioned case is before the Court on Petitioner's Amended Petition for Judicial Review filed October 26, 1998; Petitioner's Motion for Additions to Agency Record filed January 4, 1999; and Petitioner's application for Leave to Present Additional Evidence filed April 28, 1999. A hearing on those matters was conducted by the Court on September 13, 1999 at 1:30 p.m. Goodman Oil Company (Goodman Oil) was represented by John McCreedy of the firm Jim Jones & Associates and by Karen A. Peterson of the firm Allison, MacKenzie, Hartman, Soumbeniotis & Russell, Ltd. Respondents State of Nevada, Department of Taxation and Nevada Tax Commission (State) were represented by Norman J. Azevedo, Senior Deputy Attorney General.

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Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

A. **Indian Tax Cases Generally**

The United States Constitution grants Congress the power to regulate commerce with Indian Tribes, *U.S. Constitution, Art. 1, § 8, cl. 3.* The U.S. Supreme Court has stated:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . ., and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Montana v. Blackfeet Tribe, 471 U.S. 759, 764, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985). In *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 132 L.Ed.2d 440 (1995), the United States Supreme Court outlined the relevant inquiry in Indian tax cases:

> The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. See, *e.g. Moe*, 425 U.S., at 475-481 (Montana's cigarette sales tax imposed on retail consumers could not be applied to on-reservation "smoke shop" sales to tribal members). But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, see *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154-157 (1980), and may place on a tribe or tribal members "minimal burdens" in collecting the toll. *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. ____, ____ (1994) (slip op., at 12).

Id., 115 S.Ct. at 2220.

B. **Sovereignty**

The State of Nevada through chapter 365 of the Nevada Revised Statutes and NAC 365.060 has asserted sovereignty over the Indian tribes by taxing exempt members and requiring them to file a claim for refund to obtain the tax previously paid. Thus, NAC 365.060 assumes over the Indian tribes a sovereignty that the State of Nevada does not have over the tribe and its tribal members.

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Chapter 365 of the Nevada Revised Statutes and NAC 365.060 imposes an undue burden upon the tribe because it requires the tribe and its members to account for the consumption of gasoline when it is very clear that the tribe, who are already exempt from taxation, consumes a large percentage of the gasoline.

C. **NAC 365.060 Imposes an Undue Burden Upon the Tribe**

The imposition of the tax pursuant to Chapter 365 of the Nevada Revised Statutes on an Indian tribal member on the reservation is per se unconstitutional unless a clear exception exists. The correct standard in determining whether a tax is improperly burdensome is not to look to the burden imposed upon the State but to view the burden imposed upon the tribe or the tribal members.

In the event that the tax imposed upon a gallon of gas is sold to an exempt tribal member or tribe, the refund provision found in NAC 365.060 does not eliminate or otherwise reduce the burden imposed by chapter 365 of the Nevada Revised Statutes on exempt Indians or tribal members.

There is a burden on the Indian tribal members and the tribe as a result of taxing them and requiring them to apply for a refund.. The evidence before me is that the tribe consumes 85 percent of the fuel sold by the Feather Lodge and, because of this large percentage of fuel consumed by exempt tribal members, to require the Feather Lodge to account for the consumption of fuel to tribal members is unduly burdensome on the tribe.

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D. **The Nevada Tax Commission Can Consign Constitutional Issues**

The legal advice given to the Nevada Tax Commission that they were barred from considering the constitutional issues in this case was clearly erroneous.

THEREFORE, IT IS ORDERED that the Petition for Judicial Review is Granted.

Dated this 17 day of November, 1999.

Michael R. Griffin
DISTRICT COURT JUDGE

Submitted by:

FRANKIE SUE DEL PAPA
OFFICE OF THE ATTORNEY GENERAL
NORMAN J. AZEVEDO
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1222

By: _____
NORMAN J. AZEVEDO
Senior Deputy Attorney General

Attorneys for Respondents

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Exhibit 5

000327

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:

Pat Huhtelin, Social Services Manager I, Aging Services Division, Department of Human Resources

Denise Hund, Coordinator, Adult Day Program, The Continuum

C. Edwin (Ed) Fend, Lobbyist, American Association of Retired Persons, West Regional Office

Ramona Hayes, Director, Adult Day Care, The Meeting Place

Roberta Gang, Lobbyist, Nevada Women's Lobby

David Pursell, Executive Director, Department of Taxation

Daryl E. Capurro, Lobbyist, Nevada Motor Transport Association

Donald P. Tuohy, Lieutenant/Commander, Federal Projects, Nevada Highway Patrol Division, Department of Motor Vehicles and Public Safety

Edgar L. Harney, Nevada Highway Patrol Division, Department of Motor Vehicles and Public Safety

Peter D. Krueger, Lobbyist, Nevada Petroleum Marketers and Convenience Store Association

K. Neena Laxalt, Lobbyist, Nevada Propane Dealers Association

Blair V. Poulsen, Nevada Propane Dealers Association

J. Douglas Driggs, Jr., Attorney, Volunteers of America

Wayne Olson, Vice President of Operations, Volunteers of America

Kim Crandel, Administrator, Boulder City Hospital

Dan Holler, County Manager, Douglas County

Harvey Whittemore, Lobbyist, Nevada Beer Wholesalers Association

Bernie Curtis, Board of Commissioners, Douglas County

Donald H. Minor, Board of Commissioners, Douglas County

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association

Dino DiCianno, Deputy Executive Director, Department of Taxation

without license. (BDR 32-1238)

Senator Michael A. Schneider, Clark County Senatorial District No. 8, testified this bill would allow residents of Nevada to buy wine from wineries across the nation. He submitted a letter of support (Exhibit G). He said he received mail order catalogs regularly allowing him to purchase clothes, distinctive gifts, books, and bedding, but wine cannot be bought in this manner. He noted constituents requested a bill to allow the purchase of wine from out of state. This is a free-trade issue, he commented, and last year consumers purchased $46 billion in goods from mail order catalogs. He concluded this bill would allow people to buy quality wine at their convenience. He said wholesalers in Nevada cannot stock all of the wine produced in the 1,772 wineries in this country. He told the committee today people buy over the Internet and through catalogs. He said currently six bottles of wine may be ordered, per month, and this bill would raise the limit and allow people in this state to participate in the free market.

Harvey Whittemore, Lobbyist, Nevada Beer Wholesalers Association, testified against the bill. He said the bill failed to cover some important issues with respect to this industry. He said there are companies who are shipping into Nevada without paying the tax. He asked to meet with Senator Schneider to devise a compromise to meet the needs of both groups. He said he represented over 50,000 employees of this industry, throughout the state, who could be impacted by this bill. He noted there were proposed amendments which could be drafted into the bill.

Chairman McGinness closed the hearing on S.B. 428 and opened the hearing on Assembly Bill (A.B.) 174.

> ASSEMBLY BILL 174: Authorizes board of county commissioners of Douglas County to impose local sales and use tax and conforms similar definition provision in Carson City Charter. (BDR S-593)

Mr. Holler testified for the bill saying the bill would allow Douglas County to raise the sales- and use-tax rate one-quarter of 1 percent (.0025) for certain purposes. He requested expedition of the bill for possible implementation on July 1, 1999. He noted the raise in sales tax would amount to approximately a $300,000 increase for the first quarter of the year. He provided a letter containing information to support the bill (Exhibit H). Assemblyman Lynn C. Hettrick, Douglas County, Carson City Assembly District No. 39, said he supported the bill and would appreciate committee support. Bernie Curtis, Board of Commissioners, Douglas County, and Don Minor, Board of Commissioners, Douglas County, testified in support of the bill.

Mr. Whittemore said, for the record as a homeowner at Glenbrook, he supported the bill.

> Chairman McGinness closed A.B. 174 and opened S.B. 362.
>
> 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 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.

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:

S.B.317 Provides for reduction in business tax for businesses that provide care for adult dependents of employees. (BDR 32-1100)

S.B.349 Makes various changes to provisions governing special fuels. (BDR 32-1073)

S.B.362 Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

S.B.402 Revises provisions relating to property tax. (BDR 32-1568)

S.B.428 Allows importation of wine for household or personal use without license. (BDR 32-1238)

A.B.174 Authorizes board of county commissioners of Douglas County to impose local sales and use tax and conforms similar definition provision in Carson City Charter. (BDR S-593)

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 thought 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 processes 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 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

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).