IN THE SUPREME COURT FOR STATE OF NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *Deja Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *Little Darlings*, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*,

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her Official Capacity Only,

Respondents.

Supreme Court Case No. 59752

District Court Case No. A558787

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West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation
➡ Chapter 368A. Tax on Live Entertainment
General Provisions

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.040. "Business" defined

"Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

(b) A natural person engaging in a business if he is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or

2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or

(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.070. "Game" defined

"Game" has the meaning ascribed to it in NRS 463.0152.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.080. "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.090. "Live entertainment" defined

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

(1) Music or vocals provided by one or more professional or amateur musicians or vocalists;

(2) Dancing performed by one or more professional or amateur dancers or performers;

(3) Acting or drama provided by one or more professional or amateur actors or players;

(4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;

(5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) Excludes, without limitation, any one or more of the following activities:

(1) Instrumental or vocal music, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;

(2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

(I) Does not constitute a performance;

(II) Is not advertised as entertainment to the public;

(III) Primarily serves to provide ambience to the facility; and

(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.097. "Shopping mall" defined

"Shopping mall" includes any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

368A.100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person

who collects the taxable receipts.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.115. "Trade show" defined

"Trade show" means an event of limited duration primarily attended by members of a particular trade or industry for the purpose of exhibiting their merchandise or services or discussing matters of interest to members of that trade or industry.

368A.120. Natural persons who are deemed to be business entities

A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.

[FN1] See Historical and Statutory Notes below for effective date information.

Administration

368A.130. Repealed

368A.140. Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments. The Commission shall adopt such regulations as are necessary to carry out the provisions of this subsection. The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

(a) Collect the tax imposed by this chapter from all other taxpayers; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the Commission, the Board and the Department shall:

(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.

(b) Upon request, assist the other agencies in the collection of that tax.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.150. Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

2. The amount established by the Board or the Department pursuant to subsection 1 must be based upon the tax liability of business entities that are deemed comparable by the Board or the Department to that of the taxpayer.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.160. Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and

(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records

which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

4. A person who violates any provision of this section is guilty of a misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.170. Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this state any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while he is absent from his regular place of employment to examine those documents.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.180. Confidentiality of records and files of Board and Department

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular person or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

[FN1] See Historical and Statutory Notes below for effective date information.

Imposition and Collection

368A.200. Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:

(a) Less than 7,500, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If

the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

(a) Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

(c) Any boxing contest or exhibition governed by the provisions of chapter 467 of NRS.

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

(g) Live entertainment that is provided at a trade show.

(h) Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

(j) Live entertainment that is provided in the common area of a shopping mall, unless the entertainment is provided in a facility located within the mall.

(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

(l) Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction. For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and

(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

(m) Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise.

(n) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

(p) Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment.

6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (p) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chairman of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

7. As used in this section, "maximum occupancy" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.210. Repealed

368A.220. Filing of reports and payment of tax; deposit of amounts received in State General Fund

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month or the month in which the taxable events occurred. The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.230. Extension of time for payment; payment of interest during period of extension

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer 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 taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.240. Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable 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 tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

3. If a taxpayer collects all or part of an admission charge or charges for food, refreshments and merchandise for which he claimed a credit on a return for a previous reporting period pursuant to subsection 2, he shall include:

(a) The amount collected in the charges reported pursuant to paragraph (a) of subsection 1; and

(b) The tax payable on the amount collected in the amount of taxes reported,

in the first return filed with the Board or the Department after that collection.

4. Except as otherwise provided in subsection 5, upon determining that a taxpayer has filed a return which contains one or more violations of the provisions of this section, the Board or the Department shall:

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

(b) For the first or second return, other than a return described in paragraph (a), in any calendar year which contains one or more violations, assess a penalty equal to the amount of the tax which was not reported.

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

5. For the purposes of subsection 4, if the first violation of this section by any taxpayer was determined by the Board or the Department through an audit which covered more than one return of the taxpayer, the Board or the Department shall treat all returns which were determined through the same audit to contain a violation or violations in the manner provided in paragraph (a) of subsection 4.

[FN1] See Historical and Statutory Notes below for effective date information.

Overpayments and Refunds

368A.250. Certification of excess amount collected; credit and refund

If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must be credited on any amounts then due from the person under this chapter, and the balance refunded to the person or his successors in interest.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.260. Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

(1) The Board, if the taxpayer is a licensed gaming establishment; or

(2) The Department, if the taxpayer is not a licensed gaming establishment.

A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

(b) No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or the Department within that period.

2. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

3. Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment.

4. Within 30 days after rejecting any claim in whole or in part, the Board or the Department shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.270. Interest on overpayments; disallowance of interest

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, 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.

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.280. Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.290. Action for refund: Period for commencement; venue; waiver

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:

(a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.

2. An action brought pursuant to subsection 1 must be brought 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 Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

alleged overpayments.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.300. Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Commission within 30 days after the last day of the 6- month period.

2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.

3. If the claimant is aggrieved by the decision of:

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant 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.

4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.

5. The balance of the judgment must be refunded to the plaintiff.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or 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.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof 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.

2. 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.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.340. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

Miscellaneous Provisions

368A.350. Prohibited acts; penalty

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Commission, the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature
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West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation
➡ Chapter 368A. Tax on Live Entertainment
General Provisions

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.040. "Business" defined

"Business" means any activity engaged in or caused to be engaged in by a business entity with the object of gain, benefit or advantage, either direct or indirect, to any person or governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.050. "Business entity" defined

1. "Business entity" includes:

(a) A corporation, partnership, proprietorship, limited-liability company, business association, joint venture, limited-liability partnership, business trust and their equivalents organized under the laws of this state or another jurisdiction and any other type of entity that engages in business.

(b) A natural person engaging in a business if he is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or

2. Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or

(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] **6** games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.070. "Game" defined

"Game" has the meaning ascribed to it in NRS 463.0152.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.080. "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0169.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.090. "Live entertainment" defined

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

(1) Music or vocals provided by one or more professional or amateur musicians or vocalists;

(2) Dancing performed by one or more professional or amateur dancers or performers;

(3) Acting or drama provided by one or more professional or amateur actors or players;

(4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;

(5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) Excludes, without limitation, any one or more of the following activities:

(1) Instrumental or vocal music, which may or may not be supplemented with commentary by the musicians, in a restaurant, lounge or similar area if such music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen;

(2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

(I) Does not constitute a performance;

(II) Is not advertised as entertainment to the public;

(III) Primarily serves to provide ambience to the facility; and

(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.097. "Shopping mall" defined

"Shopping mall" includes any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

368A.100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.110. "Taxpayer" defined

"Taxpayer" means:

1. If live entertainment that is taxable under this chapter is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment.

2. Except as otherwise provided in subsection 3, if live entertainment that is taxable under this chapter is not provided at a licensed gaming establishment, the owner or operator of the facility where the live entertainment is provided.

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person

who collects the taxable receipts.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.115. "Trade show" defined

"Trade show" means an event of limited duration primarily attended by members of a particular trade or industry for the purpose of exhibiting their merchandise or services or discussing matters of interest to members of that trade or industry.

368A.120. Natural persons who are deemed to be business entities

A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.

[FN1] See Historical and Statutory Notes below for effective date information.

Administration

368A.130. Repealed

368A.140. Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments. The Commission shall adopt such regulations as are necessary to carry out the provisions of this subsection. The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

(a) Collect the tax imposed by this chapter from all other taxpayers; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a).

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

(b) Subsection 2, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the Commission, the Board and the Department shall:

(a) Jointly, coordinate the administration and collection of that tax and the regulation of taxpayers who are liable for the payment of the tax.

(b) Upon request, assist the other agencies in the collection of that tax.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.150. Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

2. The amount established by the Board or the Department pursuant to subsection 1 must be based upon the tax liability of business entities that are deemed comparable by the Board or the Department to that of the taxpayer.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.160. Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

(2) At least 4 years if the taxpayer is not a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; and

(c) Make the records available for inspection by the Board or the Department upon demand at reasonable times during regular business hours.

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records

which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

3. Any agreement that is entered into, modified or extended after January 1, 2004, for the lease, assignment or transfer of any premises upon which any activity subject to the tax imposed by this chapter is, or thereafter may be, conducted shall be deemed to include a provision that the taxpayer required to pay the tax must be allowed access to, upon demand, all books, records and financial papers held by the lessee, assignee or transferee which must be kept pursuant to this section. Any person conducting activities subject to the tax imposed by NRS 368A.200 who fails to maintain or disclose his records pursuant to this subsection is liable to the taxpayer for any penalty paid by the taxpayer for the late payment or nonpayment of the tax caused by the failure to maintain or disclose records.

4. A person who violates any provision of this section is guilty of a misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.170. Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this state any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while he is absent from his regular place of employment to examine those documents.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.180. Confidentiality of records and files of Board and Department

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

(c) Publication of statistics so classified as to prevent the identification of a particular person or document.

(d) Exchanges of information with the Internal Revenue Service in accordance with compacts made and provided for in such cases.

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

[FN1] See Historical and Statutory Notes below for effective date information.

Imposition and Collection

368A.200. Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:

(a) Less than 7,500, the rate of the tax is 10 percent of the admission charge to the facility plus 10 percent of any amounts paid for food, refreshments and merchandise purchased at the facility.

(b) At least 7,500, the rate of the tax is 5 percent of the admission charge to the facility.

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If

the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

5. The tax imposed by subsection 1 does not apply to:

(a) Live entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution.

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

(c) Any boxing contest or exhibition governed by the provisions of chapter 467 of NRS.

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(f) Merchandise sold outside the facility in which the live entertainment is provided, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

(g) Live entertainment that is provided at a trade show.

(h) Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

(i) Live entertainment that is provided at a licensed gaming establishment at private meetings or dinners attended by members of a particular organization or by a casual assemblage if the purpose of the event is not primarily for entertainment.

(j) Live entertainment that is provided in the common area of a shopping mall, unless the entertainment is provided in a facility located within the mall.

(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

(l) Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction. For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and

(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

(m) Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise.

(n) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

(p) Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment.

6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (p) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chairman of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

7. As used in this section, "maximum occupancy" means, in the following order of priority:

(a) The maximum occupancy of the facility in which live entertainment is provided, as determined by the State Fire Marshal or the local governmental agency that has the authority to determine the maximum occupancy of the facility;

(b) If such a maximum occupancy has not been determined, the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment; or

(c) If such a permit does not designate the maximum occupancy of the facility, the actual seating capacity of the facility in which the live entertainment is provided.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.210. Repealed

368A.220. Filing of reports and payment of tax; deposit of amounts received in State General Fund

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month or the month in which the taxable events occurred. The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

2. The Board or the Department, if it deems it necessary to ensure payment to or facilitate the collection by the State of the tax imposed by NRS 368A.200, may require reports to be filed not later than 10 days after the end of each calendar quarter.

3. Each report required to be filed by this section must be accompanied by the amount of the tax that is due for the period covered by the report.

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.230. Extension of time for payment; payment of interest during period of extension

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer 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 taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.240. Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable 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 tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

3. If a taxpayer collects all or part of an admission charge or charges for food, refreshments and merchandise for which he claimed a credit on a return for a previous reporting period pursuant to subsection 2, he shall include:

(a) The amount collected in the charges reported pursuant to paragraph (a) of subsection 1; and

(b) The tax payable on the amount collected in the amount of taxes reported,

in the first return filed with the Board or the Department after that collection.

4. Except as otherwise provided in subsection 5, upon determining that a taxpayer has filed a return which contains one or more violations of the provisions of this section, the Board or the Department shall:

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

(b) For the first or second return, other than a return described in paragraph (a), in any calendar year which contains one or more violations, assess a penalty equal to the amount of the tax which was not reported.

(c) For the third and each subsequent return in any calendar year which contains one or more violations, assess a penalty of three times the amount of the tax which was not reported.

5. For the purposes of subsection 4, if the first violation of this section by any taxpayer was determined by the Board or the Department through an audit which covered more than one return of the taxpayer, the Board or the Department shall treat all returns which were determined through the same audit to contain a violation or violations in the manner provided in paragraph (a) of subsection 4.

[FN1] See Historical and Statutory Notes below for effective date information.

Overpayments and Refunds

368A.250. Certification of excess amount collected; credit and refund

If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must be credited on any amounts then due from the person under this chapter, and the balance refunded to the person or his successors in interest.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.260. Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

(1) The Board, if the taxpayer is a licensed gaming establishment; or

(2) The Department, if the taxpayer is not a licensed gaming establishment.

A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

(b) No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or the Department within that period.

2. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

3. Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment.

4. Within 30 days after rejecting any claim in whole or in part, the Board or the Department shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.270. Interest on overpayments; disallowance of interest

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, 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.

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.280. Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

2. No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.290. Action for refund: Period for commencement; venue; waiver

1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:

(a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

(b) The Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim.

2. An action brought pursuant to subsection 1 must be brought 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 Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

alleged overpayments.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.300. Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Commission within 30 days after the last day of the 6- month period.

2. If the Department fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Tax Commission within 30 days after the last day of the 6-month period.

3. If the claimant is aggrieved by the decision of:

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant 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.

4. If judgment is rendered for the plaintiff, the amount of the judgment must first be credited towards any tax due from the plaintiff.

5. The balance of the judgment must be refunded to the plaintiff.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.310. Allowance of interest in judgment for amount illegally collected

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or 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.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.330. Action for recovery of erroneous refund; Jurisdiction; venue; prosecution

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof 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.

2. 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.

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.340. Cancellation of illegal determination

1. If any amount in excess of $25 has been illegally determined, either by the person filing the return or by the Board or the Department, the Board or the Department shall certify this fact to the State Board of Examiners, and the latter shall authorize the cancellation of the amount upon the records of the Board or the Department.

2. If an amount not exceeding $25 has been illegally determined, either by the person filing a return or by the Board or the Department, the Board or the Department, without certifying this fact to the State Board of Examiners, shall authorize the cancellation of the amount upon the records of the Board or the Department.

[FN1] See Historical and Statutory Notes below for effective date information.

Miscellaneous Provisions

368A.350. Prohibited acts; penalty

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

(c) Keep, cause to be kept or permit to be kept more than one set of books, records or accounts with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

2. Any person who violates the provisions of subsection 1 is guilty of a gross misdemeanor.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Commission, the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature
END OF DOCUMENT

Westlaw.

NAC 368A.010

Nev. Admin. Code ch. 368A, s. 010

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.010 Definitions. (NRS 360.090, 368A.140)

As used in NAC 368A.010 to 368A.170, inclusive, unless the context otherwise requires, the words and terms defined in NAC 368A.030 to 368A.090, inclusive, have the meanings ascribed to them in those sections.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.010, NV ADC 368A.010

NV ADC 368A.010
END OF DOCUMENT

Westlaw.

NAC 368A.030

Nev. Admin. Code ch. 368A, s. 030

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.030 "Commission" defined. (NRS 360.090, 368A.140)

"Commission" means the Nevada Tax Commission.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.030, NV ADC 368A.030

NV ADC 368A.030
END OF DOCUMENT

Westlaw.

NAC 368A.040

Nev. Admin. Code ch. 368A, s. 040

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.040 "Department" defined. (NRS 360.090, 368A.140)

"Department" means the Department of Taxation.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.040, NV ADC 368A.040

NV ADC 368A.040
END OF DOCUMENT

Westlaw.

NAC 368A.060

Nev. Admin. Code ch. 368A, s. 060

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.060 "Live entertainment status" defined. (NRS 360.090, 368A.140)

"Live entertainment status" means that condition which renders the admission to a facility or the selling of food, refreshments or merchandise subject to the tax imposed by chapter 368A of NRS.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.060, NV ADC 368A.060

NV ADC 368A.060
END OF DOCUMENT

Westlaw.

NAC 368A.070

Nev. Admin. Code ch. 368A, s. 070

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.070 "Nonprofit organization" defined. (NRS 360.090, 368A.140)

"Nonprofit organization" means any organization described in paragraph (a) of subsection 2 of NRS 368A.200 or paragraph (b) of subsection 5 of that section.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.070, NV ADC 368A.070

NV ADC 368A.070
END OF DOCUMENT

Westlaw.

NAC 368A.080

Nev. Admin. Code ch. 368A, s. 080

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.080 "Patron" defined. (NRS 360.090, 368A.140)

"Patron" means a person who gains access to a facility where live entertainment is provided and who neither solicits nor receives, from any source, any payment, reimbursement, remuneration or other form of consideration for providing live entertainment at the facility.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.080, NV ADC 368A.080

NV ADC 368A.080
END OF DOCUMENT

Westlaw.

NAC 368A.090

Nev. Admin. Code ch. 368A, s. 090

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.090 "Taxpayer" defined. (NRS 360.090, 368A.140)

"Taxpayer" means any person described in NRS 368A.110.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.090, NV ADC 368A.090

NV ADC 368A.090
END OF DOCUMENT

Westlaw.

NAC 368A.100

Nev. Admin. Code ch. 368A, s. 100

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.100 Interpretation of certain statutory terms. (NRS 360.090, 368A.140)

For the purposes of chapter 368A of NRS, the Commission will interpret the term:

1. "Boxing contest or exhibition" to have the meaning ascribed in NRS 467.0107 to the term "unarmed combat."

2. "Facility" to encompass any area or premises where live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.100, NV ADC 368A.100

NV ADC 368A.100
END OF DOCUMENT

Westlaw.

NAC 368A.110

Nev. Admin. Code ch. 368A, s. 110

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.110 Taxpayers: General requirements. (NRS 360.090, 368A.140)

1. If a taxpayer intends to provide live entertainment at a facility that is not a licensed gaming establishment, the taxpayer shall register with the Department to collect the tax. The taxpayer shall thereafter collect and remit the tax to the Department in accordance with the provisions of this chapter and chapter 368A of NRS.

2. If a taxpayer intends to provide live entertainment at a facility that is a licensed gaming establishment, the taxpayer shall act in accordance with such regulations as may be prescribed by the Nevada Gaming Commission.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.110, NV ADC 368A.110

NV ADC 368A.110
END OF DOCUMENT

Westlaw.

NAC 368A.120

Nev. Admin. Code ch. 368A, s. 120

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.120 Applicability of tax: Live entertainment status; sale of food, refreshments or merchandise. (NRS 360.090, 368A.140)

1. Live entertainment status commences when any patron is required to pay an admission charge before he is allowed to enter a facility, regardless of when the live entertainment actually commences.

2. Live entertainment status ceases at the later of:

(a) The conclusion of the live entertainment; or

(b) The time when a facility for which an admission charge was required is completely vacated by admitted patrons or is opened to the general public free of any admission charge.

3. The tax applies to the sale of food, refreshments or merchandise at a facility with a seating capacity of less than 7,500, even if patrons are unable to see, hear or enjoy live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.120, NV ADC 368A.120

NV ADC 368A.120
END OF DOCUMENT

Westlaw.

NV ADC 368A.130 Page 1

NAC 368A.130

Nev. Admin. Code ch. 368A, s. 130

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.130 Determination of tax rate when maximum occupancy has not been designated. (NRS 360.090, 368A.140)

For the purposes of paragraph (c) of subsection 7 of NRS 368A.200, if there is no governmental permit designating the maximum occupancy of a facility where live entertainment is provided, the Department shall compute the tax rate on the presumption that the actual seating capacity of the facility is at least 200 persons and less than 7,500 persons. To rebut this presumption, the taxpayer must establish, to the reasonable satisfaction of the Department, that the actual seating capacity of the facility is less than 200 persons or at least 7,500 persons. In determining whether the taxpayer has successfully rebutted the presumption, the Department shall consider all evidence provided by the taxpayer, including, without limitation, evidence of actual attendance, the number of tickets sold or offered for sale, the square footage of the facility, the physical needs or requirements of the patrons in relation to the nature of the live entertainment provided and any other evidence tending to establish the actual seating capacity of the facility.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.130, NV ADC 368A.130

NV ADC 368A.130
END OF DOCUMENT

Westlaw.

NAC 368A.140

Nev. Admin. Code ch. 368A, s. 140

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.140 Computation of tax; inclusion of tax in sales price of food, refreshments or merchandise. (NRS 360.090, 368A.140)

1. Pursuant to the provisions of subsection 4 of NRS 368A.200, the Department shall apply the tax rate to the total admission charge less the sum of any tax imposed by the United States upon or with respect to an admission charge to live entertainment, whether imposed upon the taxpayer or the patron.

2. The Department shall apply the tax rate to the gross receipts from the sale of food, refreshments or merchandise at a facility where live entertainment is provided. As used in this section, "gross receipts" has the meaning ascribed to it in NRS 372.025, except that "gross receipts" will not be construed to include the amount of any tax imposed by this State or a political subdivision upon or with respect to retail sales of tangible personal property.

3. If applicable, a taxpayer may include the excise tax in the sales price of food, refreshments or merchandise sold at a facility where live entertainment is provided, but if he does so, he shall notify the patrons of the facility by posting a sign which is visible to all purchasers of food, refreshments or merchandise which states that the excise tax is included in the sales price. In the absence of such a notification, the total amount charged to the patron shall be deemed to be the price of the item.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.140, NV ADC 368A.140

NV ADC 368A.140
END OF DOCUMENT

Westlaw.

NAC 368A.150

Nev. Admin. Code ch. 368A, s. 150

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.150 Scope of exemption for nonprofit organizations; assessment and computation of tax by Department. (NRS 360.090, 368A.140)

1. For the purposes of paragraph (b) of subsection 5 of NRS 368A.200, live entertainment is provided by or entirely for the benefit of a nonprofit organization if the proceeds of the admission charges to the facility where the live entertainment is provided become the property of the nonprofit organization. The proceeds of the admission charges do not become the property of a person other than a nonprofit organization as long as the person retains not more of the proceeds than is necessary to cover the direct, supportable costs of hosting, promoting or sponsoring the event at which the live entertainment is provided.

2. Subject to the provisions of subsection 1, a nonprofit organization providing live entertainment, or a person providing live entertainment entirely for the benefit of a nonprofit organization, incurs no liability for the excise tax on entertainment if the nonprofit organization or person contracts for goods or services with a person other than a nonprofit organization, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

3. If live entertainment is provided by or entirely for the benefit of a nonprofit organization, there will be no tax on amounts paid for food, refreshments or merchandise sold within the facility where the live entertainment is provided, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

4. Unless live entertainment is provided by or entirely for the benefit of a nonprofit organization, and except as otherwise provided in this chapter or chapter 368A of NRS, the Department shall assess and compute the excise tax in accordance with NAC 368A.140.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.150, NV ADC 368A.150

NV ADC 368A.150
END OF DOCUMENT

Westlaw.

NAC 368A.160

Nev. Admin. Code ch. 368A, s. 160

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.160 Documentation required for exemption of nonprofit organization. (NRS 360.090, 368A.140)

Any person who claims to be a nonprofit organization exempt from the provisions of NRS 368A.200, or any person who claims to provide live entertainment entirely for the benefit of such a nonprofit organization, shall, upon the request of the Department, provide to the Department such records as the Department deems necessary to demonstrate that the person who claims to be a nonprofit organization or the organization for whose benefit the person provided live entertainment:

1. Meets the criteria to qualify as a religious organization pursuant to 26 U.S.C. § 501(c) and any federal regulations relating thereto;

2. Has qualified as a tax-exempt organization pursuant to 26 U.S.C. § 501(c); or

3. Is organized or existing under the provisions of chapter 82 of NRS.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003; A by R196-05, 2-23- 2006)

NAC 368A.160, NV ADC 368A.160

NV ADC 368A.160
END OF DOCUMENT

Westlaw.

NAC 368A.170

Nev. Admin. Code ch. 368A, s. 170

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY DEPARTMENT OF TAXATION

Current through November 2007, Supplement 2007-3

NAC 368A.170 Over-collection of tax: Duties of taxpayer and Department. (NRS 360.090, 368A.140)

1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of NRS 368A.200, or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of NRS 368A.200.

2. Any over-collection must, if possible, be refunded by the taxpayer to the patron from whom it was collected.

3. A taxpayer shall:

(a) Use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the name and address of the person to whom the refund is to be made.

(b) Within 60 days after reporting to the Department that a refund must be made, make an accounting to the Department of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

4. If a taxpayer is unable for any reason to refund an over-collection, the taxpayer shall pay the over-collection to the Department.

5. If an audit of a taxpayer reveals the existence of an over-collection, the Department shall:

(a) Credit the over-collection toward any deficiency that results from the audit, if the taxpayer furnishes the Department with satisfactory evidence that the taxpayer has refunded the over-collection as required by subsection 2.

(b) Within 60 days after receiving notice from the Department that a refund must be made, seek an accounting of all refunds paid. The accounting must be accompanied by any supporting documents required by the Department.

(Added to NAC by Tax Comm'n by R212-03, eff. 12-4-2003)

NAC 368A.170

Nev. Admin. Code ch. 368A, s. 170

NAC 368A.170, NV ADC 368A.170

NV ADC 368A.170
END OF DOCUMENT

Westlaw.

NAC 368A.300

Nev. Admin. Code ch. 368A, s. 300

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.300 Definitions. (NRS 368A.140)

As used in NAC 368A.300 to 368A.540, inclusive, unless the context otherwise requires, the words and terms defined in NAC 368A.310 to 368A.390, inclusive, have the meanings ascribed to them in those sections.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.300, NV ADC 368A.300

NV ADC 368A.300
END OF DOCUMENT

Westlaw.

NAC 368A.310

Nev. Admin. Code ch. 368A, s. 310

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.310 "Board" defined. (NRS 368A.140)

"Board" means the State Gaming Control Board.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.310, NV ADC 368A.310

NV ADC 368A.310
END OF DOCUMENT

Westlaw.

NAC 368A.320

Nev. Admin. Code ch. 368A, s. 320

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.320 "Chairman" defined. (NRS 368A.140)

"Chairman" means the Chairman of the Board or a person designated by him.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.320, NV ADC 368A.320

NV ADC 368A.320
END OF DOCUMENT

Westlaw.

NAC 368A.330

Nev. Admin. Code ch. 368A, s. 330

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.330 "Live entertainment status" defined. (NRS 368A.140)

"Live entertainment status" means that condition which renders the selling of food, refreshments or merchandise subject to the tax imposed by chapter 368A of NRS.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.330, NV ADC 368A.330

NV ADC 368A.330
END OF DOCUMENT

Westlaw.

NAC 368A.340

Nev. Admin. Code ch. 368A, s. 340

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.340 "Nonprofit organization" defined. (NRS 368A.140)

"Nonprofit organization" means any organization described in paragraph (b) of subsection 5 of NRS 368A.200.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.340, NV ADC 368A.340

NV ADC 368A.340
END OF DOCUMENT

Westlaw.

NAC 368A.350

Nev. Admin. Code ch. 368A, s. 350

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.350 "Nonrestricted license" defined. (NRS 368A.140)

"Nonrestricted license" has the meaning ascribed to it in NRS 463.0177.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.350, NV ADC 368A.350

NV ADC 368A.350
END OF DOCUMENT

Westlaw.

NAC 368A.360

Nev. Admin. Code ch. 368A, s. 360

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.360 "Package" defined. (NRS 368A.140)

"Package" means any aggregation of rights to rooms, food, refreshments, merchandise, entertainment, services or other items which is advertised to the public as a single unit and sold for a single price.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.360, NV ADC 368A.360

NV ADC 368A.360
END OF DOCUMENT

Westlaw.

NAC 368A.370

Nev. Admin. Code ch. 368A, s. 370

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.370 "Patron" defined. (NRS 368A.140)

"Patron" means a person who gains access to a facility where live entertainment is provided and who neither solicits nor receives, from any source, any payment, reimbursement, remuneration or other form of consideration for providing live entertainment at the facility.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.370, NV ADC 368A.370

NV ADC 368A.370
END OF DOCUMENT

Westlaw.

NAC 368A.380

Nev. Admin. Code ch. 368A, s. 380

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.380 "Restricted license" defined. (NRS 368A.140)

"Restricted license" has the meaning ascribed to it in NRS 463.0189.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.380, NV ADC 368A.380

NV ADC 368A.380
END OF DOCUMENT

Westlaw.

NAC 368A.390

Nev. Admin. Code ch. 368A, s. 390

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.390 "Taxpayer" defined. (NRS 368A.140)

"Taxpayer" means any person described in subsection 1 of NRS 368A.110.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.390, NV ADC 368A.390

NV ADC 368A.390
END OF DOCUMENT

Westlaw

NAC 368A.400

Nev. Admin. Code ch. 368A, s. 400

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.400 Interpretation of certain statutory terms. (NRS 368A.140)

For the purposes of chapter 368A of NRS, the Board will interpret the term:

1. "Admission charge" to include, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

2. "Boxing contest or exhibition" to have the meaning ascribed in NRS 467.0107 to the term "unarmed combat."

3. "Casual assemblage" to include, without limitation:

(a) Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or

(b) Persons celebrating a friend's or family member's wedding, birthday, anniversary, graduation, religious ceremony or similar occasion that is generally recognized as customary for celebration.

4. "Facility" to encompass, if live entertainment is provided at a licensed gaming establishment that is licensed for:

(a) Less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, any area or premises where the live entertainment is provided and for which consideration is collected, from one or more patrons, for the right or privilege of entering that area or those premises, even if additional consideration is collected for the right or privilege of entering a smaller venue within that area or those premises; or

(b) At least 51 slot machines or at least 6 games, any designated area on the premises of the licensed gaming establishment within which the live entertainment is provided.

5. "Live entertainment" in the same manner as that term is interpreted pursuant to subsection 5 of NAC 368A.100. For the purposes of that subsection, the Board will interpret the term "recorded music" to include, without limitation, music on a cassette tape, compact disc, phonograph album, or video tape or disc, or on live

NAC 368A.400

Nev. Admin. Code ch. 368A, s. 400

television.

6. "Shopping mall" to include any area or premises where multiple vendors assemble for the primary purpose of selling goods or services, regardless of whether consideration is collected for the right or privilege of entering that area or those premises.

7. "Trade show" to mean an event of limited duration primarily attended by members of a particular trade or industry for the purpose of exhibiting their merchandise or services or discussing matters of interest to members of that trade or industry.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.400, NV ADC 368A.400

NV ADC 368A.400
END OF DOCUMENT

Westlaw

NAC 368A.410

Nev. Admin. Code ch. 368A, s. 410

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.410 Applicability of tax: Live entertainment status; dinner show. (NRS 368A.140)

1. Live entertainment status:

(a) Commences at the earlier of:

(1) The time when taxable live entertainment commences; or

(2) The time when any patron is required to pay an admission charge before the patron is allowed to enter a facility; and

(b) Ceases at the later of:

(1) The conclusion of the last performance of the taxable live entertainment; or

(2) The time when a facility for which an admission charge was required is completely vacated by admitted patrons or is opened to the general public free of any admission charge.

2. For the purposes of this section, there is no distinction between any period of dining and any period of entertainment at a restaurant of a licensed gaming establishment which is not open on a continual time schedule and where live entertainment is provided and advertised as a dinner show.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.410, NV ADC 368A.410

NV ADC 368A.410
END OF DOCUMENT

Westlaw.

NV ADC 368A.420

NAC 368A.420

Nev. Admin. Code ch. 368A, s. 420

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.420 Applicability of tax: Particular circumstances. (NRS 368A.140)

1. Except as otherwise provided in NRS 368A.200, the tax imposed by that section:

(a) Applies to an admission charge for a patron regardless of whether the patron is present for any portion of the live entertainment.

(b) Applies to each sale of a ticket that affords a patron the right to be present for any taxable live entertainment, unless the taxpayer establishes that the patron has received a full refund of the amount paid for the ticket.

(c) Except as otherwise provided in paragraph (d), applies to the sale of food, refreshments and merchandise at a facility that operates under a continual time schedule with no admission charge, if the food, refreshments or merchandise are ordered while the facility is in live entertainment status.

(d) Applies to the sale of food, refreshments and merchandise at a facility which are ordered or purchased during an interval between performances of live entertainment at the facility, unless the taxpayer accounts separately for the volume of sales to persons who enter the facility during such an interval and leave the facility before the commencement of the next performance of live entertainment.

(e) Applies to the sale of food and refreshments at a facility which are ordered before the facility enters into live entertainment status if the sale is completed after the facility enters into live entertainment status, unless the taxpayer identifies through its recordkeeping system the amount paid for food and refreshments ordered before the facility enters into live entertainment status.

(f) Applies to the sale of food and refreshments at a location in close proximity to a facility if the primary purpose of the location is to provide food or refreshments to the patrons of that facility who view the live entertainment provided at that facility.

(g) Applies, if an admission charge:

NAC 368A.420

Nev. Admin. Code ch. 368A, s. 420

(1) Is collected for access to a facility and payment of the admission charge entitles a patron to enter an area of the facility where live entertainment is provided, to the sale of food, refreshments and merchandise at any location within the facility to which the patron has access as a result of the payment of the admission charge, regardless of whether the patron can clearly hear or see the live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

(2) Is not collected for access to a facility, to the sale of food, refreshments and merchandise at any location within the facility, unless the taxpayer identifies through its recordkeeping system the sales to patrons who are unable to see or hear the live entertainment from the location within the facility where the food, refreshments or merchandise is sold.

2. As used in this section, "facility" means a facility where live entertainment is provided which has a maximum seating capacity of less than 7,500.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.420, NV ADC 368A.420

NV ADC 368A.420
END OF DOCUMENT

Westlaw

NAC 368A.430

Nev. Admin. Code ch. 368A, s. 430

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.430 Applicability of tax: When merchandise is deemed to be sold inside facility. (NRS 368A.140)

For the purposes of NRS 368A.200, merchandise shall be deemed to be sold inside a facility where live entertainment is provided if:

1. The purchase of a ticket or the payment of an admission fee, a cover charge, a minimum fee, or a similar charge or fee is required for a patron to gain access to the merchandise being sold; or

2. The merchandise is located in the area where the live entertainment is provided.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.430, NV ADC 368A.430

NV ADC 368A.430
END OF DOCUMENT

Westlaw.

NAC 368A.440

Nev. Admin. Code ch. 368A, s. 440

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.440 Determination of tax rate when maximum occupancy has not been designated. (NRS 368A.140)

For the purposes of paragraph (c) of subsection 7 of NRS 368A.200, if there is no governmental permit designating the maximum occupancy of a facility where live entertainment is provided, the Board will compute the tax rate on the presumption that the actual seating capacity of the facility is at least 300 and less than 7,500. To rebut this presumption, the taxpayer must establish, to the reasonable satisfaction of the Board, that the actual seating capacity of the facility is less than 300 or 7,500 or more. In determining whether the taxpayer has successfully rebutted the presumption, the Board will consider all evidence provided by the taxpayer, including, without limitation, evidence of actual attendance, the number of tickets sold or offered for sale, the square footage of the facility, the physical needs or requirements of the patrons in relation to the nature of the live entertainment provided and any other evidence tending to establish the actual seating capacity of the facility.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.440, NV ADC 368A.440

NV ADC 368A.440
END OF DOCUMENT

Westlaw.

NAC 368A.450

Nev. Admin. Code ch. 368A, s. 450

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.450 Computation of amount of tax due. (NRS 368A.140)

For purposes of computing the amount of the tax due pursuant to chapter 368A of NRS:

1. The tax rate must be applied to the total amounts paid for taxable admission charges and taxable sales of food, refreshments and merchandise, excluding the amount of any federal, state or local taxes included in those payments.

2. The tax must be paid on all taxable sales of food, refreshments and merchandise while a facility is in live entertainment status and on all taxable admission charges, regardless of whether the taxable amounts are paid in cash or through an extension of credit. Any required minimum purchases of food, refreshments or merchandise must be accounted for solely:

(a) As part of the total amount paid for taxable admission charges; or

(b) As part of the total amount paid for taxable sales of food, refreshments and merchandise.

3. The amount of any service charges imposed in connection with the use of credit cards or debit cards which is excluded from taxation pursuant to subsection 2 of NRS 368A.200, must be determined from the actual amount collected and retained by persons other than the taxpayer and not from an estimate of that amount.

4. If any taxable tickets for live entertainment are sold by a person who:

(a) Is not an affiliate of:

(1) The person licensed to conduct gaming at the facility where the live entertainment is provided; or

(2) The operator of the facility where the live entertainment is provided,

the tax must be paid on the portion of the proceeds of those sales which are remitted to the person licensed to conduct gaming at, or the operator of, the facility where the live entertainment is provided.

NAC 368A.450

Nev. Admin. Code ch. 368A, s. 450

(b) Is an affiliate of:

(1) The person licensed to conduct gaming at the facility where the live entertainment is provided; or

(2) The operator of the facility where the live entertainment is provided,

the tax must be paid on all the proceeds of those sales.

5. Subject to the provisions of subsection 4 of NRS 368A.200, the tax on any taxable ticket for live entertainment or ticket redeemable for taxable food or refreshments sold as a component of a package must be computed in accordance with the following provisions:

(a) Except as otherwise provided in paragraphs (b) and (c):

(1) The average retail value of the ticket must be prorated against the average retail value of all the components of the package, and the tax must be paid on the sum obtained by multiplying the resulting prorated fraction by the actual price paid for the package.

(2) Any value advertised to the public as the retail value of a component of a package is rebuttably presumed to constitute the actual retail value of that component.

(3) If no average retail value can be established for a component of a package, the cost of the component to the taxpayer must be used to carry out subparagraph (1).

(b) The tax on any ticket redeemable for taxable food or refreshments with an average retail value of less than $5 must be computed on the full retail value of the ticket and not as a component of a package.

(c) This subsection does not prohibit a taxpayer from paying, at the option of the taxpayer, the tax on the full retail value of the taxable components of a package.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.450, NV ADC 368A.450

NV ADC 368A.450
END OF DOCUMENT

Westlaw

NAC 368A.460

Nev. Admin. Code ch. 368A, s. 460

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.460 Inclusion of tax in price of ticket: Form of required statement. (NRS 368A.140)

The statement required by subsection 4 of NRS 368A.200 must be substantially in one of the following forms:

1. Includes Entertainment Tax;

2. Inc. Ent. Tax;

3. Includes Live Ent. Tax; or

4. L.E.T. included.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.460, NV ADC 368A.460

NV ADC 368A.460
END OF DOCUMENT

Westlaw.

NAC 368A.470

Nev. Admin. Code ch. 368A, s. 470

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.470 Scope of exemption for nonprofit organizations; assessment and computation of tax by Board. (NRS 368A.140)

1. For the purposes of paragraph (b) of subsection 5 of NRS 368A.200, live entertainment is provided by or entirely for the benefit of a nonprofit organization if the proceeds of the admission charges to the facility where the live entertainment is provided become the property of the nonprofit organization. The proceeds of the admission charges do not become the property of a person other than a nonprofit organization as long as the person retains not more of the proceeds than is necessary to cover the direct, supportable costs of hosting, promoting or sponsoring the event at which the live entertainment is provided.

2. Subject to the provisions of subsection 1, a nonprofit organization providing live entertainment, or a person providing live entertainment entirely for the benefit of a nonprofit organization, incurs no liability for the excise tax on live entertainment if the nonprofit organization or person contracts for goods or services with a person other than a nonprofit organization, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

3. If live entertainment is provided by or entirely for the benefit of a nonprofit organization, there will be no tax on amounts paid for food, refreshments or merchandise sold within the facility where the live entertainment is provided, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

4. Unless live entertainment is provided by or entirely for the benefit of a nonprofit organization, and except as otherwise provided in this chapter or chapter 368A of NRS, the Board will assess and compute the excise tax in accordance with NAC 368A.450.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.470, NV ADC 368A.470

NV ADC 368A.470
END OF DOCUMENT

Westlaw.

NV ADC 368A.480 Page 1

NAC 368A.480

Nev. Admin. Code ch. 368A, s. 480

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CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.480 Documentation required for exemption of nonprofit organization. (NRS 368A.140)

Any person who claims to be a nonprofit organization exempt from the provisions of NRS 368A.200, or any person who claims to provide live entertainment entirely for the benefit of such a nonprofit organization, shall, upon the request of the Board:

1. If the person does not claim to be an exempt religious organization, provide to the Board documentation from the Internal Revenue Service deemed appropriate by the Board indicating that the person has qualified as a tax-exempt organization pursuant to 26 U.S.C. § 501(c); or

2. If the person claims to be an exempt religious organization, or claims to have provided live entertainment entirely for the benefit of an exempt religious organization, provide to the Board such records as the Board deems necessary to demonstrate that the person or the organization for whose benefit the person provided live entertainment meets the criteria to qualify as a religious organization pursuant to 26 U.S.C. § 501(c) and any federal regulations relating thereto.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.480, NV ADC 368A.480

NV ADC 368A.480
END OF DOCUMENT

Westlaw.

NAC 368A.490

Nev. Admin. Code ch. 368A, s. 490

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.490 Responsibilities of persons licensed to conduct gaming: Payment of tax; records; reports. (NRS 368A.140, 368A.160)

1. If live entertainment that is taxable under chapter 368A of NRS is provided at a licensed gaming establishment, the person licensed to conduct gaming at that establishment is responsible for the payment of the tax, even if another person is affording that entertainment. In such a case, the person licensed to conduct gaming at that establishment is responsible for collecting the tax from the person affording that entertainment and for remitting the tax based upon the records of the person affording that entertainment.

2. If live entertainment that is taxable under chapter 368A of NRS is provided at a facility within a licensed gaming establishment in connection with any sale of food, refreshments or merchandise that is taxable under chapter 368A of NRS, and the facility is not operated by the person licensed to conduct gaming at that establishment, that person shall:

(a) Keep all pertinent records required by NRS 368A.160, chapter 463 of NRS and Regulation 6 of the Nevada Gaming Commission and State Gaming Control Board; and

(b) Obtain and keep, or require the person that operates that facility to obtain and keep, any other pertinent records required by NAC 368A.300 to 368A.540, inclusive.

3. If live entertainment that is taxable under chapter 368A of NRS is provided at a facility within a shopping mall on the premises of a licensed gaming establishment and the shopping mall is owned by the person licensed to conduct gaming at that establishment, or by an affiliate of that person, the person licensed to conduct gaming at that establishment is responsible for the payment of the tax and shall include all taxable amounts in the reports required by NRS 368A.220.

4. Each person that holds:

(a) A nonrestricted license shall file with the Board, on or before the 24th day of each month, a report pursuant to NRS 368A.220, showing the amount of all receipts for the preceding month which are taxable pursuant to chapter 368A of NRS.

NAC 368A.490

Nev. Admin. Code ch. 368A, s. 490

(b) A restricted license shall file with the Board, on or before the 10th day of the month following each calendar quarter, a report pursuant to NRS 368A.220, showing the amount of all receipts for the preceding calendar quarter which are taxable pursuant to chapter 368A of NRS.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.490, NV ADC 368A.490

NV ADC 368A.490
END OF DOCUMENT

Westlaw.

NAC 368A.500

Nev. Admin. Code ch. 368A, s. 500

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

Current through November 2007, Supplement 2007-3

NAC 368A.500 Maintenance and availability of records of taxpayers. (NRS 368A.140, 368A.160)

A taxpayer shall:

1. Record all sales which are taxable pursuant to chapter 368A of NRS in a manner that reflects the amount of each taxable sale, unless the taxpayer uses an alternative accounting procedure approved by the Chairman.

2. Keep records evidencing any exemption from the tax imposed by chapter 368A of NRS of live entertainment provided at the licensed gaming establishment of the taxpayer.

3. Make its records available for audit by the Board at any reasonable time.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.500, NV ADC 368A.500

NV ADC 368A.500
END OF DOCUMENT

Westlaw.

NAC 368A.510

Nev. Admin. Code ch. 368A, s. 510

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.510 Procedures for internal control. (NRS 368A.140)

1. Each:

(a) Group I licensee that provides live entertainment shall:

(1) Include in its system of internal control, submitted pursuant to Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board, a description of the procedures adopted by the licensee to comply with NAC 368A.300 to 368A.540, inclusive; and

(2) Comply with that system of internal control and any minimum standards for internal control for entertainment adopted by the Chairman pursuant to Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board.

(b) Group II licensee that provides live entertainment and each taxpayer that holds a restricted license shall comply with any procedures for internal control for entertainment adopted by the Chairman pursuant to Regulation 6.100 of the Nevada Gaming Commission and State Gaming Control Board.

Except as otherwise approved in writing by the Chairman, a taxpayer shall not carry out any procedures for internal control that deviate from any standards or procedures for internal control for entertainment adopted and published by the Chairman.

2. Each group I licensee that provides live entertainment shall direct its independent accountant to perform observations, examinations of documents and inquiries of employees, using any applicable guidelines, checklists and other criteria established by the Chairman, to determine compliance with the requirements for entertainment. The independent accountant shall report his findings as part of the report required by subsection 9 of Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board.

3. The internal auditor of each group I licensee that provides live entertainment shall:

NAC 368A.510

Nev. Admin. Code ch. 368A, s. 510

(a) Using any applicable guidelines, checklists and other criteria established by the Chairman, perform observations, examinations of documents and inquiries of employees to determine compliance with the requirements for entertainment.

(b) Submit to the Board within 120 days after the last day of the first 6 months of the business year of the licensee two copies of a report by the internal auditor summarizing all instances of noncompliance with the requirements for entertainment during the first 6 months of the business year of the licensee and any applicable responses by the management of the licensee, including any work required to be performed during the reporting period and any additional procedures that were performed.

(c) Unless the instances of noncompliance are to be disclosed in the report submitted by the independent accountant for the licensee pursuant to subsection 9 of Regulation 6.090 of the Nevada Gaming Commission and State Gaming Control Board, submit to the Board within 120 days after the last day of the final 6 months of the business year of the licensee two copies of a report by the internal auditor summarizing all instances of noncompliance with the requirements for entertainment during the final 6 months of the business year of the licensee and any applicable responses by the management of the licensee, including any work required to be performed during the reporting period and any additional procedures that were performed.

4. As used in this section:

(a) "Group I licensee" and "group II licensee" have the meanings ascribed to those terms in Regulation 6.010 of the Nevada Gaming Commission and State Gaming Control Board.

(b) "Requirements for entertainment" means the provisions of NAC 368A.300 to 368A.540, inclusive, chapter 368A of NRS and any minimum standards for internal control for entertainment adopted by the Chairman.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.510, NV ADC 368A.510

NV ADC 368A.510
END OF DOCUMENT

Westlaw.

NV ADC 368A.520 Page 1

NAC 368A.520

Nev. Admin. Code ch. 368A, s. 520

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.520 Refund of overpayment of taxes. (NRS 368A.140)

The provisions of NRS 463.387 shall be deemed to apply to a claim pursuant to NRS 368A.260 by a taxpayer for the refund of any overpayment of taxes, except that:

1. The claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made; and

2. No interest will be allowed on the overpayment if the Board determines that the overpayment was made intentionally or by reason of carelessness.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.520, NV ADC 368A.520

NV ADC 368A.520
END OF DOCUMENT

Westlaw.

NAC 368A.530

Nev. Admin. Code ch. 368A, s. 530

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.530 Penalty for evasion or nonpayment of tax. (NRS 368A.140)

Any taxpayer liable for the payment of the tax imposed by chapter 368A of NRS who willfully fails to report, pay or truthfully account for the tax is liable for a penalty in the amount of the tax evaded or not paid, to be assessed and collected in the same manner as charges, taxes, licenses and penalties are assessed and collected pursuant to chapter 463 of NRS.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NAC 368A.530, NV ADC 368A.530

NV ADC 368A.530
END OF DOCUMENT

Westlaw.

NAC 368A.540

Nev. Admin. Code ch. 368A, s. 540

NEVADA ADMINISTRATIVE CODE
CHAPTER 368A. TAX ON LIVE ENTERTAINMENT
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Current through November 2007, Supplement 2007-3

NAC 368A.540 Violation constitutes unsuitable method of operation. (NRS 368A.140)

A violation of any of the provisions of NAC 368A.300 to 368A.540, inclusive, or chapter 368A of NRS constitutes an unsuitable method of operation subjecting a licensed gaming establishment to the suspension or revocation of its gaming license.

(Added to NAC by Gaming Control Bd. by R223-03, 2-25-2004, eff. 1-1-2004)

NV ADC 368A.540
END OF DOCUMENT

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IN THE MATTER OF: The Appeal of Olympic Gardens, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc. ("Appellants") from the Department of Taxation's Denial of their refund request pursuant to NRS 368A.260

The above matter came before the Nevada Tax Commission ("the Commission") for hearing on August 6, 2007. Bradley Shafer, Esq. and Dianna Sullivan, Esq. appeared on behalf of Appellants. Senior Deputy Attorney General David J. Pope and Deputy Attorney General Dennis Belcourt appeared on behalf of the Department of Taxation ("the Department").

The Commission hereby makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Appellants, as providers of live entertainment, are or have been taxpayers under NRS chapter 368A, through which is imposed the Live Entertainment Tax ("LET").
2. Appellants filed timely requests for refunds pursuant to NRS 368A.260 for the tax periods of January, February 2004, March 2004 and April 2004, claiming that the LET is facially unconstitutional, that it unconstitutionally targets them or their message, and that they are entitled to refunds for the taxes paid by them, pursuant to NRS 368A.200(5)(a).
3. The Department denied Appellants' requests.
4. Appellants filed timely appeals from the Department's denials of their refund requests.
5. In this appeal, Appellants contend that a tax on live entertainment is per se unconstitutional, that the LET is rendered unconstitutional by the number of statutory exemptions, which Appellants claim make the tax one targeted at live adult entertainment, and that the legislative record shows an intent to tax based on content, to the detriment of providers of live adult entertainment.
6. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed such.

CONCLUSIONS OF LAW

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."
2. Entertainment can be a form of speech protected under the First Amendment of the United States Constitution and Article I, section 9 of the Nevada Constitution.
3. The United States and Nevada Constitutions do not forbid taxation of live entertainment as such.
4. NRS 368A.090 contains a definition of live entertainment. Regulations and an amendment to NRS 368A.090 define what is not live entertainment.
5. NRS 368A.200, as initially enacted in 2003 and as amended in 2005 and 2007, contains exemptions from the live entertainment tax.
6. A tax that targets a small group of speakers may violate the United States and Nevada constitutional protections against infringement of speech.
7. The live entertainment tax under NRS chapter 368A is an extension of the former casino entertainment tax (NRS chapter 463). It is imposed on an array of types of entertainment, both at licensed gaming establishments and other locations. It therefore does not target a small group of speakers.
8. A tax that constitutes a "regulation of speech because of disagreement with the message which it conveys" may violate the United States and Nevada constitutional protections against infringement of speech. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).
9. The definition in NRS 368A.090, the exemptions in NRS 368A.200, and other provisions of NRS chapter 368A delineating the scope of the tax are reasonable classifications for tax purposes and do not appear to be aimed at any message that may be contained in the entertainment by Appellants or any other speakers. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940) (providing, "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification").
10. Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment.
11. Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment.
12. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed such.

DECISION

After due deliberation, and based on the foregoing, the Commission denied the appeal.

FOR THE COMMISSION:

DINO DICIANO
Executive Director
Nevada Department of Taxation

cc: David Pope, Sr. Deputy Attorney General
Dennis Belcourt, Deputy Attorney General
Taxpayers (via regular mail)

SUMM

ORIGINAL

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District Court

CLARK COUNTY, NEVADA

FILED

Case No. A554870
Dept. No. IX

JAN 23 3 53 PM '08

CLERK OF THE COURT

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club; OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, LLC, d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores;

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS;

Defendants.

SUMMONS

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

DEPARTMENT OF TAXATION WITH NOTICE TO CATHERINE MASTO, ATTORNEY GENERAL, STATE OF NEVADA

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.

b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

RECEIVED
JAN 23 2008
CLERK OF THE COURT

Diana L. Sullivan, Esq.
CHANEM & SULLIVAN, LLP
8861 West Sahara Ave., Suite 120
Las Vegas, Nevada 89117
Attorney for Plaintiffs

CLERK OF THE COURT

JAN 09 2008

By: _____ Date
DEPUTY CLERK JULIE RICHMOND
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service:
SUMMONS & COMPLAINT FOR
DEPARTMENT OF TAXATION

DEPTARTMENT OF TAXATION

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Department of Taxation, C/O NEVADA OFFICE OF THE ATTORNEY GENERAL, Carson City, Nv.

JANUARY 16, 2008 at 3:18 p.m., Affiant personally served a true and correct copy of the same upon DEPARTMENT OF TAXATION c/o NEVADA OFFICE OF THE ATTORNEY GENERAL, accepted by Deputy Attorney General, Colleen Hemingway at NEVADA OFFICE OF THE ATTORNEY GENERAL, 100 North Carson St., in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 24 JANUARY, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
24 JANUARY, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

ORIGINAL

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SUMM

District Court

CLARK COUNTY, NEVADA

FILED

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club; OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, LLC, d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores;

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS;

Defendants.

Case No. A-08-534917-C
Dept. No. XI

CLERK OF THE COURT

SUMMONS

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

NEVADA STATE BOARD OF EXAMINERS

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:
   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.
2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

Diana L. Sullivan

Diana L. Sullivan, Esq.
GHANEM & SULLIVAN, LLP
8861 West Sahara Ave., Suite 120
Las Vegas, Nevada 89117
Attorney for Plaintiffs

CLERK OF THE COURT

By: _____ JAN 09 2009
DEPUTY CLERK JULIE RICHMOND Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service:
SUMMONS & COMPLAINT FOR NEVADA STATE BOARD OF EXAMINERS

NV STATE BOARD OF EXAMINERS

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Nevada State Board of Examiners, 209 East Musser St., Carson City, Nv.

JANUARY 16, 2008 at 3:30 p.m., Affiant personally served a true and correct copy of the same upon NEVADA STATE BOARD OF EXAMINERS c/o Debbie Christensen at 209 E. Musser St., in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 24 JANUARY, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
24 JANUARY, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

ORIGINAL

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SUMM

District Court

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club; OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, LLC, d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores;

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS;

Defendants.

Case No. A554970
Dept. No.

FILED
JAN 29 3 52 PM '08

CLERK OF COURT

SUMMONS

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

NEVADA TAX COMMISSION

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:
   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.
2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at the direction of:

RECEIVED
JAN 29 2008
CLERK OF COURT

Diana L. Sullivan

Diana L. Sullivan, Esq.
CHANEY & SULLIVAN, LLP
8861 West Sahara Ave., Suite 120
Las Vegas, Nevada 89117
Attorney for Plaintiffs

CLERK OF THE COURT

By: _____ JAN 29 2008
DEPUTY CLERK JULIE RICHMOND Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service:
SUMMONS & COMPLAINT FOR NEVADA TAX COMMISSION

NEVADA TAX COMMISSION

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Nevada Tax Commission, Carson City, Nv.

JANUARY 16, 2008 at 2:35 p.m., Affiant personally served a true and correct copy of the same upon NEVADA TAX COMMISSION c/o ERIN FIERRO at NEVADA TAX COMMISSION, 1550 College Parkway, Ste. 115, in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 24 JANUARY, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
24 JANUARY, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

ORIGINAL

30

SUMM

District Court

CLARK COUNTY, NEVADA

A554976 FILED

Case No. A554976
Dept. No. IX

JAN 29 3 52 PM '08

CLERK OF THE COURT

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club; OLYMPUS GARDEN, INC., d/b/a Olympic Garden; SHAC, LLC, d/b/a Sapphire; THE POWER COMPANY, INC., d/b/a Crazy Horse Too Gentlemen's Club; D. WESTWOOD, INC., d/b/a Treasures; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a Scores;

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS;

Defendants.

SUMMONS

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by the plaintiff against you for the relief set forth in the Complaint.

NEVADA DEPARTMENT OF TAXATION

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:
   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.
   b. Serve a copy of your response upon the attorney whose name and address is shown below.
2. Unless you respond, your default will be entered upon application of the plaintiff and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

RECEIVED
JAN 29 2008
CLERK OF THE COURT

Issued at the direction of:

Diana L. Sullivan

Diana L. Sullivan, Esq.
GHANEM & SULLIVAN, LLP
8861 West Sahara Ave., Suite 120
Las Vegas, Nevada 89117
Attorney for Plaintiffs

CLERK OF THE COURT

By: _____ JAN 29 2008
DEPUTY CLERK Date
JULIE RICHMOND
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service:
SUMMONS & COMPLAINT FOR NEVADA DEPARTMENT OF TAXATION

NEVADA DEPT. OF TAXATION

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Nevada Department of Taxation, Carson City, Nv.

JANUARY 16, 2008 at 2:35 p.m., Affiant personally served a true and correct copy of the same upon NEVADA DEPARTMENT OF TAXATION c/o ERIN FIERRO at NEVADA DEPARTMENT OF TAXATION, 1550 College Parkway, Ste. 115, in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 24 JANUARY, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
24 JANUARY, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

COPY

ANS
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Sr. Deputy Attorney General
Nevada State Bar #8617
Suzanne M. Warren
Deputy Attorney General
Nevada State Bar #9002
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
(702) 486-3420
(702) 486-3416 fax
Attorneys for the Nevada Department of Taxation

FILED

MAR 3 4 5" PM '08

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls,* LITTLE DARLINGS OF LAS VEGAS, LLC d/b/a *Little Darlings,* K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiff(s),

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

Case No. A533273

Dept. No. IX

ANSWER

COMES NOW, Defendants Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michele Jacobs, in her official capacity only, by and through their attorneys, Catherine Cortez Masto, Attorney General, David J. Pope, Senior Deputy Attorney General, and Suzanne M. Warren, Deputy Attorney General, and hereby submit their Answer to Plaintiff's First Amended Complaint.

RECEIVED
MAR 10 2008
By

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

JURISDICTION AND VENUE

1. Answering paragraph 2, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

2. Answering paragraph 3, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein. Answering Defendants specifically deny that they are persons for purposes of 42 U.S.C. § 1983.

3. Answering paragraphs 4, 5, and 6, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

PARTIES

4. Answering paragraphs 7, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

5. Answering paragraphs 8, 9, 10, 11, 12, 13, 14, 15, and 16, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

6. Answering paragraph 17, Answering Defendant Nevada Department of Taxation admits that it is a governmental entity created under the laws of the State of Nevada and that it administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers in Nevada. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

7. Answering paragraph 18, the answering Defendant Nevada Tax Commission admits that it is a governmental entity created by the laws of the State of Nevada and that it is the head of the Department of Taxation which administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes with regard to non-gaming licensed taxpayers and that it is statutorily authorized to consider and rule upon appeals of refund claims. The answering Defendant Nevada Tax Commission further answers that they are without sufficient knowledge as to the remaining allegations and therefore deny the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

8. Answering paragraph 19, Answering Defendant State Board of Examiners admits that it is a governmental entity created under the laws of the State of Nevada, consisting of the governor, the secretary of state, and the attorney general. Answering Defendant Nevada State Board of Examiners further admits that pursuant to NRS 368A.250, it is authorized to approve refunds of amounts collected by the Nevada Department of Taxation in excess of the amount legally due. The answering Defendant State Board of Examiners further answers that it is without sufficient knowledge as to the remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

9. Answering paragraph 20, Answering Defendant Michelle Jacobs admits that she is an employee of the Nevada Department of Taxation and is, in some capacity, responsible for the administration of Chapter 368A. Other Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

STATEMENT OF FACTS

10. Answering paragraph 21, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

11. Answering paragraph 22, Answering Defendants admit the allegations contained therein.

12. Answering paragraph 23, Answering Defendant Nevada Department of Taxation admits that it collects the tax imposed by Chapter 368A (Plaintiffs incorrectly cite Chapter 367A) from taxpayers who/which are not licensed gaming establishments. Answering Defendant Nevada Department of Taxation further admits that pursuant to NRS 368A.140 it shall adopt such regulations as are necessary to carry out this function. Other Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

13. Answering paragraph 24, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

14. Answering paragraph 25, Answering Defendants admit that the statutory sections cited therein, as they existed when enacted, speak for themselves.

15. Answering paragraph 26, Answering Defendants admit that Chapter 368A was amended by Assembly Bill No. 554 which reduced the scope of the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

16. Answering paragraph 27, 28, 29, 30, 31, 32, 33, and 34, Answering Defendants admit that the Plaintiffs mentioned therein have been required to pay the Live Entertainment Tax found in Chapter 368A of the NRS. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

17. Answering paragraph 35, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

18. Answering paragraph 36, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

19. Answering paragraph 37, Answering Defendants admit the allegations contained therein.

20. Answering paragraph 38, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

21. Answering paragraph 39 and 40, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

22. Answering paragraph 41, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

23. Answering paragraph 42, Answering Defendants admit that the excerpts from the statute appear to be the same language found in the statute cited therein.

24. Answering paragraphs 43, 44, and 45, Answering Defendants admit that the statutory sections cited therein speak for themselves.

25. Answering paragraph 46, Answering Defendants admit that pursuant to NRS 368A.140(2)(a) the Nevada Department of Taxation is statutorily required to collect the Live Entertainment Tax from non-gaming licensed taxpayers and pursuant to NRS 368A.140(2)(b) is empowered to adopt such regulations as are necessary to carry out the provisions of paragraph (a).

26. Answering paragraph 47, Answering Defendants admit that pursuant to NRS 368A.200(5) the tax imposed by Chapter 368A is not applicable to a variety of circumstances and further admit that any statutory sections cited therein speak for themselves.

27. Answering paragraphs 48, 49 and 50, Answering Defendants admit that the statutory sections cited therein speak for themselves.

COUNT I – DECLARATORY RELIEF

28. Answering paragraph 51, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

29. Answering paragraph 52, Answering Defendants deny each and every allegation contained therein.

30. Answering paragraph 53, Answering Defendants deny each and every allegation contained therein.

31. Answering paragraph 54, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

contained therein and, upon said ground, deny each and every allegation contained therein.

32. Answering paragraph 55, Answering Defendants deny each and every allegation contained therein.

33. Answering paragraph 56, Answering Defendants deny each and every allegation contained therein.

COUNT II – INJUNCTIVE RELIEF

34. Answering paragraph 57, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

35. Answering paragraph 58, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

36. Answering paragraph 59, Answering Defendants admit only that they intend to enforce and carry out the provisions of Chapter 368A. Answering Defendants deny each and every remaining allegation contained therein.

37. Answering paragraph 60, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

38. Answering paragraph 61, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

COUNT III – DAMAGES AGAINST DEFENDANTS

39. Answering paragraph 62, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

40. Answering paragraph 63, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

41. Answering paragraph 64, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

42. Answering paragraph 65, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

43. Answering paragraph 66, Answering Defendants deny each and every allegation contained therein.

COUNT IV – ATTORNEY FEES AND COSTS

44. Answering paragraph 67, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

45. Answering paragraph 68, Answering Defendants deny each and every allegation contained therein.

As to any allegations not specifically answered above or inadvertently omitted, Answering Defendants deny them in their entirety.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.
2. Answering Defendants claim all immunities, defenses, exemptions, and limitations on liability pursuant to the provisions of Chapter 41 of the Nevada Revised Statutes.
3. Answering Defendants are entitled to qualified immunity as a matter of law.
4. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of monetary damages is available under that statute.

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

5. The Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of injunctive relief is available under that statute.
6. Pursuant to Chapter 368A of the Nevada Revised Statutes, Plaintiffs are not entitled to an injunction, writ of mandate, or any other legal or equitable process to prevent or enjoin the collection of the tax, penalty or interest imposed by Chapter 368A.
7. The Nevada Department of Taxation properly assessed tax as authorized and required by, and in accordance with, Chapter 368A of the Nevada Revised Statutes and the applicable Nevada Administrative Code provisions.
8. The Defendants are entitled to sovereign immunity.
9. This action is barred by Nevada Revised Statutes 41.031 and 41.0337, due to Plaintiffs' failure to name the State of Nevada as a defendant.
10. Answering Defendants allege that at the time of filing of this Answer, all possible affirmative defenses may have not been alleged pending the development of sufficient facts after reasonable inquiry; therefore, Answering Defendants reserve the right to amend this Answer to allege additional affirmative defenses if warranted by subsequent investigation.

WHEREFORE, Defendants pray that this Court enter judgment in their favor and that Plaintiffs take nothing by way of their Complaint.

Respectfully submitted:

Dated March 3, 2008

CATHERINE CORTEZ MASTO
Attorney General

By: _____

David J. Pope
Sr. Deputy Attorney General
Nevada State Bar #8617
Suzanne M. Warren
Nevada State Bar #9002
555 E. Washington Ave., #3900
Las Vegas, NV 89101

Attorneys for Defendants

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on March 4, 2008, I served the foregoing **Answer** by mailing a copy thereof, via first class, postage- paid mail, addressed as follows:

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. #2
Lansing, MI 48906

Dominic P. Gentile, Esq.
Gentile Depalma, Ltd.
Las Vegas, NV 89169

DATED this 4th day of March, 2008

By: _____
An employee of the State of Nevada,
Office of the Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

COPY

ANS
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Sr. Deputy Attorney General
Nevada State Bar #8617
Suzanne M. Warren
Deputy Attorney General
Nevada State Bar #9002
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
(702) 486-3420
(702) 486-3416 fax
Attorneys for the Nevada Department of Taxation

FILED
MAR 3 4 17 PM '08

DISTRICT COURT

CLARK COUNTY NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club;* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden;* SHAC, LLC, d/b/a *Sapphire;* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club;* D. WESTWOOD, INC., *d/b/a Treasures;* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, *d/b/a Scores;*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No. A554970

Dept. No. IX

ANSWER

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

COME NOW, Defendants Nevada Department of Taxation, Nevada Tax Commission, and Nevada State Board of Examiners, by and through their attorneys, Catherine Cortez Masto, Attorney General, David J. Pope, Senior Deputy Attorney General, and Suzanne M. Warren, Deputy Attorney General, and hereby submit their Answer to Plaintiffs' Complaint.

JURISDICTION AND VENUE

1. Answering paragraph 2, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations

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By

contained therein, and upon said basis, deny each and every allegation contained therein.

2. Answering paragraph 3, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

3. Answering paragraphs 4, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

PARTIES

4. Answering paragraph 5, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

5. Answering paragraph 6, 7, 8, 9, 10, 11 and 12, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

6. Answering paragraph 13, Answering Defendant Nevada Department of Taxation admits that it is a governmental entity created under the laws of the State of Nevada and that it administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers in Nevada. Nevada Department of Taxation further answers that it is without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 13, and upon said basis, denies each and every remaining allegation contained therein. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

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Las Vegas, NV 89101

7. Answering paragraph 14, Answering Defendant Nevada Tax Commission admits that it is a governmental entity created by the laws of the State of Nevada and that it is the head of the Department of Taxation which administers and enforces the statutory provisions of Chapter 368A of the Nevada Revised Statutes with regard to non-gaming licensed taxpayers and that it is statutorily authorized to consider and rule upon appeals of refund claims. Defendant Nevada Tax Commission also admits that it rendered the decision which Plaintiffs challenge by way of this action and further answers that it is without sufficient knowledge or information as to the remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

8. Answering paragraph 15, Answering Defendant State Board of Examiners admits that it is a governmental entity created under the laws of the State of Nevada, consisting of the governor, the secretary of state, and the attorney general. Answering Defendant Nevada State Board of Examiners further admits that pursuant to NRS 368A.250, it is authorized to approve refunds of amounts collected by the Nevada Department of Taxation in excess of the amount legally due. State Board of Examiners further answers that it is without sufficient knowledge or information as to any remaining allegations and therefore denies the same. Other Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

STATEMENT OF FACTS

9. Answering paragraph 16, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

10. Answering paragraph 17, Answering Defendants admit the allegations contained therein.

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

11. Answering paragraph 18, Answering Defendants admit that at some time following the enactment of Chapter 368A of the Nevada Revised Statutes administrative regulations, otherwise known as Chapter 368A of the Nevada Administrative Code, were promulgated regarding the administration and enforcement of Chapter 368A of the Nevada Revised Statutes. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained in paragraph 18 and, upon said basis, deny each and every remaining allegation contained therein.

12. Answering paragraph 19, Answering Defendant Nevada Department of Taxation admits that it collects the tax imposed by Chapter 368A from taxpayers who/which are not licensed gaming establishments. Answering Defendant Nevada Department of Taxation further admits that pursuant to NRS 368A.140 it shall adopt such regulations as are necessary to carry out this function. Other Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein, and upon said basis, deny each and every allegation contained therein.

13. Answering paragraph 20, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

14. Answering paragraph 21, Answering Defendants admit that the statutory sections cited therein, as they existed when enacted, speak for themselves.

15. Answering paragraph 22, Answering Defendants admit that Chapter 368A was amended by Assembly Bill No. 554 which reduced the scope of the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining

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allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

16. Answering paragraph 23, 24, 25, 26, 27, 28, and 29, Answering Defendants admit that the Plaintiffs mentioned therein are subject to Chapter 368A of the NRS and have been and are required to pay the Live Entertainment Tax found in Chapter 368A of the NRS. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

17. Answering paragraph 30, Answering Defendants admit that live entertainment occurs at Plaintiffs' business premises. Answering Defendants further answer they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

18. Answering paragraph 31, Answering Defendants answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

19. Answering paragraph 32, Answering Defendants admit the allegations contained therein.

20. Answering paragraph 33, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

21. Answering paragraph 34, Answering Defendants admit that Plaintiffs have filed requests for refunds. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity

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of any remaining allegations contained therein and, upon said ground, deny each and every other allegation contained therein.

22. Answering paragraph 35, Answering Defendant Nevada Department of Taxation admits that it has denied the requests for refund. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of any remaining allegations contained therein and, upon said ground, deny each and every remaining allegation contained therein.

23. Answering paragraph 36, Answering Defendants admit that a hearing was scheduled before Defendant Nevada Tax Commission at which would be heard the appeals of denials of requests for refunds of the Live Entertainment Tax for tax periods January, February, March and April, 2004. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

24. Answering paragraph 37, Answering Defendants admit that the hearing was continued. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

25. Answering paragraph 38, Answering Defendants admit that the Nevada Tax Commission, after considering the argument and materials submitted, issued a written decision, dated October 12, 2007, denying Plaintiffs' appeals. Answering Defendants deny that any witness testimony was offered at the hearing before the Nevada Tax Commission.

26. Answering paragraph 39, Answering Defendants admit that any statutory sections cited therein speak for themselves. Answering Defendants further answer that they are without sufficient knowledge or information upon which to form a belief as to the truth or

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

falsity of the remaining allegations contained therein, and upon said basis, deny each and every other allegation contained therein.

27. In answering paragraph 40, Answering Defendants admit that any statutory sections cited therein speak for themselves.

28. In answering paragraph 41, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

29. In Answering paragraph 42, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

30. Answering paragraph 43, Answering Defendants admit that the excerpts from the statute appear to be the same language found in the statutes cited therein and that the statutory sections cited therein speak for themselves.

31. Answering paragraphs 44, 45 and 46, Answering Defendants admit that the statutory sections cited therein speak for themselves.

32. Answering paragraph 47, Answering Defendants admit that pursuant to NRS 368A.140(2)(a) the Nevada Department of Taxation is statutorily required to collect the Live Entertainment Tax from non-gaming licensed taxpayers and pursuant to NRS 368A.140(2)(b) is empowered to adopt such regulations as are necessary to carry out the provisions of paragraph (a).

33. Answering paragraph 48, Answering Defendants admit that the statutory sections cited therein speak for themselves.

34. Answering paragraph 49, Answering Defendants admit that pursuant to NRS 368A.200(5) the tax imposed by Chapter 368A is not applicable to a variety of circumstances and further admit that any statutory sections cited therein speak for themselves.

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Las Vegas, NV 89101

35. Answering paragraphs 50 and 51, Answering Defendants admit that the statutory sections cited therein speak for themselves.

COUNT I – DECLARATORY RELIEF

36. Answering paragraph 52, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

37. Answering paragraph 53, Answering Defendants deny each and every allegation contained therein.

38. Answering paragraph 54, Answering Defendants deny each and every allegation contained therein.

39. Answering paragraph 55, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

40. Answering paragraph 56, Answering Defendants deny each and every allegation contained therein.

41. Answering paragraph 57, Answering Defendants deny each and every allegation contained therein.

COUNT II – REQUEST FOR REFUND

42. Answering paragraph 58, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

43. Answering paragraph 59, Answering Defendants deny each and every allegation contained therein.

44. Answering paragraph 60, Answering Defendants deny each and every allegation contained therein.

45. Answering paragraph 61, Answering Defendants admit that the statutory sections cited therein speak for themselves and deny each and every remaining allegation contained therein.

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Las Vegas, NV 89101

COUNT III – INJUNCTIVE RELIEF

46. Answering paragraph 62, Answering Defendants incorporate by reference each and every paragraph above as if fully set forth herein.

47. Answering paragraph 63, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

48. Answering paragraph 64, Answering Defendants admit only that they intend to enforce and carry out the provisions of Chapter 368A. Answering Defendants deny each and every remaining allegation contained therein.

49. Answering paragraph 65, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

50. Answering paragraph 66, Answering Defendants are without sufficient knowledge or information upon which to form a belief as to the truth or falsity of the allegations contained therein and, upon said ground, deny each and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

2. Answering Defendants claim all immunities, defenses, exemptions, and limitations on liability pursuant to the provisions of Chapter 41 of the Nevada Revised Statutes.

3. Answering Defendants are entitled to qualified immunity as a matter of law.

4. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of monetary damages is available under that statute.

5. Answering Defendants are not "persons" for purposes of 42 U.S.C. § 1983 and therefore no remedy in the form of injunctive relief is available under that statute.

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Las Vegas, NV 89101

6. Pursuant to Chapter 368A of the Nevada Revised Statutes, Plaintiffs are not entitled to an injunction, writ of mandate, or any other legal or equitable process to prevent or enjoin the collection of the tax, penalty or interest imposed by Chapter 368A.

7. The Nevada Department of Taxation properly assessed tax as authorized and required by, and in accordance with, Chapter 368A of the Nevada Revised Statutes and the applicable Nevada Administrative Code provisions.

8. Answering Defendants are entitled to sovereign immunity.

9. This action is barred by Nevada Revised Statutes 41.031 and 41.0337, due to Plaintiffs' failure to name the State of Nevada as a defendant.

10. Answering Defendants allege that at the time of filing of this Answer, all possible affirmative defenses may have not been alleged pending the development of sufficient facts after reasonable inquiry; therefore, Answering Defendants reserve the right to amend this Answer to allege additional affirmative defenses if warranted by subsequent investigation.

WHEREFORE, Defendants pray that this Court enter judgment in their favor and that Plaintiffs take nothing by way of their Complaint.

Respectfully submitted:

Dated: March 3, 2008

CATHERINE CORTEZ MASTO
Attorney General

By: _____

David J. Pope
Sr. Deputy Attorney General
Nevada State Bar #8617
Suzanne M. Warren
Deputy Attorney General
Nevada State Bar #9002
555 E. Washington Ave., #3900
Las Vegas, NV 89101

Attorneys for Defendants

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on March 4, 2008, I deposited in the U.S. mail, postage prepaid, via First Class Mail, a true and correct copy of the foregoing **Answer,** addressed as follows:

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite 2
Lansing, MI 48906-2110

DATED this 4th day of March, 2008

By: _____
An employee of the State of Nevada,
Office of the Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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CLERK OF THE COURT

DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
GHANEM & SULLIVAN, LLP
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Telephone: (702) 862-4450
Facsimile: (702) 862-4422
Attorneys for Plaintiffs

BRADLEY J. SHAFER*
Michigan Bar # P36604
Shafer & Associates, P.C.
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Lansing, Michigan 48906-2110
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(517) 886-6565 - facsimile
Email: shaferassociates@acd.net
* *Pending Admission Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

AMENDED AFFIDAVIT OF SERVICE FOR THE NEVADA TAX COMMISSION

Attached herein is the Amended Affidavit of Service of the Summons and Complaint

....

....

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CLERK OF THE COURT

on Defendant Nevada Tax Commission.

DATED this 10th day of April, 2008.

GHANEM & SULLIVAN, LLP

By _____
DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service: Amended SUMMONS & COMPLAINT FOR NEVADA TAX COMMISSION

NEVADA TAX COMMISSION

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Nevada Tax Commission, Carson City, Nv.

JANUARY 18, 2008 at 2:35 p.m., Affiant personally served a true and correct copy of the same upon NEVADA TAX COMMISSION c/o ERIN FIERRO at NEVADA TAX COMMISSION, 1550 College Parkway, Ste. 115, in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 09 February, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
09 February, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

ORIGINAL

11

DIANA L. SULLIVAN, ESQ.
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Attorneys for Plaintiffs

BRADLEY J. SHAFER*
Michigan Bar # P36604
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3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
(517) 886-6560 - telephone
(517) 886-6565 - facsimile
Email: shaferassociates@acd.net
* *Pending Admission Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

AMENDED AFFIDAVIT OF SERVICE FOR THE NEVADA DEPARTMENT OF TAXATION

Attached herein is the Amended Affidavit of Service of the Summons and Complaint

....

....

on Defendant Nevada Department of Taxation.

DATED this 9th day of April, 2008.

GHANEM & SULLIVAN, LLP

By Diana L Sullivan

DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service: Amended SUMMONS & COMPLAINT FOR NEVADA DEPARTMENT OF TAXATION

NEVADA DEPT. OF TAXATION

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Nevada Department of Taxation, Carson City, Nv.

JANUARY 18, 2008 at 2:35 p.m., Affiant personally served a true and correct copy of the same upon NEVADA DEPARTMENT OF TAXATION c/o ERIN FIERRO at NEVADA DEPARTMENT OF TAXATION, 1550 College Parkway, Ste. 115, in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 09 February, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
09 February, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

ORIGINAL

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FILED

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CLERK OF THE COURT

DIANA L. SULLIVAN, ESQ.
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930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Telephone: (702) 862-4450
Facsimile: (702) 862-4422
Attorneys for Plaintiffs

BRADLEY J. SHAFER*
Michigan Bar # P36604
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906-2110
(517) 886-6560 - telephone
(517) 886-6565 - facsimile
Email: shaferassociates@acd.net
* *Pending Admission Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

AMENDED AFFIDAVIT OF SERVICE FOR NEVADA OFFICE OF THE ATTORNEY GENERAL

Attached herein is the Amended Affidavit of Service of the Summons and Complaint

....

....

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APR 11 2008

CLERK OF THE COURT

on Defendant Nevada Department of Taxation c/o Nevada Office of the Attorney General.

DATED this 10th day of April, 2008.

GHANEM & SULLIVAN, LLP

By Diana L Sullivan
DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service: Amended SUMMONS & COMPLAINT FOR DEPARTMENT OF TAXATION

DEPTARTMENT OF TAXATION

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Department of Taxation, C/O NEVADA OFFICE OF THE ATTORNEY GENERAL, Carson City, Nv.

JANUARY 18, 2008 at 3:18 p.m., Affiant personally served a true and correct copy of the same upon DEPARTMENT OF TAXATION c/o NEVADA OFFICE OF THE ATTORNEY GENERAL, accepted by Deputy Attorney General, Colleen Hemingway at NEVADA OFFICE OF THE ATTORNEY GENERAL, 100 North Carson St., in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 09 February, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
05 February, 2008 by Kristin Peregrin

NOTARY PUBLIC

CHRISTY GRIFFIN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 07-3389-2 - Expires February 14, 2011

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FILED

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CLERK OF THE COURT

DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
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* *Pending Admission Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

AMENDED AFFIDAVIT OF SERVICE FOR THE NEVADA BOARD OF EXAMINERS

Attached herein is the Amended Affidavit of Service of the Summons and Complaint

....

....

RECEIVED

APR 11 2008

CLERK OF THE COURT

on Defendant Nevada Board of Examiners.

DATED this 10th day of April, 2008.

GHANEM & SULLIVAN, LLP

By _____
DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., et al,

Plaintiffs,

vs

NEVADA DEPARTMENT OF TAXATION, et al,

Defendants,

CASE NO. A554970

DEPT NO. IX

Affidavit of Service: Amended SUMMONS & COMPLAINT FOR NEVADA STATE BOARD OF EXAMINERS

NV STATE BOARD OF EXAMINERS

STATE OF NEVADA)
) Ss:
COUNTY OF WASHOE)

KRISTIN PEREGRIN, hereby states that Affiant is over 18 years of age, and not a party to, nor interested in, the above-captioned action.

JANUARY 16, 2008, affiant received the Summons and Complaint for service upon Nevada State Board of Examiners, 209 East Musser St., Carson City, Nv.

JANUARY 18, 2008 at 3:30 p.m., Affiant personally served a true and correct copy of the same upon NEVADA STATE BOARD OF EXAMINERS c/o Debbie Christensen at 209 E. Musser St., in the City of Carson, State of Nevada.

FURTHER YOUR AFFIANT SAYETH NAUGHT

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED 05 February, 2008

Kristin Peregrin

SUBSCRIBED and **SWORN** to before me
05 February, 2008 by Kristin Peregrin

NOTARY PUBLIC

JESSICA BOYD
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 02-72703-2 - Expires September 18, 2010

CIVIL COURT MINUTES

08-A-554970-C K-Kel Inc vs Nevada Dept Of Taxation

04/17/08 ??:?? ?M 00 PLTFS' MTN TO ASSOCIATE COUNSEL BRADLEY J SHAFER/1

HEARD BY: Jennifer Togliatti, Judge; Dept. 9

OFFICERS: Alan Castle, Court Clerk

PARTIES: NO PARTIES PRESENT

There being no opposition, COURT ORDERED, petition GRANTED. By way of this minute order Ms. Sullivan to prepare the order and notify all interested parties.

CLERK'S NOTE: The above minute order has been Distributed to: Ghanem & Sullivan; and Catherine Cortez Masto, Attorney General.

MOT
CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Sr. Deputy Attorney General
Nevada State Bar #8617
BLAKE A. DOERR
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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, LLC d/b/a *Little Darlings*, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*, OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, LLC, d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*,

Plaintiff(s),

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Defendants.

Case No. A533273
Dept. No. IX

MOTION TO DISMISS

Date of Hearing:
Time of Hearing:

DISTRICT COURT
CLARK COUNTY NEVADA

COME NOW, Defendants Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michele Jacobs, in her official capacity only, by

and through their attorneys, Catherine Cortez Masto, Attorney General, David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, and hereby move this Court for an Order dismissing the Complaint in its entirety or, in the alternative, an Order dismissing certain Plaintiffs or causes of action from the Complaint.

This Motion is made and based on all pleadings and papers on file, the attached Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

Respectfully submitted:

Dated April 18, 2008

CATHERINE CORTEZ MASTO
Attorney General

By: _____

David J. Pope
Sr. Deputy Attorney General
Nevada State Bar #8617
Blake A. Doerr
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Attorneys for Defendants

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Las Vegas, NV 89101

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion to Dismiss will be heard before the above-entitled Court on the _____ day of _____, 2008 at _____ in Department IX or as soon thereafter as counsel may be heard.

Respectfully submitted,

Dated April 18, 2008

CATHERINE CORTEZ MASTO
Attorney General

By: _____
David J. Pope
Sr. Deputy Attorney General
Nevada State Bar #8617
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

BACKGROUND

PLAINTIFFS are owners of a number of exotic dancing establishments. PLAINTIFFS allege that the Live Entertainment Tax (LET), established by Chapter 368A of the Nevada Revised Statutes, is an impermissible state tax. DEFENDANTS are the various agencies of the State of Nevada which administer and collect the LET and approve refunds thereof. PLAINTIFFS allege that the LET is an unconstitutional infringement by the State of Nevada on constitutionally protected expression. Plaintiffs seek as their remedy: (1) an injunction enjoining the Defendants from enforcing the provisions of the LET; (2) a refund of all LET payments that have been "involuntarily" made; (3) a declaration that the LET is unconstitutional; and, (4) an award for damages, costs and fees pursuant to 42 U.S.C. §1988.

PROCEDURAL HISTORY

On December 19, 2006, PLAINTIFFS filed their Complaint. In January of 2007, Plaintiffs K-KEL, INC., OLYMPUS GARDEN, INC., SHAC, LLC, THE POWER COMPANY, INC., D. WESTWOOD, INC., and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC (hereinafter "K-KEL PLAINTIFFS") requested refunds for LET paid for January, February, March and April 2004. The other two Plaintiffs, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC, have not made a claim for a refund. The Department of Taxation denied the requested refunds. K-KEL PLAINTIFFS appealed the denial of the refunds to the Nevada Tax Commission who also denied the refund requests. K-KEL PLAINTIFFS then filed a separate Complaint nearly identical to the instant Complaint. That case is Clark County District Court Case Number A554970, which is pending in this very Court.

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This matter should be dismissed in its entirety because none of the PLAINTIFFS had pursued their administrative remedies before the filing of this Complaint, therefore, this Court lacks subject matter jurisdiction over their claims. Furthermore, Plaintiffs DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC should be dismissed from the action entirely because they have never requested a refund as is required by statute.

In the interest of judicial economy, the COMPLAINT should be dismissed in its entirety as only the K-KEL PLAINTIFFS may bring this type of action and they have done so, for all intents and purposes, in the matter pending against the same Defendants in this very Court under Case Number A554970.

II.

ARGUMENT

A. PLAINTIFFS HAD NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES AT THE TIME THEY FILED THEIR COMPLAINT AND HAVE DEPRIVED THIS COURT OF SUBJECT MATTER JURISDICTION

"A taxpayer must exhaust its administrative remedies before seeking judicial relief; failure to do so deprives the district court of subject matter jurisdiction." County of Washoe v. Golden Road Motor Inn, 105 Nev. 402, 403-404, 777 P.2d 358, 359 (1989). "If a statutory procedure exists for the recovery of taxes erroneously collected, that procedure ordinarily must be followed before commencing suit in district court." Id. (emphasis added). N.R.S. § 368A.280(2) provides the statutory procedure for recovering LET erroneously collected. It provides:

> No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed. (emphasis added).

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In addition, N.R.S. § 368A.260 provides specific procedures which a taxpayer must follow when requesting a refund or credit for alleged erroneously collected taxes. Relevant to the instant action are the following provisions:

> No refund may be allowed unless a claim for it is filed with . . . [t]he Department . . .. A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made. No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the . . . Department within that period. Each claim must be in writing and must state the specific grounds upon which the claim is founded.

N.R.S. § 368A.260 (emphasis added).

Only in certain instances, may a party not first exhaust its administrative remedies before proceeding to district court. Malecon Tobacco, LLC. v. State ex rel. Dept. of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 476 (2002). The court may not require exhaustion when the issues: (1) "relate solely to the interpretation or constitutionality of a statute"; or, (2) when resort to administrative remedies would be futile. Id. (emphasis added). Furthermore, only constitutional challenges which do not involve factual determinations (i.e. facial challenges as opposed to as-applied challenges) may be considered by the Court before requiring exhaustion of the administrative remedies. Id. at 841.

PLAINTIFFS Complaint contains a request for an injunction, a refund of all LET payments and fees and costs in addition to a declaration that the LET is unconstitutional. Therefore, this Complaint does not relate solely to the constitutionality of the statute in question. In addition, PLAINTIFFS have not alleged and had not established that resort to administrative remedies would be futile. PLAINTIFFS simply had no right to file this Complaint before pursuing and exhausting their administrative remedies.

Additionally, PLAINTIFFS did not request a refund before they filed this Complaint. N.R.S. § 368A.280(2) provides:

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> No suit or proceeding may be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been filed. (emphasis added).

And, N.R.S. § 368A.260 (1)(a)(2) provides: "A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made." Moreover, N.R.S. § 368A.290 limits the claims which a Plaintiff may bring against the Department to the claims which were contained in the original claim for refund. It provides, in relevant part:

> Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by . . . [t]he Nevada Tax Commission, the claimant may bring an action against the Department [of Taxation] on the grounds set forth in the claim.

N.R.S. § 368A.290(1) (emphasis added).

1. PLAINTIFFS DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC HAVE NOT EVEN FILED A REQUEST FOR REFUND AND SHOULD BE DISMISSED

PLAINTIFFS DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC have not, to date, even filed a request for refund. As previously stated, N.R.S. § 368A.280(2) requires the filing of a claim for refund before a case can proceed to District Court. Pursuant to 260(1)(a), no refund can be allowed unless a claim is filed. Based upon the statutory provisions and case law discussed above, this Court lacks subject matter jurisdiction over the claims of these Plaintiffs and DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC should be dismissed from this action.

2. THE REMAINING PLAINTIFFS HAD NOT FILED CLAIMS FOR REFUNDS PRIOR TO FILING THE COMPLAINT IN THE INSTANT CASE

The remaining PLAINTIFFS made no claim for refund prior to filing the Complaint in the instant case and simply had no basis on which to file it. Their right to

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do so did not vest until after a final decision was made by the Nevada Tax Commission and would be limited to the "grounds set forth in the original claim." N.R.S. § 368A.290(1). Thus, while the remaining PLAINTIFFS, a.k.a. the K-KEL PLAINTIFFS, may argue that they subsequently complied with the administrative procedures in requesting a claim prior to filing their Complaint in Case No. A554970, that request does not relate back. The filing of the Complaint in the case at hand was simply premature and should be dismissed.

The remaining PLAINTIFFS filed written requests for refunds after they filed the instant Complaint. The statutes and the cases reflect the clear statutory intent to have a party proceed through the administrative process to a final decision by the Nevada Tax Commission before they proceed to the district court and here, PLAINTIFFS have not done that.

By not exhausting their administrative remedies before filing this Complaint, PLAINTIFFS have deprived this court of subject matter jurisdiction and the entire Complaint should be dismissed.

B. PLAINTIFFS HAVE NO RIGHT AS A MATTER OF LAW TO THE INJUNCTIVE RELIEF REQUESTED

PLAINTIFFS are not entitled to injunctive relief. N.R.S. § 368A.280(1) provides:

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this State or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected. (emphasis added).

Here, PLAINTIFFS have requested "both a preliminary and permanent (sic) enjoining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs." See PLAINTIFFS' COMPLAINT at p. 13, l. 13 et seq. Based on the plain meaning of the statute, the

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PLAINTIFFS have no right to any of the requested injunctive relief as a matter of law. To allow the claims for injunctive relief would usurp the entire regulatory scheme.

Additionally, PLAINTIFFS understood that they had no right to injunctive relief when they prepared their Complaint as evidenced by PLAINTIFFS' statement at p. 10, l. 16-17: "Plaintiffs have no ability to seek injunctive relief in state court against collection of the Live Entertainment Tax."

In sum, the claims for injunctive relief are not allowed as a matter of law and those claims should be dismissed from this Complaint in their entirety.

C. CONSOLIDATION IS IMPROPER

PLAINTIFFS will likely argue that their subsequent action should be consolidated into this action. However, such consolidation is inappropriate because the right to sue did not vest until the Plaintiffs pursued and exhausted their administrative remedies. The statutory scheme was designed to give deference to the administrative agency. That deference is granted because the administrative agency, and not the Court, is "especially equipped to inquire . . . into the facts." *Malecon*, 118 Nev. 837, 840, 59 P.3d 474, 476.

The Legislature saw fit to enact the LET, granted the Defendants the right to enforce and collect and approve refunds of the LET and established procedures for a taxpayer to appeal enforcement of the LET. The Plaintiffs who chose to follow the administrative procedures established their right to pursue a refund for the period provided by the statute. On the other hand, certain Plaintiffs have never requested a refund. It is simply not permissible and severely prejudicial to the Defendants to lump the Plaintiffs who have not taken the appropriate steps in with those who have. Furthermore, N.R.S. § 368A.260 establishes the statutory period in which to file a request for refund. It provides:

> A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made . . . No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Board or

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the Department within that period . . . Failure to file a claim within the time prescribed in this chapter constitutes a waiver of any demand against the State on account of overpayment. (emphasis added).

PLAINTIFFS DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC have never made a request for refund. Since they have not made a refund request, they have not yet established a right to any refund whatsoever. PLAINTIFFS DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC should not be gifted any rights they have not preserved merely as a result of consolidation.

D. PLAINTIFFS' COMPLAINT IS PROCEDURALLY DEFICIENT

NRCP 8(a) provides: "Where a claimant seeks damages of more than $10,000, the demand shall be for damages "in excess of $10,000" without further specification of amount."

PLAINTIFFS' Complaint simply contains a request for an "Entry of an award of damages against Defendants" and a refund of all LET payments "involuntarily" made. This leaves Defendants and the Court to guess what PLAINTIFFS are requesting.

PLAINTIFFS' Complaint is deficient in that they have not made a proper prayer for relief.

III.

CONCLUSION

Dismissing this Complaint does not limit the PLAINTIFFS' claim that the LET is unconstitutional on its face. That issue is preserved in the subsequent Complaint filed by the K-KEL PLAINTIFFS.

With respect to their claim that they are entitled to attorneys' fees and costs, PLAINTIFFS did not request that relief in their subsequent Complaint.

In the interest of judicial economy, this matter should be dismissed in its entirety as the only Plaintiffs who have exhausted their administrative remedies have, for all

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intents and purposes, the same matter pending against the same Defendants in this very Court under Case Number A554970.

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Las Vegas, NV 89101

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on April 18, 2008, I served the foregoing **Motion to Dismiss** by mailing a copy thereof, via first class, postage- paid mail, addressed as follows:

Diana L. Sullivan, Esq.
Ghanem & Sullivan
8861 W. Sahara Ave., #120
Las Vegas, NV 89117

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. #2
Lansing, MI 48906

DATED this 18th day of April, 2008

By: _____
An employee of the State of Nevada,
Office of the Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

ORIGINAL

16

ORDR
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Attorneys for Plaintiffs

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Apr 23 11 08 AM '08
CLERK OF THE COURT

BRADLEY J. SHAFER*
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Email: shaferassociates@acd.net
* *Pending Admission Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,* Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No.: A554970 Dept. No.: IX

ORDER ADMITTING TO PRACTICE

BRADLEY J. SHAFER, ESQ. having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of

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Counsel, a Certificate of Good Standing for the states of Michigan and Arizona, and the State Bar of Nevada Statement; said application having been noticed, no objections having being made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

ORDERED, that said application is hereby granted, and Bradley J. Shafer, Esq. is hereby admitted to practice in the above-entitled Court for the purposes of the above entitled matter only.

DATED this 21st day of April, 2008.

DISTRICT COURT JUDGE

Submitted by:

GHANEM & SULLIVAN, LLP

DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

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DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
Dept. No.: IX

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order was entered in the above-entitled action on the

....

....

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CLERK OF THE COURT

23rd day of April, 2008 a copy of which is attached.

DATED this 24th day of April, 2008.

GHANEM & SULLIVAN, LLP

By _____
DIANA L. SULLIVAN, ESQ.
Nevada Bar #4701
930 South Fourth Street, Suite 210
Las Vegas, NV 89101
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE BY FACSIMILE AND REGULAR MAIL

I hereby certify that on the 24th day of April, 2008, the foregoing **ORDER ADMITTING TO PRACTICE** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

David J. Pope, Esq.
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Facsimile: (702) 486-3416
Attorneys for Defendants

_____
an employee of GHANEM & SULLIVAN, LLP

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, LLC, d/b/a *Sapphire,* THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures,* and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS,

Defendants.

Case No.: A554970
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ORDER ADMITTING TO PRACTICE

BRADLEY J. SHAFER, ESQ. having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of

Counsel, a Certificate of Good Standing for the states of Michigan and Arizona, and the State Bar of Nevada Statement; said application having been noticed, no objections having being made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

ORDERED, that said application is hereby granted, and Bradley J. Shafer, Esq. is hereby admitted to practice in the above-entitled Court for the purposes of the above entitled matter only.

DATED this 21 day of March, 2008.

JENNIFER P. TOGLIATTI
DISTRICT COURT JUDGE

Submitted by:

GHANEM & SULLIVAN, LLP

Diana L. Sullivan

DIANA L. SULLIVAN, ESQ.
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Attorneys for Plaintiffs
**Admitted Pro Hac Vice*

DISTRICT COURT

CLARK COUNTY, NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a *Deja Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, L.L.C., d/b/a *Little Darlings,* K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club,* OLYMPUS GARDEN, INC., d/b/a *Olympic Garden,* SHAC, L.L.C. d/b/a *Sapphire*, THE POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club,* D. WESTWOOD, INC., d/b/a *Treasures*, and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores,*

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her Official Capacity Only,

Defendants.

Case No.: A533273
Dept. No.: IX
Docket

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date of Hearing: June 17, 2008
Time of Hearing: 9:00 a.m.

COME NOW Plaintiffs, by and through their attorneys of record, Diana L. Sullivan, Esq. of the law firm of GHANEM & SULLIVAN, LLP, and Bradley J. Shafer, Esq. of the law firm of SHAFER & ASSOCIATES, P.C., and hereby file this Opposition to the Defendants' Motion to Dismiss. This Opposition is made and based upon the following Points and Authorities, the exhibits attached thereto, the underlying pleadings and their exhibits, all of the pleadings on file herein, and the argument of counsel at the time of the hearing.

DATED this 9th day of May, 2008.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND AND FACTS

Plaintiffs operate commercial establishments in Las Vegas which present live exotic performance dance entertainment to the consenting adult public. This entertainment constitutes speech, expression, and a form of assembly protected not only by Article I, §§ 9 and 10 of the Nevada Constitution, but the First and Fourteenth Amendments to the United States Constitution as well.[1] Defendants have taken the position that Plaintiffs' establishments are subject to N.R.S. Chapter 368A, which imposes a tax on live entertainment. Plaintiffs contend that the Live Entertainment Tax (hereinafter sometimes

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[1] Exotic dancing, in the form of clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.,* **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); **City of Erie v. Pap's A.M.**, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same); **Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections form official regulation"); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396 (6th Cir. 2001), *citing* **Roberts v. United States Jaycees**, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (Court held that "the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a 'collective effort on behalf of shared goals.'").

simply the "LET") is facially unconstitutional in that it is violative of the constitutional protections enumerated above.[2]

In order to safeguard those rights from being trampled, Plaintiffs filed this instant lawsuit, in addition to the other administrative and judicial proceedings described below. After having convinced the federal district court here in Las Vegas to dismiss a similar action of these same Plaintiffs based upon a claim that the court lacked jurisdiction over those claims (specifically for the reason that a "plain, speedy and efficient remedy" existed for these Plaintiffs in state court), Defendants now seek to dismiss – also on jurisdictional grounds – this action as well.

What should be most persuasive to this Court in rejecting the Defendants' motion is the simple fact that these very same Defendants have argued both to the federal district court and to the Ninth Circuit United States Court of Appeals that the federal courts do not have jurisdiction over the Plaintiffs' constitutional claims because the Plaintiffs have the right to adjudicate those claims ***in the very state court proceeding which Defendants now seek to dismiss by way of this motion***.

II. PROCEDURAL HISTORY

In 2006, Plaintiffs filed suit in the United States District Court for the District of Nevada, Case Number CV-S-06-00480-RLH-RJJ, seeking the same remedies sought in the instant lawsuit: A declaration that the LET is unconstitutional, an injunction against the enforcement of Chapter 368A of the Nevada Revised Statutes ("Chapter 368A"), and return of

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[2] Indeed, two recent decisions — one out of the Seventh Circuit United States Court of Appeals and another out of a trial court in Texas — have invalidated similar types of laws. *See* Exhibits 1 and 2.

the live entertainment taxes that had been paid. These same Defendants filed a motion to dismiss the federal action, claiming that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, precluded the federal court from having jurisdiction over the claims because there existed a "plain, speedy, and efficient remedy" in state court. The district court dismissed Plaintiffs' complaint on that basis (Exhibit 3), and Plaintiffs appealed that dismissal to the United States Court of Appeals for the Ninth Circuit. Briefs have been filed in that case, and the appeal will be submitted to the panel without oral argument on May 15, 2008.

In order to prevent their constitutional rights from further violation, Plaintiffs filed this instant action in December 2006. The Parties agreed, however, to extend the date for the Defendants to answer that complaint because, in an abundance of caution, a number these Plaintiffs filed, at approximately the same time, administrative claims for refunds which, theoretically, are statutory prerequisites to the filing of this instant action (the Defendants raise this aspect of the LET in their motion to dismiss, and this issue will be discussed in greater detail below).

Specifically, on February 27, 2007, within the three year statutory period under N.R.S. § 368A.260(1) for the filing of such claims, Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc. and D.I. Food & Beverage of Las Vegas, LLC (identified in Defendants' Motion to Dismiss and herein as the "K-Kel Plaintiffs") filed individual requests for refunds of the LET.[3] A redacted copy of one of those refund

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[3] Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC (the "Deja Vu Plaintiffs"), did not become subject to the LET until Chapter 368A was amended in June of 2005, to reduce the seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See* N.R.S. § 368A.200(5)(d). Pursuant to N.R.S. §

requests is attached as Exhibit 4, which illustrates that the ***sole*** basis for the request for refund was the asserted unconstitutionality, and therefore inapplicability to the Plaintiffs, of the LET.

The K-Kel Plaintiffs' requests for refunds were all summarily denied by the Nevada Department of Taxation on April 3, 2007 (example copy attached as Exhibit 5). Those Plaintiffs all filed timely notices of administrative appeals, and the Nevada Tax Commission ("Commission") held hearings regarding the first set of denials in July and August of 2007. After the submission of materials and oral argument, the Nevada Tax Commission denied Plaintiffs' appeals in October of 2007 (Exhibit 6). On January 9, 2008, in accordance with N.R.S. §§ 368A.290(1)(b) and 368A.300(3)(b), which govern adverse decisions by the Nevada Tax Commission, the K-Kel Plaintiffs timely filed a judicial complaint for refund, declaratory relief, injunctive relief, and damages. That action is also pending before this Honorable Court, and was assigned Case No. A554970. The parties to this action then agreed that the Defendants would answer the complaint in this matter in accordance with their deadline to answer that connected lawsuit.

Defendants filed answers to both complaints on March 3, 2008, and submitted this instant motion to dismiss on April 18, 2008. To date, the only motion pending in either of the cases before this Honorable Court is the instant motion to dismiss.

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368A.260(1), the statutory three year period for those two Plaintiffs to file their administrative requests for refunds will not then expire until later this year, and those Plaintiffs are not required to have, and have not yet filed administrative claims for refund.

III. POINTS AND AUTHORITIES

A. PLAINTIFFS DO NOT NEED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES PRIOR TO THE TIME OF THE FILING OF THEIR COMPLAINT IN ORDER FOR THIS COURT TO HAVE SUBJECT MATTER JURISDICTION OVER THEIR CLAIMS.

Defendants argue that Plaintiffs had not exhausted their administrative remedies at the time they filed their complaint and that, therefore, this Court does not have subject matter jurisdiction over this action. Defendants' Motion, p. 5-8. As admitted by the Defendants in the related federal proceedings, however, exhaustion of administrative remedies is not a prerequisite for the filing of this lawsuit.

First, as a general proposition, the United States Supreme Court has observed that a person suffering a deprivation of their federal constitutional rights should not have to exhaust state administrative remedies as a condition to bringing suit to protect those liberties. The Court has "on numerous occasions rejected the argument that a civil rights action under 42 U.S.C. § 1983 should be dismissed where the plaintiff has not exhausted state administrative remedies." **Patsy v. Bd. of Regents of Florida**, 457 U.S. 496, 500, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). *See also* **Barry v. Barchi**, 443 U.S. 55, 63 n.10, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); **Gibson v. Berryhill**, 411 U.S. 564, 574, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). Plaintiffs have brought this action, in part, pursuant to the Federal Civil Rights Statute found at 42 U.S.C. § 1983. Complaint, at ¶¶ 3, 65, 66.

This exception to the exhaustion doctrine that has been carved out for claims under § 1983 is a result of the sensitive nature and supreme importance of constitutional rights. *See* **Steffel v. Thompson**, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal

courts to protect constitutional rights"). The Court has also analyzed the intent of Congress in enacting § 1983, and observed that the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" **Mitchum v. Foster**, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), *quoting* **Ex parte Virginia**, 100 U.S. 339, 346, 25 L.Ed. 676 (1879). Requiring the Plaintiffs here to exhaust potentially lengthy – and as proven in this case, futile – state administrative remedies would clearly go against the intent of Congress.

Correspondingly, state courts have recognized that the Supreme Court's decisions in **Pasty** and **Felder v. Casey**, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), mean that state courts, like federal courts, may not require exhaustion of state administrative remedies as a subject matter bar to hearing federal claims under 42 U.S.C. § 1983. *See, e.g.,* **Maryland Reclamation Associates, Inc. v. Hartford County**, 677 A.2d 567, 575, 342 Md. 476, 492-493 (Md. 1996) ("The Supreme Court has held that a plaintiff is ***entitled*** to maintain an action under 42 U.S.C. § 1983 in a state court without having exhausted available administrative remedies") (*citing* **Felder**, 487 U.S. at 146-147) (emphasis added); **Farm Bureau Town and Country Ins. Co. of Mo. v. Angoff**, 909 S.W.2d 348, 354 (Mo. 1995) ("Generally, state administrative review need not be exhausted before a § 1983 claim may be brought in state or federal court") (citing **Patsy**, 457 U.S. at 516); **National Camera, Inc. v. Sanchez**, 832 P.2d 960, 966 (Colo. App. 1991); **Allen v. Bergman**, 400 S.E.2d 347, 348-349, 198 Ga.App. 57, 58 (Ga. App. 1990) ("In **Felder** [ ], the Supreme Court held that states may no longer require litigants to exhaust administrative remedies before asserting claims pursuant to 42 U.S.C. 1981 and 42 U.S.C. 1983 in state courts"); and **Zeigler v. Kirchner**, 781 P.2d 54, 60, 162 Ariz. 77,

82-83 (Az. App. 1989) ("***The holding in <u>Felder</u> clearly demonstrates that a state court <u>may not</u> condition a Plaintiff's § 1983 claim upon the exhaustion of state administrative remedies***") (emphasis added).

> Of course, the best exposition of this doctrine comes from the Court itself:
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> In **<u>Patsy</u>** [ ], we held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court. The Wisconsin Supreme Court, however, deemed that decision inapplicable to this state-court suit on the theory that States retain the authority to prescribe rules and procedures governing suits in their courts. [ ]. As we have just explained, however, that authority does not extend so far as to permit States to place conditions on the vindication of a federal right.

<u>Felder</u>, 487 U.S. at 147 (citation omitted).

> While the exhaustion required by Wisconsin's notice-of-claim statute does not involve lengthy or expensive administrative proceedings, ***it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place.***

<u>Id</u>. at 149 (emphasis added).

> In enacting 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. ***A state law that conditions that right of recovery upon compliance with a rule . . . that directs persons to seek redress from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.*** Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right ***when that right is asserted in state court.***

<u>Id</u>. at 153 (emphasis added).

Moreover, Defendants have not identified a single reason why requiring Plaintiffs to exhaust administrative remedies will assist this Court in deciding the constitutional claims Plaintiffs have brought before it. This then leads to the next point.

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Second, in addition to and irrespective of the Federal remedy under 42 U.S.C. § 1983, the Nevada Supreme Court has determined that because of the importance of constitutional rights, a taxpayer may in fact bypass administrative remedies and seek judicial redress ***directly in the state courts if the challenge relates to the constitutionality of the taxing law.*** In **Nevada Dep't of Taxation v. Scotsman Mfg. Co., Inc.**, 109 Nev. 252, 849 P.2d 317 (Nev. 1993), the court stated that the "exhaustion doctrine will not deprive the court of jurisdiction 'where the issues relate solely to the interpretation or constitutionality of a statute." **Id**. at 255, *citing* **State of Nevada v. Glusman**, 98 Nev. 412, 419, 651 P.2d 639, 644 (Nev. 1992). *See also* **Malecon Tobacco, LLC v. State Dept. of Taxation**, 118 Nev. 837, 839-41, 59 P.3d 474, 476-77 (Nev. 2002) (exhaustion of administrative remedies is not required when the constitutionality of a tax statute is challenged on its face).

Defendants even acknowledge this line of precedent (Defendants' Motion, p. 6), but for some reasons known only to them attempt to argue that since Plaintiffs requested an injunction against the collection of an unconstitutional tax, a refund of unconstitutional taxes collected, and an award of attorney fees and costs incurred in invalidating an unconstitutional tax, that somehow means that Plaintiffs' challenge is not solely related to the interpretation or constitutionality of the Live Entertainment Tax. These remedies stem, however, ***exclusively*** from resolution of the sole underlying issue; that being whether the LET is constitutional. Indeed, Defendants have not referenced any authority whatsoever to support their "novel" argument. Therefore, and irrespective of the other matters discussed below, the exhaustion doctrine is not applicable.

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But what makes the argument of the Defendants here in regard to **Scotsman** so disingenuous is that they used the relief permitted by that ruling to convince the federal district court that it did not then have jurisdiction over the claims of the Plaintiffs in light of the provisions of the Tax Injunction Act because there exists a "plain, speedy and efficient" remedy in state court. In fact, the federal district court relied upon that argument of the Defendants in deciding to dismiss the federal complaint, and the Defendants have reiterated the applicability of the relief afforded to these Plaintiffs by **Scotsman** in the Ninth Circuit in briefing as recently as just last month.

As early as the reply that the Defendants filed in support of their motion to dismiss the federal action, they asserted that **Scotsman** provided to these Plaintiffs a "direct refund action" without requiring the Plaintiffs to pursue their administrative remedies. In arguing that Nevada law provides a "plain, speedy and efficient" remedy in state court, the Defendants stated to the federal court the following:

> "Moreover, resort to rules of decisions of the Nevada Supreme Court and proper legislative construction leads to an interpretation exactly contrary to that which Plaintiffs assert. That an action for refund provides a plain remedy is supported by a decision cited by Plaintiffs, *State v. Scotsman MFG. Co. Inc.*, 109 Nev. 252, 849 P.2d 317 (1993) (*Scotsman II*). *Scotsman II* involved a challenge to application of the local school support tax, NRS Chapter 374, to the taxpayer, a federal contractor providing housing to the Nevada Test Site. The provisions of NRS 374.635-.720 contain a refund remedy ***substantially the same*** as that found in NRS 368A.250-320. ***Significantly, NRS 374.675 is almost identical to NRS 368A.280(1)***. [ ]Under this ***substantially parallel legislative framework***, most importantly the limitations of NRS 374.675, the Court in *Scotsman* affirmed a ***direct refund action*** of the tax, ***even though the taxpayer did not first pursue its remedy through the administrative levels***. In doing so, the Nevada Supreme Court ***implicitly acknowledged*** that the refund remedy was available notwithstanding the limitation in NRS 374.675. [ ]If the remedy of a refund action is available under NRS Chapter 374, ***it is available under NRS Chapter 368A***, which is *in pari materia*. *State, Division of Insurance v. State Farm Mutual Auto Insurance Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

Defendants' federal reply brief (Exhibit 7), at pp. 5-6 (emphasis added, footnotes omitted).

The federal district court latched onto this argument of the Defendants as a basis to dismiss the federal complaint of these Plaintiffs.

> ". . . [T]he language of the statute does not, as Plaintiffs suggest, preclude judicial recourse in the State court. It merely prevents a preemptive strike, that is an action to enjoin the collection of the taxes.[4] It does not prevent a judicial challenge either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a case involving a statute which precluded any suit whatever unless an administrative claim had been filed, held that notwithstanding the statute, the California corporation could bring the suit to challenge the tax."

Order (Exhibit 3), at pp. 5-6, *citing* **Scotsman**.

Later, in the Ninth Circuit, the Defendants relied upon their previous argument in the federal district court and that court's reliance thereon. In the federal appellate court, the Defendants argued:

> "Hypothetical concerns about the state administrative remedy under Nev. Rev. Stat. Chapter 368A disappear in light of *Scotsman*, *supra*, which the District Court found to be authority for a direct action to the state district court in the case of a challenge to the sales tax on Federal constitutional grounds. []. ***If the remedy of a refund action directly brought in state district court is available under Nevada's sales tax provisions, it is available under Nev. Rev. Stat. Chapter 368A***, which is *in pari materia*, with its virtually identical refund provisions."

Appellees' Answering Brief to the Court of Appeals for the Ninth Circuit (Exhibit 8), pp. 20 (emphasis added, citations omitted). *See also* **id**. at pp. 14-15.

Then, in motion pleadings in the Ninth Circuit, the Defendants reiterated this position. In explaining that the Plaintiffs had two separate and distinct remedies under state law

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[4] The federal district court was incorrect in regard to the preclusive effect of N.R.S. § 368A.280(1) to the awarding of injunctive relief, for the reasons that are set forth in detail in Section III(B), *infra*.

available to them contrary to – as the Defendants asserted – claims by the Plaintiffs of the lack of such remedies, the Defendants (Appellees in the Ninth Circuit) stated as follows:

> "Rather, in their brief herein, Appellees simply argued that under *California v. Grace Brethren Church*, 457 U.S. 393, 417, 102 S. Ct. 2498, 2512, 2513, the availability of a refund procedure is itself sufficient to deny jurisdiction under 28 U.S.C. 1341. However, Appellees went on in the same brief to argue that there is a direct action remedy, under *State, Nevada Dep't of Taxation v. Scotsman Mfg, Co., Inc.*, 109 Nev. 252, 849 P.2d 317 (1993). In that case, the Nevada Supreme Court afforded a refund remedy notwithstanding the failure to exhaust the administrative remedy regarding pure constitutional issues. *Id.* at 255-6, 849 P.2d at 320-1. *See* Appellees' Answering Brief, pages 14 and 15."

Appellees' Opposition to Motion for Leave to Supplement the Appellate Record (Exhibit 9), at pp. 6-7.

All of these proceedings in the federal courts demonstrate that the Defendants have claimed that federal jurisdiction does not lie over the Plaintiffs' claims because these Plaintiffs have the right to bring in state court ***the very lawsuit which the Defendants now seek to dismiss by way of the instant motion***. The Defendants cannot argue in such a disingenuous fashion and, indeed, as is discussed in Section III (A)(3), *infra*, Defendants are precluded by the doctrine of judicial estoppel from taking such a contrary position now. Under **Scotsman**, then, as acknowledged by the Defendants in the federal proceedings and as recognized by the federal district court, Plaintiffs have the ability to litigate this "direct action remedy," irrespective of whether or not they have exhausted administrative remedies, and this suit should not therefore be dismissed.

Third, where the seeking of administrative redress would be futile, exhaustion of such a remedy is not a prerequisite to filing for legal redress in the courts of this state. *See* **Scotsman**, 109 Nev. at 255 (exhaustion under Nevada law is not required where "initiation of administrative proceedings would be futile"). This exception applies here as well.

Initially, the Nevada Supreme Court has recognized that if the State simply defends the constitutionality of a tax statute, the administrative proceedings will certainly then be futile. **Id**. (the taxpayer's compliance with the administrative remedies would have been futile in "view of the State's position concerning the constitutional validity of the tax"). Because the Defendants here have not given any indication to this Court that they will now change their position and concede that the LET is unconstitutional, it is presumed that they will take the position in the administrative proceedings that Chapter 368A is, in fact, fully valid. Since the filing of the Complaint here, Defendants have done just that. Hence, administrative remedies are futile pursuant to **Scotsman**.[5]

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[5] Indeed, because the Department asserted in the Commission proceedings that the LET was fully constitutional and because the Commission reached just that conclusion (Exhibit 6), any further administrative proceedings in either the Department or the Commission would also be futile. For example, the Deja Vu Plaintiffs, which have not yet filed any administrative refund requests (because they are not yet required to do so under Chapter 368A), would have no chance to prevail on their constitutional challenges because the Commission has already rejected such arguments. There is no reason to believe, and certainly the Defendants have posited no argument in this motion supporting any such belief, that the Commission would rule on ***their*** constitutional claims ***any different*** than it decided the similar challenges raised by the K-Kel Plaintiffs.

In addition, further administrative claims for refunds by the K-Kel Plaintiffs would be similarly futile. Because the LET is reported and paid on a monthly basis, the K-Kel Plaintiffs have been required to continue to submit administrative claims for refund on a monthly basis in order to preserve their rights to seek refunds for taxes paid during those specified time periods. The Nevada Tax Commission is holding all of those other proceedings in abeyance as a result of the previous ruling of the Commission and the proceedings pending in this Court. *See*

But there is an even more compelling basis to establish that any administrative remedy would be futile. That is because the Defendants have ***themselves*** argued to the Nevada Tax Commission the futility of the Plaintiffs' administrative remedies. During the first hearing that occurred before the Commission on July 9, 2007, the Department, through legal counsel (who is the ***same attorney*** that filed the motion to dismiss at bar), stated that it was:

> ". . . important to mention N.A.C. 368A.170 which requires that if it is determined that a refund is appropriate in this case, that the taxpayer would first have to establish that any amounts of refund could be or have been actually refunded to the patrons of the taxpayer, and there has been no indication in this case that there is any ability of the taxpayer to refund that money to the patrons."

Transcript (Exhibit 11), page 30, lines 8-14.

Exhibit 10. Regardless of the actions of the Department, however, any further administrative proceedings in regard to the K-Kel Plaintiffs would be futile because of the prior ruling of the Commission upholding the constitutionality of the LET.

There is also another reason that the administrative proceedings would be futile, and that is the simple fact that the resolution of constitutional issues - - which is certainly critical here for the reasons discussed above - - are unsuiting in administrative proceedings. **Malecon Tobacco**, 118 Nev. at 840-841. Our State Supreme Court has further noted that the "United States Supreme Court has recognized that under federal administrative procedures, the 'adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies.'" **Id**. at 840, *citing* **Thunder Basin Coal Co. v. Reich**, 510 U.S. 200, 215, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (other citations omitted). Indeed, the Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." **Califano v. Sanders**, 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The same circumstances apply here.

N.A.C. § 368A.170 (Exhibit 12) regulates the "over-collection" of the subject taxes, which is defined in part as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of N.R.S. 368A.200[6]." N.A.C. § 368A.170(1). The regulation states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." N.A.C. § 368A.170(2). The taxpayer is required to "use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the ***name and address*** of the person to whom the refund is to be made." N.A.C. § 368A.170(3)(a) (emphasis added).

This was the first occasion that any of the Defendants raised the applicability of N.A.C. § 368A.170. When the hearing continued before the Commission on August 6, 2007, Bradley Shafer, counsel for the taxpayers and one of the attorneys for the Plaintiffs here, addressed N.A.C. § 368A.170 and the Department's insistence that in order to obtain a refund, a taxpayer has to identify each patron who paid an admission charge, or for food, drink or merchandise, and demonstrate that the taxpayer knows where the patron lives or works in order to "reimburse" the refund to that individual. He explained that

> [W]hat the Department would say is that if a customer buys Coca-Cola, for us to get a refund of this tax, we have to get the name and address of every person buying a Coca-Cola or a beer coming in the facility and I don't think any of you in your real life experiences have ever had any time where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

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[6] Subsection 5 of N.R.S. § 368A.200 states that the LET does not apply to, among other things, "[l]ive entertainment that this state is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution." N.R.S. § 368A.200(5)(a). Consequently, if Plaintiffs' arguments are correct that the LET violates both the federal and state Constitutions, the exemption under N.R.S. § 368A.200(5)(a) applies and there has then been an "over-collection" of the tax.

Transcript (Exhibit 13), page 10, lines 14-21.

In addition to the arguments regarding the taxpayers' inability to locate each patron who paid an admission or who purchased food, drink or merchandise, the K-Kel Plaintiffs further informed the Commission that the tax was paid not by the patrons but, rather, by the clubs themselves. The K-Kel Plaintiffs introduced affidavits from four of the Plaintiffs which established that "none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that we're trying to get back." Transcript (Exhibit 13), page 10-11, lines 22-25 and 1. In fact, in commenting upon the bases for the ruling denying the claims for refunds, Commissioner Turner in adhering to his "pass-through" conceptualization of the tax, stated that he would "find in addition that a refund to the taxpayers being the clients of Mr. Shafer at this point in time would constitute an unjust enrichment at the same time." Transcript (Exhibit 13), page 93, lines 6-8.

Irrespective of these arguments of the K-Kel Plaintiffs, Senior Deputy Attorney General David Pope, ***the defense attorney who filed this very motion to dismiss***, replied as follows:

> "To the extent that the tax is applicable ***it's to be collected from the patrons of the gentlemen's clubs***, and in fact, there is to be an accounting or should have been an accounting by the gentlemen's club six days after they indicated that they were entitled to a refund.
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> I think that they may have some approach to that and it may lead to further argument, so I think it's still an issue that is applicable and we'll have to address."

Transcript (Exhibit 13), page 9, lines 5-13 (emphasis added).

Although the argument of the applicability of N.A.C. § 368A.170 was thereafter reserved by the Commission for argument at a later time (if the Plaintiffs were found to be entitled to a refund in the first place), Mr. Pope subsequently stated in the hearing:

> "I know we've reserved time to argue this, but ***the law does require that that admission charge be collected from the patrons*** and I believe it also requires that if it's included in the ticket or included in the admission charge, then there has to be some notification of that.
>
> To the extent that it's not included as was stated here today, that it's just being paid on behalf of the patrons, then I think ***it's difficult to say that the patrons aren't paying it even though they don't know that they are not. The law requires that it's being collected from the patrons*** and the appellants are paying it ***on behalf of the patrons***."

Transcript (Exhibit 13), pages 74-75, lines 19-25, 1-6 (emphasis added).

Commissioner Turner then verified this position:

> "Counsel for the taxpayers, Mr. Shafer, argued that this is really a tax that's being absorbed by the businesses he represents.
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> ***It is a pass-through tax***, and the businesses if the tax did not exist could reduce what they're charging to their customers by the amount of the tax and have the same bottom line today."

Transcript (Exhibit 13), pages 92-93, lines 21-25, 1-2 (emphasis added).

It is therefore clear that pursuant to the very arguments made by these Defendants before the Commission, that Plaintiffs can only obtain a refund of an unconstitutional tax if they were able to obtain and retain the name and address of every patron who entered the facility (three to five years earlier, as is the case here), or who purchased any form of food, beverage, or merchandise. No entertainment venue could be expected to collect and maintain such records, particularly in light of the fact that the Constitution recognizes the right to view,

hear, and engage in protected expression anonymously,[7] and these privacy interests are particularly relevant here where the Plaintiffs are a group of exotic dance facilities and where patrons may then have a specific interest in maintaining their anonymity. Particularly, then, in light of the applicability of N.A.C. § 368A.170, which the Defendants ***insist*** applies in the circumstances at issue here, any administrative remedies would be futile since the Plaintiffs would ***never*** be entitled to obtain a refund even if the LET was declared unconstitutional.

Finally, the question must be asked as to just what is to be accomplished by requiring the Plaintiffs to exhaust their administrative remedies. How would that assist this Court in ultimately ruling on Plaintiffs' constitutional claims? As noted above (n. 5, *supra*), administrative bodies are not the appropriate fora for resolving constitutional issues.

In addition, as Defendants pointed out in their motion (at page 6), Nevada courts distinguish between fact-intensive "as applied" constitutional challenges and facial challenges, holding only that "as applied" challenges must first be heard by the relevant agency. **Malecon Tobacco**, 118 Nev. at 841. Specifically, the Nevada Supreme Court has recognized that it has found no state that does "not adhere to the principle that an exception to the exhaustion doctrine may exist when a determination of the constitutional issue does not depend upon factual findings by the agency." **Id**. at 841 n.13.

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[7] *See, e.g.,* **Talley v. California**, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); **Hynes v. Mayor and Council of Borough of Oradell**, 425 U.S. 610, 628, 96 S.Ct. 1755, 1764, 48 L.Ed.2d 243 (1976); **McIntyre v. Ohio Elections Comm.**, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); **Connection Distribution Co. v. Reno**, 154 F.3d 281, 293 (6th Cir. 1998); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 394-395 (6th Cir. 2001).

In that regard, the Defendants have failed to identify any "factual findings" that the Commission would have to make in order for this Court to be able to adjudicate the Plaintiffs' constitutional challenges. And, indeed, they have failed to discuss any such requisite findings even having now had the benefit of the Commission proceedings and the resulting ruling therefrom.

For all of these reasons, Plaintiffs are not required to exhaust administrative remedies as a prerequisite to bringing this action.

1. PLAINTIFFS DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, AND LITTLE DARLINGS OF LAS VEGAS, LLC, ARE NOT REQUIRED TO HAVE FILED ADMINISTRATIVE REQUESTS FOR REFUNDS IN ORDER TO MAINTAIN THEIR CHALLENGES HERE.

Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC, need not to have already filed a claim for refund in order to be entitled to maintain this action. The statutory provisions cited by the Defendants (N.R.S. §§ 368A.260, 368A.280, and 368A.290) are simply part and parcel of the administrative remedies that Plaintiffs are not required to exhaust under the circumstances here.

In fact, the Nevada Supreme Court in **Scotsman** outright rejected the very argument Defendants assert here. In **Scotsman**, 109 Nev. at 255-256, the court found that the claimants were entitled to a refund despite the State's assertion that the claimants' failure to abide by the following provisions was a bar to subject matter jurisdiction:

> "NRS 374.640(1) provides that:
>
> No refund may be allowed unless a claim for it is filed with the department within 3 years after the last day of the month following the close of the period for which the overpayment was made or. . . .
>
> NRS 374.680 provides that:

> No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegal determined or collected unless a claim for refund or credit has been duly filed."

Id. at 254.

Those administrative requirements of a different tax statute are virtually ***identical*** to the exhaustion provisions of the LET cited by Defendants (as stated in Section III(A) *supra*, the Defendants admit this point). The **Scotsman** claimants had not filed any claim for refund, **id**. at 254, yet the court rejected the argument that failure to abide by the administrative refund provisions was a jurisdiction bar to judicial relief. **Id**. at 255-56. In doing so, the court recognized:

> "If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify an unconstitutional deprivation."

Id. at 255, *citing* **McKesson Corp. v. Division of Alcoholic Beverages and Tobacco**, 496 U.S. 18, 31, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

In addition, the State's requirement to provide a meaningful remedy is especially pertinent given the Defendants' assertion of N.A.C. § 368A.170 as a bar to relief. Transcript (Exhibit 13), page 93, lines 6-8. By their own words, Defendants have claimed that the Commission cannot provide refunds to the Plaintiffs due to N.A.C. § 368A.170. Hence, if the arguments of the Department during the Commission proceedings are to be believed, administrative remedies are futile and are simply not available to Plaintiffs. Jurisdiction is thus proper with this Court.

Lastly, Plaintiffs must note that not only had the **Scotsman** plaintiff not filed claims for refund, but they actually were past the limitations period for doing so. **Scotsman**, 109 Nev. at

254. Still, the court recognized its obligation to provide relief and did so. **Id**. at 255-256. *See also* **Campbell v. State**, 108 Nev. 215, 219, 827 P.2d 833 (1992) (district court, in equity, may order refund of taxes paid under protest despite claimants' failure to comply with statutory refund provisions).

Defendants' contentions in support of their claim that the Deja Vu Plaintiffs must have filed for refunds and have otherwise exhausted administrative remedies are no more than an assemblage of the arguments rejected in **Scotsman**. Those arguments should, once again, be rejected. This Court has full subject matter jurisdiction to hear Plaintiffs' constitutional claims.

2. THE K-KEL PLAINTIFFS DID NOT HAVE TO SUBMIT ADMINISTRATIVE CLAIMS FOR REFUNDS PRIOR TO FILING THE COMPLAINT IN THIS CASE.

For the reasons already stated in great detail above, the K-Kel Plaintiffs do not have to file claims for refunds in order for this Court to have subject matter jurisdiction over their constitutional challenges. Because Plaintiffs are not required to exhaust administrative remedies, it makes absolutely no difference whether Plaintiffs file administrative claims for refund before filing in this Court, after filing in this Court, or not at all. Exhaustion simply isn't necessary here, as Defendants ***admitted*** in federal court.

3. DEFENDANTS ARE JUDICIALLY ESTOPPED FROM ASSERTING THAT THERE IS NO DIRECT ACTION REMEDY IN THIS COURT, AND THAT THE PLAINTIFFS HAVE ADEQUATE ADMINISTRATIVE REMEDIES TO THEIR CLAIMS.

As stated above, Defendants – by their own words – have admitted in the federal litigation that, pursuant to **Scotsman**, Plaintiffs may directly challenge the constitutionality of the LET in state court and need not pursue administrative remedies. In addition, in the proceedings before the Commission, the Defendants have argued that the Plaintiffs cannot

prevail on an administrative refund action because they cannot ensure that they can remit any refund back to the patrons who, the Defendants argue, "paid" the tax. Defendants cannot now have it both ways by arguing contrary positions here.

Indeed, Defendants are judicially estopped from speaking out of both sides of their mouths. The Nevada Supreme Court has recognized that judicial estoppel is proper where the following five criteria are met:

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Marcuse v. Del Webb Communities, Inc., ___ Nev. ___, 163 P.3d 462, 468-469 (Nev. 2007).

All five of the above criteria are clearly met here. First, as to the first two criteria, Defendants have obviously taken two positions in different judicial and quasi-judicial proceedings. In addition, in federal court the Defendants successfully argued that a direct remedy in state district court ***is*** available to the Plaintiffs. Hence, the third criterion is met as well.

Further, Defendants are bound by the position taken by their attorneys in federal court and before the Commission. **Nevada Power Co. v. Flour Illinois**, 108 Nev. 638, 647 n. 9, 837 P.2d 1354 (Nev. 1992) ("[I]n 'our system of representative litigation, . . . each party is deemed bound by the acts of this lawyer-agent,' [], and a party cannot 'avoid the consequences of the acts or omissions of this freely selected agent'") (ellipsis in original, citations omitted from quotation), *citing*, respectively, **Link v. Wabash R.R. Co.**, 370 U.S. 626, 633-634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), and **Moore v. Cherry**, 90 Nev. 390, 395, 528 P.2d 1018 (Nev. 1974).

Next, the two positions taken by the Defendants are obviously totally inconsistent. Defendants' previous arguments in federal court that Plaintiffs are entitled to a "refund action directly brought in the state district court" pursuant to **Scotsman** is antipodal to its new position here that exhaustion is in fact required. Defendants could not be more duplicitous to the courts. The same applies with regard to the application of N.A.C. § 368A.170. Here, they assert that the Plaintiffs have sufficient administrative remedies available to obtain refunds, but in the proceeding before the Commission they argued that because the Plaintiffs could not identify the customers who "paid" the tax, no refunds could ever be awarded to these Plaintiffs.

Lastly, it cannot be said that the legal positions freely chosen by Defendants are the result of fraud, ignorance, or mistake. Defendants are charged with notice of the positions taken by counsels in the concurrent litigation. **Link**, 370 U.S. at 634 (citation omitted). And, here, the Court is further confronted by opposing positions argued ***by the same attorney***.

For all of these reasons, the Defendants are estopped from claiming that Plaintiffs have no right to bring this direct action, from asserting that Plaintiffs must first exhaust their administrative remedies as prerequisites for bringing forth these claims, and from claiming that the Plaintiffs have adequate remedies available pursuant to the administrative processes permitted under Chapter 368A.

B. PLAINTIFFS HAVE A RIGHT TO THE REQUESTED INJUNCTIVE RELIEF BECAUSE, AS A MATTER OF LAW, NO STATUTE CAN DIVEST THE COURTS OF THIS STATE OF THEIR CONSTITUTIONALLY-GRANTED AUTHORITY TO ISSUE WRITS OF INJUNCTIONS.

Defendants claim that Plaintiffs have no right to their requested injunctive relief due to the anti-injunction provision contained in N.R.S. § 368A.280(1). Motion, p. 8-9. This provision violates the separation of powers provision of the Nevada Constitution, and is therefore unenforceable.

The Supreme Court of Ohio recently faced a similar situation in **City of Norwood v. Horney**, 853 N.E.2d 1115, 110 Ohio St.3d 353 (Ohio 2006). In Norwood, the court evaluated the constitutionality of a statute that "prohibit[ed] a court from enjoining the taking and using of property appropriated by the government . . . prior to appellate review of the taking." **Id**. at 1122. The court ruled the statute to be "an unconstitutional encroachment of the judiciary's constitutional and inherent authority in violation of the separation-of-powers doctrine." **Id**. at 1150.

The **Norwood** court identified the power of injunction to be an inherent power of the courts under the state constitution. **Id**. at 1148-1149. The court next recognized the authority to grant injunctive relief as judicial power that "resides exclusively in the judicial branch." **Id**. at 1148. It therefore concluded that the legislature's attempt to limit the court's inherent power of injunction violated the separation-of-powers doctrine. **Id**. at 1150.

In doing so, the Ohio Supreme Court found the following statement of the Kentucky Supreme Court to be particularly astute:

> The control over this inherent judicial power, in this particular instance the injunction, is exclusively within the constitutional realm of the courts. *As such, it is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied.*

Id. at 1149 (emphasis in original), *citing* **Smothers v. Lewis**, 672 S.W.2d 62, 64 (Ky. 1984).

This Court should likewise find the legislature's attempt to limit or fashion the circumstances under which a court may exercise its injunctive power to be in violation of the separation of powers mandated by Article 3, § 1 of the Constitution of the State of Nevada.[8] In Nevada, the power of injunction is not only an inherent judicial power, but it is an *explicit* power of the courts directly conferred upon them by the Nevada Constitution. Article 6, § 6, of the State Constitution vests the power to issue writs of injunction in the State's District Courts.

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[8] At the very least, Plaintiffs should be permitted to develop this argument in this suit.

> ". . .The District Courts and the Judges thereof have the power to issue Writs of. . . Injunction. . ., and all other Writs proper and necessary to the complete exercise of the jurisdiction."

Chapter 368A attempts to divest the judiciary of its constitutionally granted power of injunction. This provision is a patently unconstitutional violation of the separation of powers set forth in Article 3, § 1, of the State Constitution, which provides:

> The powers of the government of the State of Nevada shall be divided into three separate departments,–the legislative,–the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

"It is fundamental to our system of government that the separate powers granted the executive, legislative and judicial departments be exercised ***without intrusion***." **City of North Las Vegas v. Daines**, 92 Nev. 292, 294, 550 P.2d 399 (1976), *citing* **Galloway v. Truesdell**, 83 Nev. 13, 422 P.2d 237 (1967) (emphasis added). This is the single most important principle "declaring and guaranteeing the liberties of the people." **Galloway**, 83 Nev. at 18. Statutes which attempt to limit or destroy the powers of the courts must ***fail***. **Goldberg v. The Eighth Judicial District Court of the State of Nevada**, 93 Nev. 614, 616-17, 572 P.2d 521 (1977), *citing* **Lindauer v. Allen**, 85 Nev. 430, 434, 456 P.2d 851 (1969).

Further, Plaintiffs' situation is one that has already been recognized to merit injunctive relief. The Nevada Supreme Court has previously addressed this issue of enjoining the collection of an impermissible tax. In **Penrose v. Whitacre**, 62 Nev. 239, 147 P.2d 887 (1944) (hereinafter "**Penrose II**"), the court stated that an injunction to prevent the collection of taxes would lie where "enforcement of the tax would lead to a multiplicity of suits, or ***produce irreparable injury***; or, if the property is real estate, throw a cloud upon the title of the complainant, or there must be some allegation of fraud. . . ." **Id.** at 245, *citing* **Wells, Fargo &**

Co. v. Dayton, 11 Nev. 161, 166 (1876) (other citations omitted). *See also* **Comm'r of International Revenue v. Shapiro**, 424 U.S. 614, 627, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976). The Plaintiffs must also lack an adequate remedy at law. **Penrose v. Whitacre,** 61 Nev. 440, 132 P.2d 609, 617 (1942) (hereinafter "**Penrose I**").

Here, Plaintiffs will be able to meet the requirements under **Penrose II** because: (1) enforcement of Chapter 368A will cause, and indeed has caused, Plaintiffs to suffer irreparable injury; and (2) Plaintiffs lack an adequate remedy at law. Plaintiffs have suffered the irreparable injury of having their First Amendment rights violated.[9] Further, the actual imposition of an unconstitutional tax or fee can cause irreparable injury. *See* **Joelner v. Village of Washington Park, Illinois**, 378 F.3d 613, 620, 628 (7th Cir. 2004) (Court found that if plaintiff "cannot afford such a hefty fee, he would be forced to shut down his bookstore. Hence, there is a threat that these allegedly unconstitutionally excessive fees could cause Joelner significant irreparable harm.") Likewise, no amount of money damages can remedy the continued violation of Plaintiffs' First Amendment rights. 62 Nev. at 244-45. And, more importantly, Defendants contend that the Plaintiffs cannot even bring a damage claim (or even a successful refund action) against the Defendants for the injuries sustained.

It is clear that Plaintiffs can be entitled to injunctive relief in this action under the binding precedents of **Penrose I** and **II**. Because Chapter 368A attempts to divest this Court of

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[9] "'[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,' **Elrod v. Burns**, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and money damages are therefore inadequate, **Nat'l People's Action [v. Village of Wilmette**, 914 F.2d 1008, 1013 (7th Cir. 1990)]." **Joelner v. Village of Washington Park, Illinois**, 378 F.3d 613, 620 (7th Cir. 2004) (clarification added) (adult business license fee violated the First Amendment).

its constitutionally-given power of injunction, it is an unconstitutional abridgment of the separation of powers doctrine contained in Article 3 § 1, of the Constitution of the State of Nevada, and is therefore invalid.

C. CONSOLIDATION IS NOT IMPROPER.

In their motion to dismiss, Defendants oppose a motion to consolidate that has yet to be filed. Defendants' Motion, pp. 9-10. Such an argument is premature since no motion to consolidate is pending before this Court. Plaintiffs will not, therefore, respond to these arguments at this time.

D. PLAINTIFFS' COMPLAINT IS NOT PROCEDURALLY DEFICIENT.

In Section D of their Motion, Defendants claim that Plaintiffs' Complaint is procedurally deficient because the prayer in Count III does not reference "in excess of $10,000."[10] Courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party. **Hay v. Hay**, 100 Nev. 196, 198, 678 P.2d 672 (1984). In this case, it is certainly no secret to the Defendants that the Plaintiffs have paid *millions* of dollars in live entertainment taxes, and seek return of such amounts by way of this action. Thus, for the Defendants to insinuate to this Court that they do not know if the Plaintiffs' monetary damages are less than or more than $10,000 is disingenuous. The Plaintiffs' failure to plead "in excess of $10,000" in the prayer is certainly not grounds to dismiss the Complaint; still, if the Court so desires the Plaintiffs will amend their Complaint to assert "in excess of $10,000" in the prayer of Count III.

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[10] Count I and Count II of Plaintiffs' Complaint seek equitable relief, and not monetary awards, so Count III is the only count subject to this argument.

E. PLAINTIFFS SHOULD BE ENTITLED TO AMEND THEIR COMPLAINT.

Should Plaintiffs' Complaint be found by the Court to be deficient in any regard, the Court should grant Plaintiffs leave to amend. "[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy. Leave to amend should be freely given when justice requires . . . ." **Cohen v. Mirage Resorts, Inc.**, 119 Nev. 1, 22, 62 P.3d 720, 734 (Nev. 2003). Thus, Plaintiffs respectfully request this Honorable Court grant Plaintiffs leave to amend their complaint should any deficiency be identified.

IV. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that this Honorable Court deny Defendants' motion to dismiss in its entirety, or in the alternative, allow Plaintiffs the opportunity to amend their Complaint.

DATED this 9th day of May, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2008, the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was served on the party(ies) by mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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Exhibit 1

Westlaw.
881 N.E.2d 552
378 Ill.App.3d 268, 881 N.E.2d 552, 317 Ill.Dec. 384
(Cite as: 378 Ill.App.3d 268, 881 N.E.2d 552, 317 Ill.Dec. 384)

Pooh-Bah Enterprises, Inc. v. County of Cook
Ill.App. 1 Dist.,2007.

Appellate Court of Illinois,First District, Fifth Division.
POOH-BAH ENTERPRISES, INC., d/b/a Crazy Horse Too, Plaintiff-Appellant,
v.
The COUNTY OF COOK; Barbara Bruno, Director of the Cook County Department of Revenue; and The City of Chicago, Defendants-Appellees.
No. 1-05-2924.

Dec. 21, 2007.

Background: Taxpayer brought action seeking declaratory and injunctive relief against county, director of its department of revenue, and city, challenging constitutionality of their amusement tax exemptions for small, fine arts venues that excluded adult entertainment cabarets. Defendants brought motions to dismiss. The Circuit Court, Cook County, Alexander P. White, J., granted defendants' motions. Taxpayer appealed.

Holding: The Appellate Court, Frossard, J., held that tax scheme excluding adult entertainment cabarets from amusement tax small-venue exemptions violated First Amendment.

Reversed and remanded.

West Headnotes

[1] Pretrial Procedure 307A ⚿679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of Pleadings. Most Cited Cases
In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court considers all well-pleaded facts and reasonable inferences in the light most favorable to the plaintiff. S.H.A. 735 ILCS 5/2-615.

[2] Pretrial Procedure 307A ⚿622

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak622 k. Insufficiency in General. Most Cited Cases
Only question presented by a motion to dismiss for failure to state a cause of action is whether sufficient facts are stated in the complaint which, if true, could entitle the plaintiff to relief. S.H.A. 735 ILCS 5/2-615.

[3] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
An appellate court's review of a dismissal of motion for failure to state a cause of action is de novo. S.H.A. 735 ILCS 5/2-615.

[4] Constitutional Law 92 ⚿1497

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of. Most Cited Cases
First Amendment protections are not limited to the written or spoken word, but may also extend to expressive conduct. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases

Constitutional Law 92 ⚿657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
A party raising a facial challenge to a law bears the heavy burden of demonstrating that it is unconstitutional under any set of circumstances, whereas a party raising an as-applied challenge need only show that, although the law may be constitutionally applied in most circumstances, it was specifically applied to him in an unconstitutional manner.

[6] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
Speech can be effectively limited by the exercise of the taxing power. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases

Constitutional Law 92 ⚿2081

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
Absent a compelling justification, the government may not exercise its taxing power to: (1) single out the press; (2) target a small group of speakers; or (3) discriminate on the basis of the content of taxpayer speech. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny; Compelling Interest. Most Cited Cases
Strict scrutiny requires the government to show that the law is both necessary to serve a compelling interest and narrowly tailored to achieve that end.

[9] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
Speaker-based or content-based taxes, absent a compelling government interest, will be struck down as a form of censorship. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and

Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases
A regulation is content-neutral so long as it is justified without reference to the content of the regulated speech. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
Generally, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases
Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
The First Amendment does not generally countenance governmental control over the content of messages expressed by private individuals because each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1518

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases
Content-based regulations are presumptively invalid and will be upheld only if necessary to serve a compelling governmental interest and narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ⚿2233

92 Constitutional Law

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2232 Cabarets, Discotheques, Dance Halls, and Nightclubs in General
92k2233 k. In General. Most Cited Cases

Public Amusement and Entertainment 315T ⚿9(1)

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases

Differential tax on adult entertainment cabarets was a content-based regulation on protected expression, and thus, tax was presumptively invalid and could be upheld only if it was necessary to serve compelling state interest and was narrowly drawn to achieve that end; city and county exempted small, fine arts venues from amusement tax, excluding adult entertainment cabarets, fact that small-venue exemptions could have been intended to serve content-neutral goals was not dispositive, and language of ordinances, which were incorporated into small-venue exemptions, established that adult entertainment cabaret exclusions, on their face, discriminated based on content. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases

Although the government's purpose is the controlling consideration in determining content neutrality, the mere assertion of a content-neutral purpose will not save a law which, on its face, discriminates based on content. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 ⚿2233

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2232 Cabarets, Discotheques, Dance Halls, and Nightclubs in General
92k2233 k. In General. Most Cited Cases

Public Amusement and Entertainment 315T ⚿9(1)

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk9 Sexually Oriented Entertainment
315Tk9(1) k. In General. Most Cited Cases

Tax scheme excluding adult entertainment cabarets from amusement tax small-venue exemptions was content-based regulation on speech that did not serve a compelling state interest, and thus, violated the First Amendment; interests of city and county in enhancing their reputations in the fine arts did not rise to the level of a compelling state interest that would justify, under the First Amendment, a

content-based restriction on protected expression. U.S.C.A. Const.Amend. 1.

****554** Stanley R. Kaminski, Duane Morris LLP, David A. Epstein, David A. Epstein, Ltd., Chicago, for Appellant.
Mara S. Georges, Corporation Counsel of the City of Chicago, Chicago (Benna Ruth Soloman, Deputy Corporation Counsel, Myriam Zreczny Kasper, Chief Assistant Corporation Counsel, Nadine J. Wichern, Assistant Corporation Counsel, of counsel), for Appellee City of Chicago.
Richard A. Devine, State's Attorney of Cook County, Chicago (Patrick T. Driscoll, Jr., Deputy State's Attorney, Michael C. Prinzi, Paul A. Castiglione, Assistant State's Attorneys, of counsel), for Appellees County of Cook and Barbara Bruno.
Justice FROSSARD delivered the opinion of the court:
*****386 *269** Plaintiff Pooh-Bah Enterprises, Inc., appeals the orders that granted the motions to dismiss filed by defendants the County of Cook and the director of its department of revenue (the County), and the City of Chicago (the City). Plaintiff's dismissed action sought declaratory and injunctive relief against defendants, challenging the constitutionality of their amusement tax exemptions for small, fine arts venues that exclude adult entertainment cabaret s. On appeal, plaintiff contends that the tax exemption scheme: (1) violates the first amendment of the United States Constitution; (2) violates the free speech clause o f the Illinois Constitution; (3) is overbroad; (4) is vague; and (5) violates the uniformity clause of the Illinois Constitution. For the reasons that follow, we reverse the judgment of the circuit court.

BACKGROUND

The City imposes on patrons of any amusement a tax of 8% on the admission price to enter, witness, view, or participate in any amusement within its boundaries. Chicago Municipal Code § 4-156-020(A) (amended December 15, 2004). The County imposes a virtually identical tax at a *****387 **555** rate of 3%. Cook County Amusement Tax Ordinance, § 3 (eff. April 1, 1999).

The City defines *amusement* as:

> "any exhibition, performance, presentation or show for entertainment purposes, * * * including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition [or] * * * any paid television programming." Chicago Municipal Code § 4-156-010 (2006).

Thc County's definition of *amusement* is similar. Cook County Amusement Tax Ordinance, § 2 (eff. April 1, 1999).

Effective January 1999, the City and County amended their amusement tax ordinances, with the intent to foster the production of live performances that offer theatrical, musical or cultural enrichment. See City Council Journal Entry, November 12, 1998, amending § 4-156-020(D); Cook County Board of Commissioner's Resolution, ***270** November 17, 1998, amending the amusement tax ordinance. Specifically, the City and County exempted from the amusement tax live theatrical, live musical or other live cultural performances that take place in a space with a maximum capacity of not more than 750 people (hereinafter, the small-venue exemption). Chicago Municipal Code § 4-156-020(D)(1) (2006); Cook County Amusement Tax Ordinance, § 3D(1) (eff. April 1, 1999). To clarify the exemption, amendments were passed in April 1999 defining *live theatrical, live musical or other live cultural performance* as:

> "a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings. The term does not include such amusements as athletic events, races or performances conducted at adult entertainment

cabarets [as defined by local ordinance]." Chicago Municipal Code § 4-156-010 (amended April 21, 1999); Cook County Amusement Tax Ordinance, § 2 (eff. April 1, 1999).

The following definitions are contained in section 16-16-030 of the City's adult use ordinance:

" 'Adult entertainment cabaret' means a public or private establishment which: (i) features topless dancers, strippers, male or female impersonators; (ii) not infrequently, features entertainers who display 'specified anatomical areas'; or (iii) features entertainers who by reason of their appearance or conduct perform in a manner which is designed primarily to appeal to the prurient interest of the patron or entertainers who engage in, or engage in the explicit simulation of, 'specified sexual activities.'

'Specified sexual activities' means and is defined as:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or so do my;

3. Fondling or other erotic touching of human genitals, public region, buttock or female breast.

'Specified anatomical areas' means and is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered." Chicago Municipal Code § 16-16-030 (2006).

****556 ***388** Similar definitions of these same three terms are contained in the County's zoning ordinance. Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006).

In 2001, plaintiff filed this action for declaratory and injunctive relief against the County. Plaintiff operates an adult entertainment cabaret in Chicago under the name Crazy Horse Too, which has a ***271** maximum capacity of less than 750 persons. Crazy Horse Too features live performances of exotic dancing by scantily clad women, who, during their dances, become semi-clothed in that they remove much of their clothing and display certain specified anatomical areas. Plaintiff's complaint challenged the provision of the small-venue exemption that excludes performances conducted at adult entertainment cabarets. Plaintiff argued the exclusion violates the first amendment of the United States Constitution and the free speech clause o f the Illinois Constitution. The City filed a motion to intervene as a party defendant because its amusement tax and small-venue exemption are similar to the County's. The circuit court granted the motion.

Plaintiff filed a second amended complaint, adding first amendment and free speech clause claims against the City. According to the complaint, after the small-venue exemptions were enacted, plaintiff stopped adding the amusement tax to the admission fee it charged and began paying the tax itself under protest. Plaintiff sought a refund of those taxes, arguing that the small-venue exemptions' exclusion of patrons of performances conducted at adult entertainment cabarets impermissibly discriminated on the basis of content, facially and as applied, against exotic dancing and other performances with adult content in violation of the first amendment and the free speech clause. Plaintiff also argued that the adult entertainment cabaret exclusions were, facially and as applied, overbroad and vague in violation of the first amendment and free speech clause.

The City and County moved to dismiss plaintiff's claims under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2002)), for failure to state a claim upon which relief may be granted. The circuit court granted the motions to dismiss, concluding that the exclusion of adult en-

tertainment cabarets from the small-venue exemptions did not violate the first amendment, that the free speech clause of the Illinois Constitution did not provide any greater protection in this type of case, and that the tax exemption schemes were neither overbroad nor vague. Plaintiff filed a motion to reconsider, which was denied by the circuit court.

Plaintiff also filed a third amended complaint, containing two claims under the uniformity clause of the Illinois Constitution. The City then moved to dismiss, and the County joined the motion. The circuit court dismissed the new claims because it found that real and substantial differences existed between small, fine arts venues and adult entertainment cabarets, that similar distinctions for tax purposes have been upheld, and that the differences bore a reasonable relationship to the small-venue exemption's purpose of enhancing the City's and County's reputations in the fine arts.

Plaintiff then appealed.

***272** ANALYSIS

[1][2][3] The circuit court granted defendants' motions to dismiss because plaintiff failed to state a claim upon which relief may be granted. In ruling on such a motion, the court considers all well-pleaded facts and reasonable inferences in the light most favorable to the plaintiff. *****389**557***Jackim v. CC-Lake, Inc.,* 363 Ill.App.3d 759, 760-61, 299 Ill.Dec. 761, 842 N.E.2d 1113 (2005). The only question presented by a section 2-615 motion to dismiss for failure to state a cause of action is whether sufficient facts are stated in the complaint which, if true, could entitle the plaintiff to relief. *Illinois Graphics Co. v. Nickum,* 159 Ill.2d 469, 488, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). Our review of a dismissal under section 2-615 is *de novo. Jackim,* 363 Ill.App.3d at 760, 299 Ill.Dec. 761, 842 N.E.2d 1113.

First Amendment

[4] The first amendment to the United States Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment, prohibits governmental action that abridges freedom of speech. U.S. Const., amends. I, XIV; *People v. Alexander,* 204 Ill.2d 472, 476, 274 Ill.Dec. 414, 791 N.E.2d 506 (2003). First amendment protections are not limited to the written or spoken word, but may also extend to expressive conduct. *Texas v. Johnson,* 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353 (1989). While erotic dancing of the sort practiced at Crazy Horse Too enjoys constitutional protection as expressive conduct, it falls "only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265, 278 (2000).

[5] Plaintiff raises both facial and as-applied constitutional challenges to the provisions in defendants' tax schemes that exclude adult entertainment cabarets from the amusement tax small-venue exemption. Plaintiff argues that the provisions are content-based on their face and the exclusion of performances conducted at adult entertainment cabarets applies to plaintiff's small venue by reference to the expressive activity performed inside. A party raising a facial challenge to a law bears the heavy burden of demonstrating that it is unconstitutional under any set of circumstances, whereas a party raising an as-applied challenge need only show that, although the law may be constitutionally applied in most circumstances, it was specifically applied to him in an unconstitutional manner. *People v. Garvin,* 219 Ill.2d 104, 117, 301 Ill.Dec. 423, 847 N.E.2d 82 (2006).

[6][7][8] "It is settled that speech can be effectively limited by the exercise of the taxing power." *Speiser v. Randall,* 357 U.S. 513, 518, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460, 1468 (1958), citing *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). ***273** Although it is constitutional to tax first amendment activities in a genuinely nondiscriminatory fashion (*Arkansas*

Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209, 219 (1987)), the Supreme Court in *Leathers v. Medlock,* 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), identified three situations where a tax imposed by government will trigger strict scrutiny under the first amendment. Absent a compelling justification, the government may not exercise its taxing power to (1) single out the press, (2) target a small group of speakers, or (3) discriminate on the basis of the content of taxpayer speech. *Leathers,* 499 U.S. at 447, 111 S.Ct. at 1443-44, 113 L.Ed.2d at 503-04. Strict scrutiny requires the government to show that the law is both necessary to serve a compelling interest and narrowly tailored to achieve that end. *United States v. Playboy Entertainment Group. Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865, 879 (2000).

[9] In explaining the problematic nature of differential taxation, the Supreme Court, in the context of a discriminatory tax on a certain segment of print media, stated that the general applicability of any burdensome tax helps to ensure that it will ***390 **558** be met with widespread opposition. But when such a law applies only to a single constituency, it is insulated from political constraint. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295, 304-05 (1983). Speaker-based or content-based taxes, absent a compelling government interest, will be struck down as a form of censorship. *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 116, 63 S.Ct. 870, 876, 87 L.Ed. 1292, 1300 (1943) ("a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful"); *Grosjean,* 297 U.S. at 244, 56 S.Ct. at 447, 80 L.Ed. at 666 (a gross receipts tax derived from advertisements carried in newspapers operated as a restraint on speech).

The Supreme Court has also recognized that content-based tax *exemptions* operate to suppress speech and implicate strict scrutiny. In *Speiser,* 357 U.S. at 518, 78 S.Ct. at 1338, 2 L.Ed.2d at 1468, where the Court deemed unconstitutional a California tax provision requiring veterans to sign a loyalty oath in order to claim a property tax exemption, the Court noted, "[i]t cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." Similarly, Illinois courts have recognized the suppressive nature of selective taxes and selective tax exemptions, holding that they are limited by the first amendment. *American Multi-Cinema, Inc. v. City of Warrenville,* 321 Ill.App.3d 349, 354, 255 Ill.Dec. 42, 748 N.E.2d 746 (2001) (noting that a selective amusement tax on free speech will trigger heightened ***274** scrutiny under the first amendment if it discriminates on the basis of content); *Satellink of Chicago, Inc. v. City of Chicago,* 168 Ill.App.3d 689, 696, 119 Ill.Dec. 545, 523 N.E.2d 13 (1988) (amusement tax amendment that targeted subscription television by exempting cable television would not withstand strict scrutiny analysis).

The City's and County's amusement taxes are taxes of general applicability, which apply to sports, theaters, movies, paid television, circuses, and numerous other forms of entertainment unless specifically exempted. The taxes do not single out the press for special treatment or target a small group of speakers. However, the third circumstance that triggers heightened scrutiny analysis under the first amendment-that the tax discriminates on the basis of the content of the speech-is an issue in this case.

Defendants argue that their amusement tax schemes should be deemed content-neutral because they were not enacted with the purpose of discriminating against any particular expression. According to defendants, the adult entertainment cabaret exclusions were not enacted to suppress protected expression but, rather, because that type of venue does not further the legitimate governmental policy of encouraging, through subsidization, small-venue fine arts performances that will enhance the City's and County's reputations in the fine arts. Because those policy interests are not related to the content of the

message being expressed, defendants contend, their tax schemes should be considered content-neutral and, thus, strict scrutiny should not apply. We disagree.

Content-Neutral and Content-Based Regulations

[10][11][12] A regulation is content-neutral so long as it is " 'justified without reference to the content of the regulated speech.' "*Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 675 (1989), quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984). Generally, laws ***391 **559** that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. *People v. Jones,* 188 Ill.2d 352, 358-60, 242 Ill.Dec. 267, 721 N.E.2d 546 (1999) (statute that banned the emission of loud amplified sound from vehicles but exempted advertising was content-based and violated the first amendment). Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral. *Turner Broadcasting System, Inc. v. Federal Communications Comm'n,* 512 U.S. 622, 643-44, 114 S.Ct. 2445, 2459-60, 129 L.Ed.2d 497, 518-19 (1994) (strict scrutiny did not apply to requirement that cable systems must carry full power local***275** broadcast stations because the provisions depended only on the operator's channel capacity, not the content of programming).

[13][14] The first amendment does not generally countenance governmental control over the content of messages expressed by private individuals because each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. *Turner Broadcasting System, Inc.,* 512 U.S. at 641, 114 S.Ct. at 2458, 129 L.Ed.2d at 517. Thus, content-based regulations are presumptively invalid (*R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305, 317 (1992)) and will be upheld only if necessary to serve a compelling governmental interest and narrowly drawn to achieve that end (*Widmar v. Vincent,* 454 U.S. 263, 270, 102 S.Ct. 269, 274, 70 L.Ed.2d 440, 447-48 (1981)).

[15][16] Although the government's purpose is the controlling consideration in determining content neutrality, the mere assertion of a content-neutral purpose will not save a law "which, on its face, discriminates based on content." *Turner Broadcasting System, Inc.,* 512 U.S. at 642-43, 114 S.Ct. at 2459, 129 L.Ed.2d at 518. See also *Jones,* 188 Ill.2d at 361-62, 242 Ill.Dec. 267, 721 N.E.2d 546. The fact that defendants' small-venue exemptions may have been intended to serve content-neutral goals is not dispositive. The Supreme Court has repeatedly stated that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' "*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105, 117, 112 S.Ct. 501, 509, 116 L.Ed.2d 476, 488 (1991), quoting *Minneapolis Star & Tribune Co.,* 460 U.S. at 592, 103 S.Ct. at 1376, 75 L.Ed.2d at 309. We therefore reject defendants' contention that the existence of a content-neutral purpose renders the tax ordinances at issue here content-neutral.

The language of the definitions from the City's adult use ordinance and the County's zoning ordinance, which were incorporated into the City's and County's respective small-venue exemptions, establishes that the adult entertainment cabaret exclusions, on their face, discriminate based on content. Specifically, the definitions in the amusement tax ordinances of *live theatrical, live musical or other live cultural performance* (Chicago Municipal Code § 4-156-010 (2006); Cook Count y Amusement Tax Ordinance, § 2 (eff. April 1,1999)) reference the definition of *adult entertainment cabaret* contained within the City's adult use ordinance or the County's zoning ordinance (Chicago Municipal Code § 16-16-030 (2005); Cook County Zoning Ordinance of 2001, Art. 14.2.1 (2006)). Both the City's adult use ordinance and the County's zoning

ordinance define an *adult entertainment cabaret* by the content of the expression featured at the establishment, *e.g.*, topless dancing, stripping, entertainers who display specified***392 **560 anatomical*276 areas (excessive breast or buttocks skin exposure), etc. Chicago Municipal Code § 16-16-030 (2005); Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006). Consequently, read together, the operative language of those ordinances excludes from the amusement tax small-venue exemption those amusements that are defined, insofar as applied t o plaintiff, by semi-naked erotic performance art or expression. One cannot determine whether the operative criteria of the adult entertainment cabaret exclusions apply to a particular small venue without considering the content of the small venue's featured speech or expressive conduct.

Defendants are not aided by their citation to *Leathers,* where the Supreme Court found that an Arkansas statute extending the generally applicable sales tax to cable services (but not satellite services), while maintaining existing exemptions for magazines and newspapers, did not raise first amendment concerns. *Leathers,* 499 U.S. at 453, 111 S.Ct. at 1447, 113 L.Ed.2d at 508. There, the Court determined that the Arkansas sales tax was not content-based because nothing in the statute referred to the content of mass media communications. Moreover, cable television offered subscribers a mixture of news, information, and entertainment and there was no record evidence that such material differed systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines. *Leathers,* 499 U.S. at 449, 111 S.Ct. at 1445, 113 L.Ed.2d at 505. Here, in contrast, defendants' adult entertainment cabaret exclusions are content-based and the content of the performances featured at such cabarets differs systematically in its erotic message from that communicated by the exempt fine arts venues.

Compelling Interest

Accordingly, because the differential tax on erotic dance is a content-based regulation on protected expression, it is presumptively invalid and may be upheld only if it is necessary to serve a compelling state interest and narrowly drawn to achieve that end. Because defendants argued on appeal, unsuccessfully, that their tax schemes were content-neutral, they did not argue that their tax schemes served a compelling state interest in order to survive a first amendment strict scrutiny analysis.

[17] Alternatively, defendants argue that their adult entertainment cabaret exclusions do not prohibit or restrict exotic dancing but, rather, are governmental policy to encourage, through subsidization, the production of innovative fine arts performances at small venues in an effort to enhance the City's and County's reputations in the fine arts. Defendants contend that new and innovative shows have a greater *277 chance of being chosen for production on Broadway or to tour nationally. Moreover, such shows may have the added effect of drawing new restaurants, shops and hotels to the surrounding community. Defendants argue that the most efficient way to subsidize small, fine arts venues is to give their patrons an exemption from the amusement tax, because it relieves small venues of the administrative and financial burdens that flow from having to collect the tax from patrons and remit it to the City and County at specified times.

Defendants argue that state action that interferes is different from state action that encourages an alternative activity based on public policy. Citing *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and *National Endowment for the Arts v. Finley,* 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), defendants ***393 **561 argue that their tax schemes are consistent with Supreme Court rulings that allow the government to selectively fund a program to encourage certain activities it believes to be in the public interest without at the same time funding an

alternative program. We disagree. *Regan, Rust,* and *Finley* do not establish that the government can encourage one private speaker over another based on content or message without implicating first amendment concerns.

Regan held that an internal revenue statute that prohibited tax exempt charitable organizations from using tax-deductible contributions to support their lobbying efforts did not violate the first amendment, which did not require Congress to subsidize lobbying. *Regan,* 461 U.S. at 546, 103 S.Ct. at 2001, 76 L.Ed.2d at 137. Furthermore, the statute did not violate the equal protection component of the fifth amendment, because it was rational for Congress to decide that, even though it would not subsidize substantial lobbying by charities generally, it would subsidize lobbying by veterans' organizations given our country's long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. *Regan,* 461 U.S. at 550-51, 103 S.Ct. at 2003-04, 76 L.Ed.2d at 140.

Unlike the tax ordinances before us, Congress in *Regan* did not discriminate invidiously in granting its exemptions, which were not aimed at suppressing any ideas. Veterans' organizations were entitled to receive tax-deductible contributions regardless of the content of any speech they might use, including lobbying. Congress could exempt veterans' organizations from taxation differently than it did charitable organizations as long as the exemption was not content-based. *Regan,* 461 U.S. at 548, 103 S.Ct. at 2002, 76 L.Ed.2d at 138. *Regan* did not uphold, or even address, discrimination between speech or expressive activities based on content.

***278** In *Rust,* 500 U.S. at 178-80, 111 S.Ct. at 1764-66, 114 L.Ed.2d at 246-47, regulations prohibited recipients of federal funds appropriated for family-planning services from engaging in counseling concerning, referrals for, and activities advocating abortion and required the recipients to maintain separate facilities, personnel and accounting records from any abortion activity. Those regulations did not violate first amendment free speech rights because the government did not discriminate on the basis of viewpoint. The government merely chose to fund one activity to the exclusion of another, and the regulations simply ensured that federal funds were not used for activities, including speech, that were outside the scope of the federal program. *Rust,* 500 U.S. at 193, 111 S.Ct. at 1772, 114 L.Ed.2d at 255. In contrast to our case, *Rust* concerned the dissemination to the public of a specific government message through a focused government subsidy program that paid organizations to distribute the government's message. *Rust* did not involve encouraging selected private speech by private citizens exercising their first amendment rights. *Rust,* 500 U.S. at 199, 111 S.Ct. at 1775, 114 L.Ed.2d at 259.

Defendants' reliance on *Rust* is misplaced because that case involved the government speech doctrine rather than government regulation of private speech. In accordance with the government speech doctrine, when the government itself is speaking or is paying a third party to speak to the public on the government's behalf, the government's message is not subject to first amendment restrictions. This doctrine follows from the simple fact that the first amendment aims to protect citizens' free speech from government interference. Later, in *****394**562***Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Court reiterated the point that the constitutional regulation of speech discussed in *Rust* did not apply to a government-created program to encourage private speech, but was limited to situations where the government disbursed public finds to private speakers to transmit specific information pertaining to the government's own program. *Rosenberger,* 515 U.S. at 833, 115 S.Ct. at 2519, 132 L.Ed.2d at 718 (where student organizations were subsidized by a state university but were not agents of the university, the student organizations' subsidized speech was private speech rather than government speech and, thus, not exempt from first amendment protection).

In *Finley,* 524 U.S. at 581-83, 118 S.Ct. at 2175-76, 141 L.Ed.2d at 512-13, the Court upheld a grant program provision that implemented the consideration of decency and respect standards when determining which art projects would receive government subsidies. The provision was facially constitutional because it did not place conditions on grants ***279** or preclude awards to projects that might be deemed indecent or disrespectful. *Finley,* 524 U.S. at 581-83, 118 S.Ct. at 2175-77, 141 L.Ed.2d at 512-13. Any content-based considerations taken into account in the grant-making process were a consequence of the nature of arts funding where the government agency's mandate was to make aesthetic judgments. *Finley,* 524 U.S. at 585-86, 118 S.Ct. at 2177-78, 141 L.Ed.2d at 514-15. The Court, however, reiterated that if the provision was applied so as to discriminate based on " 'certain ideas or viewpoints' " (*i.e.,* in a content-based manner) or if the decency or respect standards were an enforced requirement, the provision would then be subject to strict scrutiny review. *Finley,* 524 U.S. at 587, 118 S.Ct. at 2178-79, 141 L.Ed.2d at 516, quoting *Simon & Schuster, Inc.,* 502 U.S. at 116, 112 S.Ct. at 508, 116 L.Ed.2d at 487. As discussed above, defendants' adult entertainment cabaret exclusions discriminate against protected speech based on content.

Regan,, Rust, and *Finley* do not support defendants' contention that affirmative government policies encouraging selective private speech do not implicate the first amendment and thereby escape strict scrutiny analysis. Moreover, we find no compelling state interest which necessitates the content-based adult entertainment cabaret exclusions contained in defendants' amusement tax schemes. Defendants argue that they have a legitimate interest in enhancing Chicago's and Cook County's reputations in the fine arts. We do not disagree with this proposition; however, their interests do not rise to the level of a compelling state interest that will justify, under the first amendment, a content-based restriction on protected expression. See *Minneapolis Star & Tribune Co.,* 460 U.S. at 586, 103 S.Ct. at 1372, 75 L.Ed.2d at 305 (raising revenue is not a compelling interest sufficient to withstand strict scrutiny).

CONCLUSION

Accordingly, we hold that the City's and County's adult entertainment cabaret exclusions from the amusement tax small-venue exemptions are content-based regulations on speech that do not serve a compelling state interest and, therefore, violate the first amendment. Given this holding, we do not reach plaintiff's claims that the tax schemes are unconstitutionally overbroad or vague or violate the uniformity clause of the Illinois Constitution. We reverse the orders of the trial court that granted defendants' motions to dismiss*****395 **563** for failure to state a claim and remand this cause for further proceedings.

Reversed and remanded.

FITZGERALD SMITH, P.J., and TULLY, J., concur.
Ill.App. 1 Dist.,2007.
Pooh-Bah Enterprises, Inc. v. County of Cook
378 Ill.App.3d 268, 881 N.E.2d 552, 317 Ill.Dec. 384

END OF DOCUMENT

Exhibit 2

CAUSE NO. D-1-GN-07-004179

TEXAS ENTERTAINMENT ASSOCIATION, INC. AND KARPOD, INC.	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
vs.	§	TRAVIS COUNTY, TEXAS
SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	
Defendants.	§	345TH JUDICIAL DISTRICT

JUDGMENT

From March 3, 2008 to March 6, 2008, the Court heard the trial of this cause. After considering the pleadings, the evidence, the arguments of counsel, and the applicable legal authorities, the Court decides as follows:

The Court DENIES Plaintiffs' motions to exclude the opinions of Defendants' experts, Dr. Bell and Dr. George.

The Court holds that Subchapter B of Chapter 47 of the Texas Business and Commerce Code, while furthering laudable goals, violates the First Amendment to the United States Constitution and is therefore invalid.

This subchapter probably must be reviewed as a content-based tax, using strict scrutiny, either because it is "aimed" at what are arguably the primary effects of protected speech, i.e., the effect on the audience of watching nude erotic dancing, or because its "aim," as determined by the use of the bulk of the funds raised by the tax for the Texas health opportunity pool, is to address lack of adequate health insurance, a statewide problem, by singling out business activity

involving expression that, while politically unpopular, is nevertheless protected by the First Amendment. Subchapter B does not pass muster under this standard because Defendants failed to—and conceded that they cannot—meet their burden to show that it is necessary to serve a compelling state interest and narrowly tailored for that purpose.

Even if the subchapter were analyzed as a content-neutral measure aimed at the secondary effects of protected speech, using intermediate scrutiny, it must be held unconstitutional.

If reliance by the Legislature on some pre-enactment evidence of links between the secondary effects addressed by the programs funded by the subchapter's tax and the business activity subject to the tax is a constitutional requirement (as is suggested, but not expressly held, by Supreme Court caselaw), Subchapter B must be held unconstitutional because no evidence indicating that any legislators actually considered any evidence of such links was presented at trial. Tori Camp's testimony indicated that materials supporting the existence of such links were made available to certain legislators, but no evidence showed that any legislator had actually considered or even seen those materials.

If pre-enactment evidence is not required, the subchapter must still be held unconstitutional because Defendants, while presenting persuasive trial evidence supporting a link between the business activity subject to the tax and the secondary effects addressed by the sexual assault program fund, presented no evidence supporting a link between the business activity subject to the tax and the alleged secondary effects addressed by the Texas health opportunity pool. There is no evidence that combining alcohol with nude erotic dancing causes dancers to be uninsured, that any dancer is in fact uninsured, or that any uninsured dancer could qualify for assistance from the fund.

Subchapter B also fails to pass muster under intermediate scrutiny because it is not narrowly tailored. First, only one of the two alleged secondary effects was ever shown to be possibly connected to the combination of nude erotic dancing and the consumption of alcohol. Second, no evidence was presented to show that the amount of the tax is related in any way to the degree to which the taxed business activity contributes to the alleged secondary effects or to the financial cost of that contribution.

For the foregoing reasons, the Court DECLARES that sections 47.051–.056 of the Texas Business and Commerce Code are unconstitutional and invalid. It is therefore unnecessary to reach Plaintiffs' state constitutional claims.

The Court ORDERS that Defendants are PERMANENTLY ENJOINED from assessing or collecting the tax imposed by sections 47.051–.056.

The Court ORDERS, pursuant to section 37.009 of the Texas Civil Practice and Remedies Code and 42 U.S.C. § 1988, that Plaintiffs recover from Defendants their reasonable and necessary attorneys' fees in an amount to be determined by the Court after receiving letters from Plaintiffs and Defendants on this issue. The letters must contain no more than three pages and be filed by April 4, 2008.

SIGNED this 28th day of March, 2008.

SCOTT H. JENKINS
JUDGE PRESIDING

Vernon's Texas Statutes and Codes Annotated Currentness
Business and Commerce Code (Refs & Annos)
Title 4. Miscellaneous Commercial Provisions (Refs & Annos)
Chapter 47. Sexually Oriented Businesses (Refs & Annos)
Subchapter B. Fee Imposed on Certain Sexually Oriented Businesses
§ 47.051. Definitions

In this subchapter:

(1) "Nude" means:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(2) "Sexually oriented business" means a nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

§ 47.052. Fee Based on Admissions; Records

(a) A fee is imposed on a sexually oriented business in an amount equal to $5 for each entry by each customer admitted to the business.

(b) A sexually oriented business shall record daily in the manner required by the comptroller the number of customers admitted to the business. The business shall maintain the records for the period required by the comptroller and make the records available for inspection and audit on request by the comptroller.

(c) This section does not require a sexually oriented business to impose a fee on a customer of the business. A business has discretion to determine the manner in which the business derives the money required to pay the fee imposed under this section.

§ 47.053. Remission of Fee; Submission of Reports

Each quarter, a sexually oriented business shall:

(1) remit the fee imposed by Section 47.052 to the comptroller in the manner prescribed by the comptroller;

and

(2) file a report with the comptroller in the manner and containing the information required by the comptroller.

§ 47.054. Allocation of Certain Revenue for Sexual Assault Programs

The comptroller shall deposit the first $25 million received from the fee imposed under this subchapter in a state fiscal biennium to the credit of the sexual assault program fund.

§ 47.055. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium in the Texas health opportunity pool established under Subchapter N, Chapter 531, Government Code. Money deposited in the pool under this section may be used only to provide health benefits coverage premium payment assistance to low-income persons through a premium payment assistance program developed under that subchapter.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, becomes law and the Texas health opportunity pool is established under that Act. If that Act does not become law, or that Act becomes law but the pool is not established, this section has no effect, and the revenue is deposited as provided by Section 47.0551.

§ 47.0551. Allocation of Additional Revenue

(a) The comptroller shall deposit all amounts received from the fee imposed under this subchapter after the first $25 million in a state fiscal biennium to the credit of the premium payment assistance account. The premium payment assistance account is an account in the general revenue fund that may be appropriated to the Health and Human Services Commission only to provide health benefits coverage premium payment assistance to low-income persons through a program developed by the commission.

(b) This section takes effect only if Senate Bill No. 10, Acts of the 80th Legislature, Regular Session, 2007, does not become law, or that Act becomes law, but the Texas health opportunity pool is not established under that Act. If that Act becomes law and the pool is established, this section has no effect, and the revenue is deposited as provided by Section 47.055.

§ 47.056. Administration, Collection, and Enforcement

The provisions of Subtitle B, Title 2, Tax Code, apply to the administration, payment, collection, and enforcement of the fee imposed by this chapter.

END OF DOCUMENT

Exhibit 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C. d/b/a DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, L.L.C. d/b/a LITTLE DARLINGS; K-KEL, INC. d/b/a SPEARMINT RHINO GENTLEMAN'S CLUB; OLUMPUS GARDEN, INC. d/b/a OLYMPIC GARDEN; SHAC, L.L.C. d/b/a SAPPHIRE; THE POWER COMPANY, INC., d/b/a CRAZY HORSE TOO GENTLEMEN'S CLUB; D. WESTWOOD, INC. d/b/a TREASURES; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a SCORES, Plaintiff(s), vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION and NEVADA STATE BOARD OF EXAMINERS, Defendant(s).	2:06-cv-0480-RLH-RJJ **ORDER** (Motion to Dismiss–#12)

Before the Court is Defendants' **Motion to Dismiss Amended Complaint** (#12, filed May 10, 2006). Plaintiffs' Opposition (#16) was filed June 5, 2006. Defendants' Reply (#17) was filed June 14, 2006.

The Motion will be granted.

BACKGROUND

This suit arises from a statute enacted by the Nevada State legislature, 20th Special Session, in 2003, which, *inter alia*, replaced the casino entertainment tax with a tax on all live

entertainment. The provisions of the live entertainment tax were placed in Chapter 368A of the Nevada Revised Statutes ("NRS") and were further amended by the Nevada State Legislature in 2005.[1]

Plaintiffs, who operate establishments at which "live performance dance entertainment" is provided, contend that the Live Entertainment Tax violates their rights under the First and Fourteenth Amendments of the United States Constitution as a restraint on speech and a violation of substantive due process. They seek declaratory relief concerning the constitutionality of the tax and their non-obligation to pay it, and seek an injunction against its enforcement and seek damages under 42 U.S.C. §1983, including a refund of taxes paid.

Defendants' Motion to Dismiss challenges this Court's jurisdiction, invoking 28 U.S.C. §1341 (the "Tax Injunction Act" or "TIA"), which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Defendants also contend, based upon the pleadings and requirements of the Tax Injunction Act, that Plaintiffs have failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(1) and (6).

STANDARD OF REVIEW

Rule 8 (Fed. R. Civ. P.) requires every complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Local Rule LR 8-1 requires that, "The first allegation of any complaint . . . shall state the statutory or other basis of claimed federal jurisdiction and the facts in support thereof. Federal courts are courts of *limited jurisdiction*. They have no inherent or general subject matter jurisdiction. They can adjudicate only those cases which the Constitution and Congress authorize. These are usually only those

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[1] The Live Entertainment Tax applies to certain gaming and non-gaming facilities. NRS 368A.060 AND 368A200. The Department of Taxation administers the tax with respect to entities without gaming licenses. The Gaming Commission administers the tax with regard to gaming licensees.

which involve a federal question, the United States is a party or where there is diversity of citizenship and certain criteria are met. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). The Plaintiffs bear the burden of proof by a preponderance of evidence that federal subject-matter jurisdiction exists. *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

DISCUSSION

The United States Supreme Court has held, in a fairly recent decision, that the Tax Injunction Act "shields state tax collections from federal-court restraints," and "was designed expressly to restrict the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." *Hibbs v. Winn*, 542 U.S. 88, 104 (2004).

Drawing a clear distinction between tax credits (over which the district courts have jurisdiction) and actions seeking to avoid payment of taxes or to otherwise interfere with state tax collection, *Hibbs* took great pains to reaffirm a long line of its decisions which denied jurisdiction to U.S. district courts in cases where the purpose of the suit was to avoid the payment of taxes–usually on constitutional grounds–or seek a refund for taxes already paid. *See e.g., Rosewell v.*

LaSalle National Bank, 451 U.S. 1011 (1981) (two-year delay of tax refund was still a plain, speedy and efficient remedy to preclude federal district court jurisdiction under Tax Injunction Act); *Fair Assessment in real Estate Association, Inc. V. McNary*, 454 U.S. 100 (1981) (comity and TIA barred taxpayers' suit for damages under §1983); *California v. Grace Brethren Church*, 457 U.S. 393 (1982) (TIA prohibits federal district court from enjoining or declaring unconstitutional state tax laws where plain, speedy and efficient remedy available); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (district court cannot enjoin, suspend or restrain the assessment or collection of taxes under State law, where plain, speedy and efficient remedy may be had in State courts).

The Ninth Circuit likewise has held that the Tax Injunction Act barred federal court consideration of a complaint involving the constitutionality of California Proposition 13. *Marvin F. Poer and Company, v. Counties of Alameda*, 725 F.2d 1234 (1984). In that case, the Circuit Court stated that, "federal courts have generally dismissed cases in which plaintiffs have sought both injunctive or declaratory relief and a refund or damages." *Citing Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972, *cert. denied*, 410 U.S. 966); *City of Burbank v. State of Nevada*, 548 F.2d 708 (9th Cir. 1981); and *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir. 1980).

The *Hibbs* Court went to significant lengths to explain that it responds to State governments' need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference and the legal right that the disputed taxes be determined in a suit for refund. 542 U.S. at 103. The Court also noted that two of the purposes of the Act was to eliminate disparities between large out-of-state corporations and in-state taxpayers in what their remedies should be; and, to stop taxpayers, with the aid of a federal injunction, from withholding large sums thereby disrupting state government finances. *Id.* at 104. The Tax Injunction Act was "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings," training "its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing

authority." *Id.* at 104-105. The Court noted that "federal-court relief would have operated to reduce the flow of state tax revenue," and acknowledged that "the principal purpose of the TIA was to 'limit drastically' federal-court interference with 'the collection of [state] taxes.'" *Id.* at 105-106.

Plaintiffs' Opposition attempts to argue that First Amendments rights enjoy a special protection from improper taxation, fee assessment or licensing requirements. They cite cases in support of this argument, including Supreme Court cases. This Court does not question the decisions in those cases, but they are inapposite to the jurisdictional issue here. In their lead-off case, they cite *Fair Assessment in real Estate Ass'n, Inc. v. McNary,* which the *Hibbs* case cites as noted above. However, this case is contrary to Plaintiffs' argument. In *McNary,* the dismissal on jurisdictional grounds was affirmed.

The other cases cited either do not address taxation collection issues, or they involve cases where the proper jurisdictional route was taken, *i.e.*, they were pursued through *State courts*, up through State Supreme Courts and then to the Supreme Court of the United States. Those cases adopted the procedure mandated by the Tax Injunction Act!

Another argument attempted by Plaintiffs is that there is no remedy in the State courts. This argument is based upon NRS 368A.280(1), which states:

> No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of this State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

First, it should be noted that the foregoing statute does not preclude a taxpayer from pursuing the established procedures for contesting a tax or seeking a refund.

Second, the language of the statute does not, as Plaintiffs suggest, preclude judicial recourse in the State court. It merely prevents a preemptive strike, that is an action to enjoin the collection of the taxes. It does not prevent a judicial challenge either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a

case involving a statute which precluded any suit whatever unless an administrative claim had been filed, held that notwithstanding the statute, the California corporation could bring the suit to challenge the tax. *State v. Scotsman Mfg. Co. Inc.*, 109 Nev. 252, 849).2d 317 (1993). This decision strongly suggests that declaratory relief is available in State court notwithstanding NRS 368A.280(1).

At any rate, Plaintiffs have not alleged in their complaint, with specific facts, that there exists no "plain," speedy or efficient remedy available under the laws or through the courts of the State of Nevada. Accordingly, Plaintiffs have neither established jurisdiction nor stated a claim upon which relief can be granted by this Court. This case clearly is a case designed to enjoin or restrain the assessment or collection of a tax under a State law and further seeks damages, including a refund of taxes. It clearly falls within the purpose of the Tax Injunction Act and removes this Court's jurisdiction.

Defendants also argue that they are not "persons" for the purposes of Section 1983 and therefore no claim under that section can lie against them. Although the Court need not address this argument, it notes that the assertion is correct.

Defendants also argue that they are immune from this suit pursuant to the provisions of the Eleventh Amendment of the Constitution. In this case the State of Nevada has not waived its Eleventh Amendment Immunity, nor is such a waiver alleged or pled. Nor do Plaintiffs allege that Congress has abrogated the State's Eleventh Amendment immunity under these circumstances. This is clearly a suit against the State of Nevada and its agencies.

For all the foregoing reasons, the Court finds that Defendants' Motion to Dismiss has merit and must be granted.

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IT IS THEREFORE ORDERED that **Motion to Dismiss Amended Complaint** (#12) is GRANTED.

Dated: July 25, 2006.

Roger L. Hunt

ROGER L. HUNT
United States District Judge

Exhibit 4

GHANEM SULLIVAN

Attorneys At Law

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Diana L. Sullivan
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February 27, 2007

VIA FACSIMILE (775) 684-2020
AND OVERNIGHT COURIER
Nevada Department of Taxation
Attn: Michelle Jacobs
1550 College Parkway
Carson City, Nevada 89706

Re: ***Claim for Refund – Nevada Tax on Live Entertainment***
Taxpayer: K-Kel, Inc.
Tax Period: January 2004

Dear Ms. Jacobs:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of [redacted] and [redacted]/100 Dollars ($[redacted]) via check #[redacted] for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

I. ***Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g.*, **Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, ***and live entertainment***, such as musical and dramatic works, fall within the First Amendment guarantee. . .") (emphasis added); **Winters v. New York**, 333 U.S.507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); **Doran v. Salem Inn, Inc.**, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); **Ward v. Rock Against Racism**, 491 U.S. 781, 790,

109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and **Zacchini v. Scripts-Howard Broadcasting Co.**, 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) (". . .entertainment itself can be important news."). *See also* **Virginia v. Black**, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."[3] But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- $ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

- $ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

- $ Live entertainment that is provided at a trade show (g)

- $ Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)

- $ Live entertainment provided in the common area of a shopping mall (j)

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[1] Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see* **S.O.C., Inc. v. Mirage Casino-Hotel**, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

[2] The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

[3] Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. *See, e.g.*, **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); **City of Erie v. Pap's A.M.**, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). *See also* **Schad**, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

$ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

$ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)

$ An outdoor concert (n)

$ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

$ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

$ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)

$ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

$ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)

$ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In **Minneapolis Star v. Minnesota Comm'r of Rev.**, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of ***compelling importance*** that it cannot achieve without differential taxation." Id. at 586 (emphasis added). Then, in **Arkansas Writers' Project, Inc. v. Ragland**, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that ". . .the State

must show that its regulation is ***necessary to serve a compelling State interest*** and is ***narrowly drawn*** to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.[4]

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "***presumed unconstitutional.***" **Minneapolis Star**, 460 U.S. at 586 (emphasis added). *See also* **Simon & Schuster v. Crime Victims Bd.**, 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is ***presumptively inconsistent*** with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of **Murdock v. Pennsylvania**, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of $1.50 per day or $7.00 for one week. **Id.** at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." **Id.** at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in **Murdock** that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." **Id.** at 111-12. The Court flatly stated that "***a state may not impose a charge for the enjoyment of a right granted by the federal constitution.***" **Id.** at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is

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[4] *See, e.g.*, **Sable Communications of California, Inc. v. F.C.C.**, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. *See also* **United States v. Playboy Entertainment Group, Inc.**, 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). *See also* **Minneapolis Star**, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of **Minneapolis Star** and **Ragland**.[5]

2. ***Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.***

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." **Leathers v. Medlock**, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), *citing* **Minneapolis Star**, 460 U.S. at 585; and **Grosjean v. American Press Co.**, 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. **Minneapolis Star**, 460 U.S. at 585, *citing* **Railway Express Agency v. New York**, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. Id. This scheme, like that in **Minneapolis Star**, impermissibly discriminates among businesses on the basis of their size. **Minneapolis Star**, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

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[5] While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of **Fernandes v. Limmer**, 663 F.2d 619 (5th Cir. 1981), the Court there was dealing with a $6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . .were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . .[must be] available to all, not merely to those who can pay their own way.' **Murdock v. Pennsylvania** 319 U.S. 105, at 111." Id. at 632. *See also* **American Target Advertising, Inc. v. Giani**, 199 F.3d 1241 (10th Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of $25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a $250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of $25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . .the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and **Joelner v. Village of Washington Park, Ill.**, 378 F.3d 613, 628 (7th Cir. 2004).

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second NASCAR race, an all-star basketball game, and a baseball team." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. **Leathers**, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. *See, generally*, **American Multi-Cinema, Inc. v. City of Warrenville**, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. **Leathers**, 499 U.S. at 446-47; **Minneapolis Star**, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. **Minneapolis Star**, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. ***The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).***

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

By: Diana L. Sullivan, Esq.

Exhibit 5

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

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April 3, 2007

K-KEL INC
SPEARMINT RHINO
15423 E VALLEY BLVD
CITY OF INDUSTRY CA 91746

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude K-KEL, Inc., DBA Spearmint Rhino, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

Exhibit 6

JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

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October 12, 2007

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Dianna L. Sullivan, Esq.
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IN THE MATTER OF: The Appeal of Olympic Gardens, Inc., D.I. Food & Beverage of Las Vegas, Shac, LLC, D. Westwood, Inc., K-Kel, Inc., The Power Co., Inc. ("Appellants") from the Department of Taxation's Denial of their refund request pursuant to NRS 368A.260

The above matter came before the Nevada Tax Commission ("the Commission") for hearing on August 6, 2007. Bradley Shafer, Esq. and Dianna Sullivan, Esq. appeared on behalf of Appellants. Senior Deputy Attorney General David J. Pope and Deputy Attorney General Dennis Belcourt appeared on behalf of the Department of Taxation ("the Department").

The Commission hereby makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Appellants, as providers of live entertainment, are or have been taxpayers under NRS chapter 368A, through which is imposed the Live Entertainment Tax ("LET").
2. Appellants filed timely requests for refunds pursuant to NRS 368A.260 for the tax periods of January, February 2004, March 2004 and April 2004, claiming that the LET is facially unconstitutional, that it unconstitutionally targets them or their message, and that they are entitled to refunds for the taxes paid by them, pursuant to NRS 368A.200(5)(a).
3. The Department denied Appellants' requests.
4. Appellants filed timely appeals from the Department's denials of their refund requests.
5. In this appeal, Appellants contend that a tax on live entertainment is per se unconstitutional, that the LET is rendered unconstitutional by the number of statutory exemptions, which Appellants claim make the tax one targeted at live adult entertainment, and that the legislative record shows an intent to tax based on content, to the detriment of providers of live adult entertainment.
6. If any Finding of Fact is more properly classified as a Conclusion of Law, then it shall be deemed such.

CONCLUSIONS OF LAW

1. NRS 368A.200(5)(a) exempts from the live entertainment tax "(l)ive entertainment that this State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution."
2. Entertainment can be a form of speech protected under the First Amendment of the United States Constitution and Article I, section 9 of the Nevada Constitution.
3. The United States and Nevada Constitutions do not forbid taxation of live entertainment as such.
4. NRS 368A.090 contains a definition of live entertainment. Regulations and an amendment to NRS 368A.090 define what is not live entertainment.
5. NRS 368A.200, as initially enacted in 2003 and as amended in 2005 and 2007, contains exemptions from the live entertainment tax.
6. A tax that targets a small group of speakers may violate the United States and Nevada constitutional protections against infringement of speech.
7. The live entertainment tax under NRS chapter 368A is an extension of the former casino entertainment tax (NRS chapter 463). It is imposed on an array of types of entertainment, both at licensed gaming establishments and other locations. It therefore does not target a small group of speakers.
8. A tax that constitutes a "regulation of speech because of disagreement with the message which it conveys" may violate the United States and Nevada constitutional protections against infringement of speech. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).
9. The definition in NRS 368A.090, the exemptions in NRS 368A.200, and other provisions of NRS chapter 368A delineating the scope of the tax are reasonable classifications for tax purposes and do not appear to be aimed at any message that may be contained in the entertainment by Appellants or any other speakers. See *Madden v. Kentucky*, 309 U.S. 83, 87-88, 60 S.Ct. 406, 408 (1940) (providing, "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification").
10. Mention by legislators of taxability of live adult entertainment under a proposed bill that was subsequently enacted does not prove that the bill was enacted because of disagreement with the message provided by live adult entertainment.
11. Statements by legislators with respect to a bill that would have taxed live adult entertainment as a separate class, where the bill did not pass, does not prove the intent of a separate bill that did not select live adult entertainment.
12. If any Conclusion of Law is more properly classified as a Finding of Fact, then it shall be deemed such.

DECISION

After due deliberation, and based on the foregoing, the Commission denied the appeal.

FOR THE COMMISSION:

DINO DICIANO
Executive Director
Nevada Department of Taxation

cc: David Pope, Sr. Deputy Attorney General
Dennis Belcourt, Deputy Attorney General
Taxpayers (via regular mail)