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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APPELLANTS' APPENDIX
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[1] Because the case below (A554970) and "Case 1" (A533273) were coordinated (Order of August, 4, 2010, App.Apx. 1699-1702) and later consolidated (Order of April 6, 2011, App.Apx. 2638-2640) the relevant documents for both actions are included in an abundance of caution.

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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

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"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.

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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;

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(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

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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.

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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

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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:

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(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

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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.

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(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.

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[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.

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(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.

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[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

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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.

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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

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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

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"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.

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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;

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(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

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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.

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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

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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:

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(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

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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.

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(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.

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[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.

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(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.

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[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

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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.

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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

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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.

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NAC 368A.010

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

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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

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NAC 368A.030

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

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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

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NAC 368A.040

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

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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

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NAC 368A.060

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

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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

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NAC 368A.070

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

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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)

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NAC 368A.080

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

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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

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NAC 368A.090

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

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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

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NAC 368A.100

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

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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

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NAC 368A.110

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

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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

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NAC 368A.120

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

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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

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NAC 368A.130

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

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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)

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NAC 368A.140

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

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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

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NAC 368A.150

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

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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)

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NV ADC 368A.150
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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
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NAC 368A.170

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

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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)

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NAC 368A.170

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

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

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NAC 368A.300

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

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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
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NAC 368A.310

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

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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
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NAC 368A.320

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

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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
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NAC 368A.330

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

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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
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NAC 368A.340

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

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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

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NAC 368A.350

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

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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
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NAC 368A.360

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

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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
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NAC 368A.370

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

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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
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NAC 368A.380

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

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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
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NAC 368A.390

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

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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
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NAC 368A.400

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

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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

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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

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NAC 368A.410

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

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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

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NV ADC 368A.420

NAC 368A.420

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

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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:

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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
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NAC 368A.430

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

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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
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NAC 368A.440

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

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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
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NAC 368A.450

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

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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.

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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
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NAC 368A.460

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

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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
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NAC 368A.470

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

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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
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NAC 368A.480

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

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ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

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
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NAC 368A.490

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

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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.

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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
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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
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NAC 368A.510

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

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.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:

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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
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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
ADMINISTRATION OF TAX BY STATE GAMING CONTROL BOARD

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
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NAC 368A.530

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

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.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
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NAC 368A.540

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

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.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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JIM GIBBONS
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THOMAS R. SHEETS
Chair, Nevada Tax Commission
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October 12, 2007

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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)

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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

ORDER DENYING MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE

Date of Hearing: November 13, 2008
Time of Hearing: 9:00 a.m.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT came on for hearing on November 13, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

. . .

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

The Court having considered the papers and pleadings as well as the oral argument and finding that material issues of fact exist, hereby orders:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is DENIED without prejudice.

IT IS SO ORDERED.

DATED this 9th day of December, 2010.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake A. Doerr
Senior Deputy Attorney General

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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

ORDER DENYING MOTION TO DISMISS WITHOUT PREJUDICE

Date of Hearing: July 31, 2008
Time of Hearing: 9:00 a.m.

DEFENDANTS' MOTION TO DISMISS came on for hearing on July 31, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the *Plaintiffs*;

. . .

The Court having considered the papers and pleadings as well as the oral argument hereby orders:

DEFENDANTS' MOTION TO DISMISS is DENIED without prejudice.

IT IS SO ORDERED.

DATED this 1st day of December, 2010.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
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Senior Deputy Attorney General

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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C. d/b/a Déjà 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, L.L.C., 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 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that a Order Denying Motion for Summary Judgment Without Prejudice was entered on 9th day of December, 2010, and e-filed on the 10th day of

. . .

. . .

. . .

December, 2010, a copy of which is attached hereto.

DATED this 15th day of December, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ BLAKE A. DOERR
BLAKE A. DOERR
Senior Deputy Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

CERTIFICATE OF MAILING

I, hereby certify that on the 15th day of December, 2010, I served the foregoing **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
The William H. Brown Law Office, Ltd.
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Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
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/s/ TRACI PLOTNICK
An employee of Office of Attorney General

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DISTRICT COURT

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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 **ORDER DENYING MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE** Date of Hearing: November 13, 2008 Time of Hearing: 9:00 a.m.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT came on for hearing on November 13, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants; William J. Brown, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

. . .

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

The Court having considered the papers and pleadings as well as the oral argument and finding that material issues of fact exist, hereby orders:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is DENIED without prejudice.

IT IS SO ORDERED.

DATED this 9th day of December, 2010.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake A. Doerr
Senior Deputy Attorney General

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CLARK COUNTY, NEVADA

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PLEASE TAKE NOTICE that a Order Denying Motion to Dismiss Without Prejudice was entered on 9th day of December, 2010, and e-filed on the 10th day of December, 2010, a

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Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

copy of which is attached hereto.

DATED this 15th day of December, 2010.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ BLAKE A. DOERR
BLAKE A. DOERR
Senior Deputy Attorney General

Attorney General's Office
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CERTIFICATE OF MAILING

I, hereby certify that on the 15th day of December, 2010, I served the foregoing **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

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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 **ORDER DENYING MOTION TO DISMISS WITHOUT PREJUDICE** Date of Hearing: July 31, 2008 Time of Hearing: 9:00 a.m.

DEFENDANTS' MOTION TO DISMISS came on for hearing on July 31, 2008;

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the *Plaintiffs*;

. . .

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

The Court having considered the papers and pleadings as well as the oral argument hereby orders:

DEFENDANTS' MOTION TO DISMISS is DENIED without prejudice.

IT IS SO ORDERED.

DATED this 1st day of December, 2010.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
Blake A. Doerr
Senior Deputy Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

TRAN

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CLERK OF COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOW GIRLS, LITTLE DARLINGS OF LAS VEGAS, LLC, K-KEL, ET AL,

Plaintiffs,

vs.

NEVADA DEPARTMENT OF TAXATION,

Defendant.

CASE NO. A533273/A554970

DEPT. IX

06A533273
TRANS
Transcript of Proceedings
1746674

BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE

DECEMBER 28, 2010

TRANSCRIPT OF PROCEEDINGS

MATTERS/REQUEST OF COURT

APPEARANCES:

For the Plaintiff: BRADLEY J. SHAFER, ESQ.
WILLIAM H. BROWN, ESQ.

For the Defendant: BLAKE A. DOERR, ESQ.
VIVIENNE RAKOWSKY, ESQ.
DAVID J. POPE, ESQ.

RECORDED BY: YVETTE SISON-BRITT, COURT RECORDER

RECEIVED
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CLERK OF THE COURT

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Tuesday, December 28, 2010 at 9:52 a.m.

THE COURT: Mr. Shafer has a problem counsel, have you heard?

MR DOERR: We have not.

THE COURT: Can you give me two minutes while I --

MR DOERR: Absolutely.

THE COURT: -- consult with my JEA and see if he -- he called, and he can't get in on the 1-800 number for his phone appearance.

MR DOERR: Take your time.

THE COURT: So, I don't know -- I don't know what to do. That's the bottom line, as far as -- maybe we can see if --

THE COURT: -- he has been calling us, my department, wherever my department is, but he's been calling us, and I don't know if the phone call --

[Colloquy - The Court and The Recorder]

THE COURT: -- remind me why I set it today? I mean, did we pick this day?

MR DOERR: We did.

THE COURT: Because we --

MR DOERR: We were going to --

THE COURT: -- get my decision, which I'm still working on.

MR DOERR: Okay. And then status check and then the decision on the discovery issues. We had submitted the documents for in-camera review, so we were anticipating a decision on that. I also -- we have a couple orders that we were going to ask you to sign, the one regarding res judicata issue, and the one regarding the -- the denial of the motion for preliminary injunction, generally --

THE COURT: And did you give them to Mr. Shafer or no?

MR DOERR: -- actually, Mr. Shafer -- I'm bring this here for you to sign and then I'm going to send it to Will, who's submitting it. They sent it to me --

THE COURT: Oh.

MR DOERR: -- I said I'm coming down, so I'll hand-deliver it.

THE COURT: Okay, why don't you --

MR DOERR: The other one --

THE COURT: Can you give that to Herman?

MR DOERR: -- sure. The other one, Your Honor, and the last time we brought the --

THE COURT: Just for the record, the order denying motion for preliminary injunction without prejudice is --

MR DOERR: Mr. Brown prepared that I believe, so they sent it to me. They said they were going to mail it in. I said I coming to the Court tomorrow. They said okay -- I said I'd be happy to bring it down.

THE COURT: So you looked at it, and you have no objection?

MR DOERR: I don't.

THE COURT: It seems like you were just here, but what was the date that you were here for -- December 9th?

MR DOERR: I believe it was December 6th or December 8th or 9th? I don't remember the exact date.

THE COURT: Okay. So I signed the order denying Defendant's res judicata claim, because it appears everyone's agreed. And I don't know how he's going to object to "plaintiff's motion is denied without prejudice." It's as simple as can be.

MR DOERR: Your Honor, if he had --

THE COURT: There's no findings. There's no nothing. And I'm happy with it

so I'm signing it.

MR DOERR: I had forwarded him the motions on the motion for denial of the motion for summary judgment motion to dismiss. I thought he would be preparing that one, and last time we were here, you said, technically, you won that motion so you should be preparing that so --

THE COURT: Okay. So I've signed the order denying the motion for preliminary injunction without prejudice. And I signed the order submitted by opposing counsel.

Well, let me take a quick two-minute break for her to call Rose, and see -- do you want to try to get him on the phone maybe?

MR DOERR: I was gonna say, perhaps, I have his office number here. If we could call him on the cell phone or --

MS. RAKOWSKY: I have a speaker phone.

MR DOERR: -- we have a speaker phone on the cell phone.

THE COURT: Okay.

MS. RAKOWSKY: High tech.

THE COURT: Okay. Let me take a quick restroom break and then -- while you try to get a hold of him.

MR DOERR: Thank you.

THE COURT: And I'll be right back.

[Case Trailed at 9:57 a.m.]

[Case Recalled at 10:04]

THE COURT: So counsel, can you hear us?

MR. SHAFER: Yes, somewhat.

THE COURT: You want me to speak up? Okay. We're going to have the

hearing up at the bench. Can you hear me now?

MR. SHAFER: Slightly. Not great, but I can hear you.

THE COURT: Okay. Now can you hear me better?

MR. SHAFER: Yes. Yes, much better.

THE COURT: Okay. Great.

MR. SHAFER: Thank you, Your Honor.

THE COURT: Okay. Before we got you on the rather sophisticated cell phone appearance that we use through Sprint, we discussed the fact that you submitted an order to counsels because he was coming down here, and I signed that. it was the order -- it was the order denying Defendant's res judicata claim. I've signed that just kind of a --

MR. SHAFER: Okay.

THE COURT: -- just kind of as a preliminary matter. Then, counsel for the State or the Department submitted an order denying motion for preliminary injunction without prejudice, and it -- the -- the language of import is at line 7 and 8 of page 2 that says Plaintiff's motion for preliminary injunction is denied without prejudice. It is as basic and simple as it could possibly be, so I signed it because I couldn't imagine that you would object. It doesn't have any findings. It just denies it.

MR. SHAFER: Well, Your Honor, the only -- the only point I would make in regard to that is that again the separation of powers argument is part of that motion for preliminary injunction, and going back to the first hearing that we had on these various motions at issue, you told me that you were denying the general merits of the motion for preliminary injunction without prejudice and then we were still gonna deal with the issue on the separation of powers argument, and that's kind of what we've been arguing on since so, I wouldn't want an order -- and if you're denying the

separation of powers argument, you times the separation of powers argument by -- if you're not doing that, I would be concerned particularly given the fact that we are going to have a new judge very shortly. I would be concerned that the record may not be clear in regard to what's going on with the separation of powers argument.

THE COURT: Well, let me do this --

MR. SHAFER: Yes.

THE COURT: If I were to have counsel submit a new order on the motion for preliminary injunction denial that says that if the Court is not persuaded at the early stage of the case, that you have a probability of success on the merits, particularly as it relates to irreparable harm, you know, we had the most detailed discussion of how your client couldn't get his money back or your client, you know, wouldn't be able to get the money paid in lieu of the clients paying it for the first time the last time you were here. So, I have no problem. I understand what you're saying, but I -- I thought I made a ruling from the bench that was pretty clear that it wasn't based upon -- my denial was not based upon the fact that I wasn't making a statutory-based denial. Does that make sense? I was making a case and fact and law driven denial, not based on the separation of powers but based upon the Court being unable --

MR. SHAFER: Correct. The other issues. Yes.

THE COURT: -- so, if he does a different order that makes that distinction. Would that satisfy your concerns?

MR. SHAFER: Yes, Your Honor.

THE COURT: Okay, so can I have that order back, and I'll put it in the circular file?

MR DOERR: Sure.

THE COURT: Okay. And can you do an order --

MR DOERR: Yes.

THE COURT: -- that tracks what I just said.

MR DOERR: Absolutely.

THE COURT: Simply. Okay. So does -- so he'll submit something else on that. Your order is signed though, and the order denying Defendant's res judicata claim.

Now, my recollection is, you were waiting for your ruling on the separation of powers, right?

MR. SHAFER: Yes.

THE COURT: And you're waiting for your ruling on the discovery issues?

MR. SHAFER: Yes, Your Honor, and also I had asked for some type of scheduling order because, you know, we have gone way beyond the prior scheduling order when all this got bogged down, and I want to make sure that a new Judge doesn't look at this or the Discovery Commissioner and just say -- oh, you know, you guys have gone beyond this, and there's no more discovery, and you know, I haven't had an opportunity to do my depositions yet because we been waiting for the resolution of these document disputes, and you have graciously told me I would be -- get my depositions, so -- and I've actually sent Mr. Doerr with some possible deposition dates -- a letter with some possible deposition dates, 'cause I will be in Nevada on another matter so.

THE COURT: Okay. So basically, you're just waiting for me, that's the gist of it.

MR. SHAFER: Yes, Your Honor.

THE COURT: Well. The good news is I'm working on it. The bad news is

I'm not prepared to rule from the bench right this second. So here's my question --

MR. SHAFER: Yes, Your Honor.

THE COURT: And, you know, you have not been in the courtroom listening to the Court's tales of woe about the reassignment of cases and the sharing of courtrooms, and the changing of assignments. At the end of the day, since you were last here, I've moved floors, and basically have become the Chief Judge, and so we've had some issues associated with the transition. I'm going to keep this case until I have the rulings that you are asking for, and then I'm going to order it reassigned. I anticipate doing that hopefully by the end of the first week of January.

MR. SHAFER: Okay.

THE COURT: So, I would've liked to have done it sooner, but somehow I underestimated how long the move would take. It just didn't seem like I had that much -- I've accumulated that much stuff -- it's a long time, days. And your briefs are in a box in my office.

MR. SHAFER: I'm sure we're not the only thing on your agenda as well, Your Honor, so I -- I fully understand.

THE COURT: You mean the arson in Family Court yesterday or the bomb scare going on currently as we speak. Those kinds of Chief Judgely things that I been dealing with while I'm trying to rule on the separation of powers?

MR. SHAFER: I guess maybe it was a good thing that you said that I didn't have to be there and I could appear by telephone then. I might've not have been able to make it to your courthouse.

THE COURT: Yeah well. So here's -- here's what I'd like to do.

[Colloquy - The Court and The Clerk]

THE COURT: Okay. So here's the situation. I'm setting a status check again

in January on your case. It's going to be January 11th, I'm sorry January 13th at 9 a.m., and I would suggest you appear by Court Call; and as long as you book it two days before, you should be good to go.

MR. SHAFER: Okay.

THE COURT: And my plan would be -- you have a -- it's a special setting, meaning, can you hold on one second, as of right now, there's only two other cases on calendar for status checks in other matters, nothing significant, so I'll hear your case first. If you appear by Court Call, it would be easier to hear your case first. And basically, what I've been hearing, presumably, is that you would've had your -- I'd like to do a minute order and not rule from the bench. So, hopefully you would've had a minute order. If not, then I'd be prepared to rule from the bench, but I hope to have the minute order out, and then I'd be discussing the scheduling based upon the ruling.

I know you want me to give some direction in writing, either by way of an order or in the minutes so that when it does get reassigned, you -- you know, you have that --

MR. SHAFER: Yes, Your Honor.

THE COURT: -- and then you don't have to worry about it I guess.

MR. SHAFER: Yes, Your Honor.

THE COURT: So -- so I apologize for the inconvenience to the two of you, and but the good news is I guess, the numbers of my cases have whittled down significantly and starting in January, I have -- I've moved, and will have time once I find your case in a box to make your ruling and get you going.

MR. SHAFER: Yeah, it's probably likely that I'll actually come out for that Your Honor. I have to be in Las Vegas for a few other things where I have some

variable timeframe around then and then -- I may well just be out there for the January 13th hearing then or status check.

THE COURT: Well, that's up to you, but I -- just as an aside, if it doesn't work out for you, Court Call is not a problem, as long as you book it, according to my recorder, two days before.

MR. SHAFER: Yes.

THE COURT: So, it doesn't matter to me, either way, you're welcome to appear by Court Call or in person, but -- any -- any date I have in this case has to be on a Thursday or Friday. If you needed another day, I could do it if you're available. I mean, any Thursday or Friday in January I could do. I'm trying not to do it the first two weeks because of the reassignment, which you know, I know I'm like a broken record, but -- but I'm hoping that the kinks are worked out in the first two weeks.

MR. SHAFER: It -- actually as it is, Your Honor, I believe that the 13th is fine for me.

THE COURT: What about you?

MR DOERR: I think so.

THE COURT: I mean, my other choice would be [indiscernible].

MR DOERR: One of us can be here.

THE COURT: I mean I'm not an [indiscernible] other than scheduling. So, but that's the Thursday before Martin Luther King Day.

MR DOERR: Yeah. You know, I just wanted to say that, you know, I think we could work out the scheduling by stipulation. I'm not -- I'm not denying him the depositions. He's given me some dates. But our concern is -- is that -- and what, what we discussed is, is if we do it by stipulation through the Discovery Commissioner, then we have to go back in there and explain to her everything that

we've been through. I don't know --

THE COURT: Well how about if you just -- if you stipulate have me sign the order.

MR DOERR: Well, we thought we'd be transferred out. If we can reach some stipulation, which I'm sure we can. He's given me dates at the beginning of March for the depositions. I don't have a problem with that, and I think that gives him plenty of time, so long as we get a ruling on the document discovery, he gets his depositions, and then we go forward to have it -- you know, we can pick a discovery cut-off date after those depositions, prepare an order, and you know, how about if -- if we can agree to that, we'll come back on the 13th, with the stipulation ready to go for you, that way --

THE COURT: Now, the only thing I couldn't do is -- what you would be doing is, I would propose to you, is stipulating to, you know -- I mean I couldn't give you a trial date. You would just need to be ready after such and such date.

MR DOERR: Well, we would need a new trial schedule and order.

THE COURT: Right.

MR DOERR: So. In the past, when we've done that, we've had to go to the Discovery Commissioner. Even on a stipulation, we've all had to go in there and re-give her a status check of where we are, even though we were all fine with it. We all agreed to everything, and we just weren't -- because of the unique situation that this is where we find ourselves in, we just don't really want to have to explain it again, because it goes back a few years. We all know where we're going -- where it's been. You know, our document discovery is about over, and then we're going to do the depositions and then we're gonna move on --

THE COURT: Right.

MR DOERR: -- and so, that's why we're sort of -- we're looking for Your Honor's assistance in talking about that, but if we can sort of get our discovery dates nailed down between us, and then we could submit something to -- I believe it's master calendaring who does the scheduling order, that's really what we would hope for. I don't think we -- Brad do you agree with that?

MR. SHAFER: I don't have a problem with that, but again I would like the Judge to enter the order just because I don't want to have a problem with the Discovery Commissioner, and Your Honor, I'd make two further points to kind of keep this thing in context. First is we do have, you know, a five-year rule issue, and so this thing can't languish out a lot longer, you know, following discovery cut-off, but equally with that, I think the chances of actually needing a trial are remote. I think that probably both parties believe that this can be resolved on a motion for summary judgment. You know, most of the things are issues of law and so, you know, I don't know, given the fact that you will not be the Trial Judge, I don't know how much flexibility you would have of, you know, setting an order that would have like a, you know, dispositive cut-off date or filing date for dispositive motions or something like that so we don't get in a bind of, you know, having a trial date, you know, assuming one of the motions would be denied or whatever, then we'll have a trial date that would be beyond the five years so, I just don't know how to solve working with you handing the football off, Your Honor.

MR DOERR: Brad, was your complaint filed December of '06, is that correct?

MR. SHAFER: I believe so.

MR DOERR: I don't remember the day, Your Honor, but it was December of '06, so December of '11 at some point would be the five year date.

THE COURT: December 19, 2006.

MR DOERR: Sounds right.

THE COURT: Okay. So actually -- the -- you know, my only options are, once you have a ruling from me in January, then the case gets reassigned, then you have a stipulation. If you're asking me to kind of circumvent the Discovery Commissioner, because the Discovery Commissioner may change as well, on account once it's not mine, it's not mine. She does half and he does half. I could go to the Department that it gets assigned to and explain to them just plug in the trial date and the cut-offs and that either they or I are going to sign off on it. That's the least I could do, considering [indiscernible], just sitting here for an hour.

MR. SHAFER: I wouldn't have an objection to that, Your Honor.

THE COURT: I mean that way, you know, it's -- the only choices are the Discovery Commissioner or the new Judge giving you a new scheduling order. So if you submit it to me, then I can explain to the Judge, here's the deal, they're crawling up on the five years, the case is pretty much done, and they just need a date and dispositive motions which may or may not decide the case. Here you go Judge, pick your date, plug it in. That's what I would tell them and that's it.

MR. SHAFER: I would appreciate that, Your Honor.

THE COURT: Okay. Then, then that's the plan. I will see you on the 13th either in person or phone. We will discuss your -- either bring it that day we'll fill in the blanks, and then I can shop it to the new department, and explain to them the irregularity -- reason for the irregularities, that it's an older case, and they just need dates, and that would save a lot of hassle to skip the Discovery Commissioner, and depending on who that new person is, we'll see how successful that -- that goes, but I mean you will -- you will just basically tell me, we'll be ready for trial after this date, whatever it is --

MR. SHAFER: Yes, Your Honor.

THE COURT: -- based upon my ruling and your discussions --

MR. SHAFER: And then we'll also try, we'll also tell you what the -- the filing date was so that we make sure we have a trial date before that, yes.

MR DOERR: I believe she looked it up and it was --

THE COURT: It was December 19th.

MR DOERR: -- it was December 19th.

MR. SHAFER: Okay.

THE COURT: Okay.

MR. SHAFER: Yes, Your Honor.

MR DOERR: Your Honor, while we're here too, several appearances ago, you sort of alluded to the fact we might be able to request this be transferred to Judge Gonzalez because she had some familiarity with the case because she sat in for you at one point, and I know that Will and I had discussed there may be a process for that. I don't know what that is. Is that possible? Is that appropriate. I don't know the answers to those questions. Is that probable or -- if you say that wastes our time --

MR. SHAFER: Your Honor, we don't want to do anything unethical or untoward, and so --

MR DOERR: Nor do we.

MR. SHAFER: -- if we're speaking out of turn, please let us know. But, we have discussed this issue.

THE COURT: Well, you know, here's the thing. It's not unethical. There is a rule for the random assignment of cases, however, there's also a strong Chief Judge Rule in this jurisdiction that allows for the Chief Judge to assign cases. There's a

sub-rule that allows the presiding judges to assign cases, based upon the efficient, you know, the sufficiency of the Court, remanded into Justice and all that.

So, there is somewhat of a history, if it's a five-year case. There's a history of it not being assigned. I mean, just go back kind of policy -- speaking policy wise for the Court. Historically, when a reassignment occurs, four and five-year cases don't get reassigned because the expectation is that the judge that has that case needs to take care of that case. That being said, that doesn't apply in my situation, and so I had intended to discuss this with her, not the assignment to her, but -- I don't -- I'm not offended, or I don't think you're doing anything wrong. I understand that, you know, it's crawling up on the five years, and when you get reassigned, it's a judicial crap shoot, and I -- pardon the Las Vegas pun, and so -- so I will discuss it with her, the propriety of it, and the rules and everything else, and get back to you on that on January 13th.

MR. SHAFER: Thank you, Your Honor.

MS. RAKOWSKY: Thank you.

MR DOERR: Very well.

THE COURT: Okay. So I'll see you on the 13th at 9 o'clock. Is there anything -- and you're gonna submit a new order --

MR DOERR: Judge, I think I'm gonna bring that with me on the 13th --

THE COURT: So he can look at it?

MR DOERR: I'll run it by them. I just -- rather than -- you know, we were looking for you this morning too. Rather than just take a risk on it not getting here or something, we'll just bring it down. I'll make sure that they've looked at it, that they agree with it, and --

[Colloquy - The Court and The Clerk]

THE COURT: Anyway, I'm sorry --

MS. RAKOWSKY: We had fun going down to ten --

MR DOERR: To ten.

MS. RAKOWSKY: -- and walking around the building today.

THE COURT: Okay. We'll work on that, sign. But, in the mean time -- so counsel, you're gonna come to 14A, and you're going to see a sign for a different judge, and you're going to come in anyway.

MR. SHAFER: Okay.

THE COURT: Okay. I -- we are courtroom sharing. We share. There's no -- there's no sign for me right now. So, just come to your usual place, 14A, and I will be here.

MR. SHAFER: Okay.

THE COURT: Even if the sign doesn't say so, I will be here.

MR. SHAFER: Okay, Your Honor.

THE COURT: Okay. I appreciate it, and I will see you on January 13th at 9 o'clock, and I will discuss the other issues with Judge Gonzalez, because regardless of who -- I intended to speak to her about this case because it's a five-year case, so it's not -- it needs special attention regardless of who gets it. So anyway, so I will see you on the 13th at 9 o'clock.

MS. RAKOWSKY: Thank you.

MR. SHAFER: We all appreciate your indulgence, Your Honor.

THE COURT: Thank you very much.

MS. RAKOWSKY: Thank you.

MR DOERR: Thank you.

MR. SHAFER: Bye.

[Proceeding concluded at 10:27 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Yvette G. Sison-Britt
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	December 28, 2010

06A533273 Little Darlings Of Las Vegas LLC, K-Kel Inc, et al
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

December 28, 2010	9:00 AM	Status Check	Status Check: Reassignment / Time Schedule

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette G. Sison-Britt

PARTIES PRESENT:

Deja Vu Showgirls Of Las Vegas LLC	Plaintiff
Shafer, Bradley J.	Attorney
Nevada Dept Of Taxation	Defendant
Nevada State Board Of Examiners	Defendant
Nevada Tax Commission	Defendant
Doerr, Blake A.	Attorney
Rakowsky, Vivienne	Attorney

JOURNAL ENTRIES

-

Order denying motion for preliminary injunction without prejudice prepared by Plaintiff SIGNED IN OPEN COURT and order denying res judicata claim SIGNED IN OPEN COURT and returned to Mr. Doerr. Colloquy regarding order regarding motion for summary judgment and motion to

Matter recalled. Bradley Shafer, Esq. present via phone conference. Colloquy regarding separation of powers argument. Order returned to counsel for correction to add language regarding pending determination as to the separation of powers language and denial was based upon fact and law.

Colloquy regarding pending ruling on separation of powers issue, Discovery issues and scheduling order once a determination has been made on the pending issues. Court advised counsel regarding

the Court's new assignment and anticipated reassignment of case during the first week of January 2011. COURT ORDERED, status check on Chief Judge's calendar to determine where case is going to be assigned. Colloquy regarding Discovery, stipulation regarding cut-offs. Counsel inquired regarding having case transferred to Judge Gonzalez for the purpose of Judicial Economy. Court noted she already planned on speaking with the Presiding Civil Judge regarding transfer of case and would bring counsel's request to transfer to Judge Gonzalez since she has some familiarity with the case and that would limit additional delays following a ruling by this Court on the separation of powers issue. Further, Court will advise parties next date of any developments in the transfer of case.

01/13/2011 9:00 a.m. Status Check: Pending Ruling In Re - Separation of Powers Issue ... Discovery Issues ... Trial Scheduling Order (Transfer of Case)

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	December 28, 2010

08A554970 K-Kel Inc
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

December 28, 2010	9:00 AM	Status Check	Status Check: Reassignment / Time Schedule

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette G. Sison-Britt

PARTIES PRESENT:

K-Kel Inc	Plaintiff
Shafer, Bradley J.	Attorney
Nevada Dept Of Taxation	Defendant
Nevada State Board Of Examiners	Defendant
Nevada Tax Commission	Defendant
Doerr, Blake A.	Attorney
Rakowsky, Vivienne	Attorney

JOURNAL ENTRIES

-

Order denying motion for preliminary injunction without prejudice prepared by Plaintiff SIGNED IN OPEN COURT and order denying res judicata claim SIGNED IN OPEN COURT and returned to Mr. Doerr. Colloquy regarding order regarding motion for summary judgment and motion to

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01/13/2011 9:00 a.m. Status Check: Pending Ruling In Re - Separation of Powers Issue ... Discovery Issues ... Trial Scheduling Order (Transfer of Case)

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CLERK OF THE COURT

ORDR

WILLAIM H. BROWN, ESQ.
Nevada Bar No.: 7623
LAW OFFICES OF
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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC, d/b/a *Déjà Vu Showgirls*, LITTLE DARLINGS OF LAS VEGAS, LLC, *et al.*, Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, *et al,* Defendants.	Case No.: A533273; ***Coordinated with*** Case No.: A554970 **ORDER DENYING DEFENDANTS' *RES JUDICATA* CLAIM** Hearing Date: December 9, 2010 Hearing Time: 9:00 a.m.

Before this Court is that portion of the Plaintiffs' Motion for Preliminary Injunction asserting that N.R.S. §368A.280(1) violates the separation of powers provision of the Nevada Constitution and is,

therefore, invalid and unenforceable (the "Motion"). The Defendants have asserted in a second supplement to their opposition to the Motion that the issues/claims raised in the Motion regarding the claimed unconstitutionality of N.R.S. §368A.280(1) are barred by *res judicata* in light of rulings by the United States District Court for the District of Nevada and the Ninth Circuit United States Court of Appeals in the case generally captioned as Deja Vu Showgirls of Las Vegas, L.L.C. v. The Nevada Department of Taxation, District Court No. 2:06-cv-0480-RLH-RJJ, and appellate court docket number 06-16634.

The Motion having come on for hearing before this Honorable Court on December 9, 2010, at the hour of 9:00 a.m., and the Court having read and considered the papers and pleadings on file herein and the arguments of counsel, the Court hereby orders as follows:

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendants' claim that Plaintiffs' Motion for Preliminary Injunction in regard to the alleged unconstitutionality of N.R.S. §3684.280(1) is barred by *res judicata* is hereby DENIED.

IT IS FURTHER ORDERED that this Court will rule on Plaintiffs' separation of powers argument contained in the Motion by separate order.

Dated this 28th day of December, 2010.

IT IS SO ORDERED.

Jennifer P. Togliatti

JENNIFER P. TOGLIATTI
DISTRICT COURT JUDGE

Respectfully Submitted:

LAW OFFICES OF
WILLIAM H. BROWN, LTD.

By: 

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, et al. Plaintiffs, vs. NEVADA DEPARTMENT OF TAXATION NEVADA TAX COMMISSION, et al., Defendants.	.	CASE NO. A-533273 DEPT. NO. 9 *Coordinated with:* A-554970 **Transcript of Proceedings**

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

REQUEST OF COURT

THURSDAY, JANUARY 13, 2011

APPEARANCES:

FOR THE PLAINTIFFS:	WILLIAM H. BROWN, ESQ. 330 S. Third St., Ste. 860 Las Vegas, NV 89101 BRADLEY J. SHAFER, ESQ. 3800 Capitol City Blvd, Ste. 2 Lansing, MI 48906
FOR DEPT. OF TAXATION:	VIVIENNE RAKOWSKY, ESQ. BLAKE DOERR, ESQ. DAVID J. POPE, ESQ. Attorney General's Office 555 E. Washington Ave., #3900 Las Vegas, NV 89101

COURT RECORDER:	TRANSCRIPTION BY:
YVETTE SISON-BRITT District Court	VERBATIM DIGITAL REPORTING, LLC Englewood, CO 80110 (303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, THURSDAY, JANUARY 13, 2011, 8:59 A.M.

THE COURT: Okay, I'm going to call the Deja Vu case. Counsel, will you state your appearances for the record.

MR. SHAFER: Bradley Shafer appearing on behalf of the plaintiffs pro hoc vice, Your Honor.

MR. BROWN: William Brown, local counsel for the plaintiffs.

MS. RAKOWSKY: Vivienne Rakowsky from the Attorney General's Office on behalf of the Department of Taxation.

MR. DOERR: Blake Doerr from the Attorney General's Office on behalf of the Department of Taxation.

MR. POPE: And David Pope also with the Attorney General's Office on behalf of the defendants.

THE COURT: The first thing I wanted to address was the assignment of the cases. I have given careful consideration to your suggestion at the last court date. And I have also discussed the issue of the assignment of the case with our presiding civil judge, Judge Gonzalez.

Based upon my understanding of the facts at issue in this case, and the law at issue in this case, and the fact that she has some familiarity with the case because she's had you appear before her in my stead previously, and the fact that she is the presiding civil judge, I have decided to, pursuant to EDCR 1.30, to ensure the orderly administration of

justice in this matter, ordered the case transferred to Judge Gonzalez.

Now, I've also discussed with Judge Gonzalez that there are two outstanding legal issues that, of legal discovery issues that the parties have been waiting for me to decide. One of the issues that comes to mind when considering all of this is that because there are issues of constitutionality, and other significant issues associated with statutory interpretation, I am a little -- I was a little concerned about making some specific rulings that then the whole case goes to her and then she gets reversed from my rulings, or she disagrees with my rulings. That's a problem.

So you've done a lot of work in front me regarding the two issues that are pending. My concern is I -- I think I'm going to decline to rule on the inherent authority issue, because I think if it's not moot, quite frankly, by a denial of preliminary injunction, then she should rule upon it, because it's her case, and at the end of the day she's going to decide your issues, and she's been given a case reduction, based upon her presiding judge situation and her business court matters, so she has more time than, perhaps, she used to.

And I have advised her that this case needs her immediate attention so she's going to take it and, because it's getting -- getting to that point.

So then the only other issues were the discovery issues. Again, you all are going to think that you've been through all of this and I'm punting the matter to her, which to -- that is the practical effect, is I am punting this to Judge Gonzalez because at the end of the day she's the one that's either going to make the summary judgment ruling, try the case, decide your procedural issues regarding the Petition for Judicial Review that you believe should have been filed versus what has been filed and all those issues.

So what I -- what I propose to you is, you know, the bad news is you're not leaving here with a ruling and you didn't get one before. The good news is you made a specific request that seemed reasonable to me, based upon all the hard work that you've done in this case and my familiarity with the issues that I'm going to grant. And you are going to Judge Gonzalez.

So the question becomes, my plan was to go down the hall and advise her of the Status Check date that I set in her department for her, and advise her of the issues that are pending. The only thing I need you to do is give you the -- have her give -- have you give her a copy of your in camera production -- I know you have a copy of it -- so that she can review it, because otherwise, we're having a hybrid of decision-making.

So normally I think this would result in a delay.

But based upon my conversations with her, I don't think it will be much of a delay. I told her if she takes this case, if she's willing to take this case, she has to prioritize it because of its age and pending issues. And so she agreed to do that. And she's -- I'm assuming one of the reasons you all agreed to her assignment or -- or requested it, is because of your familiarity with her.

So she'll get it done. And I apologize for the inconvenience, but at some point I've got to make -- I'm going to make a proclamation about the inherent authority of the courts and order discovery either she might not have, or she would have and I wouldn't have. I'm not comfortable handing her my, here's all my rulings, good luck with that.

So I know that's an inconvenience and it will result in a delay, but it won't be a significant delay because I've made those arrangements with her. Do you have any questions?

MR. SHAFER: Your Honor, the only issue that I foresee on the hand-off and regarding the discovery issue is what the defense raised last time in regard to the language of that minute order and whether there was a full definitive ruling in regard to discovery.

Now, you know, since the date of that minute order we've -- I've now been back here to Vegas four times, and I've been here on a telephone conference as well as we were discussing what additional discovery, if any, the plaintiffs

are entitled to. And so my only concern is if you're just giving this case over to her, the defense -- the defendants are going to say, here's Judge Togliatti's minute order, all the discovery has already been ruled on, there's nothing more there. And --

THE COURT: Well, that -- that's not true because I did -- I ordered an in camera production and went through line by line and asked to be able to review those to make a determination as to whether anything else was required.

So to the extent that I didn't -- I mean, I thought that's what we were doing here. And perhaps I'm not articulating myself very well.

MR. SHAFER: I agree with you a hundred percent, but a Court speaks through its written orders and --

THE COURT: Okay, well give me a written Order and I'll speak through it --

MR. SHAFER: Okay.

THE COURT: -- saying that the Court has continued to consider discover issues, and quite frankly --

MR. SHAFER: And it's just made no definitive --

THE COURT: It made no -- well, I haven't ruled upon the -- you know, the Department of Taxation's position that under no circumstances can the Court order what you're asking for has not been ruled upon.

I mean, they did produce what I earlier ordered. I

mean, they have complied with what I've ordered thus far. I don't -- and in an appropriate fashion. And to that -- to the extent that they met that argument, they're correct.

But by no means did the Court intend the language of that previous minute order to conclude the discovery issues. And so to the extent that I need a written Order to satisfy you that you are still free to have your discovery requests considered by Judge Gonzalez, if that's -- I mean, I thought that's what we've been doing, then I don't know what, if any, objection you have to that.

You have argued that -- that I made a ruling and you complied with it, and -- and that should be it, and I'm not -- I'm not authorized or would be in violation of Nevada law to order anything else. But, I mean, I don't think that we have been in the posture that we're done considering the request for discovery, correct?

MS. RAKOWSKY: Yeah, I believe that the -- the basic order that we're going back to is the one where you were supposed to check to make sure that the -- we were going to do it by categories, which we did.

And I believe that you were going to check to make sure that the entities listed on each category were, in fact, entities that belonged in that category and that those categories did not contain gentlemen's clubs. And I believe that's where we were on the discovery.

I thought that, you know, pursuant to the Discovery Commissioner order and your subsequent order that that's -- that's the point that we were at discovery. I didn't think that we were going to reopen the whole issue to start producing all the -- all of the original documents that the plaintiffs has asked for.

MR. SHAFER: Your Honor, about three or four hearings ago I gave you their chart and I had underlined in red, I gave you my copy, and you're saying, Mr. Shafer, you want everything? I said no, Your Honor, I've actually limited it down, and here's what I had, you know, underlining my own in regards to certain categories where I wanted the underlying documentation so that I could see what those figures comprised of.

And I think that's what we've been arguing about, of whether I get any of that.

THE COURT: I think you're entitled to make that request to Judge Gonzalez. I don't think I've ruled upon that request. I'm clear on what you've been asking for. I'm just saying that I -- I -- if I wasn't clear, that I was still considering it, then -- then that's my (indiscernible).

MR. SHAFER: I think as long as I can get a transcript of this hearing, in case the issue comes up in front of Judge Gonzalez, we'll be fine.

THE COURT: Okay. Well, here's my question. How

long would it take you to get -- because I -- I'm not comfortable just handing her what I have. And there's a reason for that. Because if -- if you all are -- you have to give her what you want her to have so that you know that she has everything. And then I'm not part of some inquiry later that hey, you didn't give her my list with the red underlines. I'm not comfortable with that.

I mean, I have it, but I'm not comfortable with that because then I'm somehow part of it. So I know it's an inconvenience, I do, and I apologize for that inconvenience. But to ensure that you are satisfied that she got everything you wanted her to have that's previously been given to me, and the record can be made by each side that that's been done, as opposed to relying on it being done behind the scenes, which I'm not comfortable with, then I need you to do that. How long do you think that would take?

Basically, giving her what you've given me for your in camera review and -- because here's the other thing. I know I'm -- I brought up at some point filing that under seal. I never did it, because we never really got to that point. I mean, the reason you file something under seal is because you're going to make a ruling, and then for appellate purposes, or Writ purposes, that is under seal for review by the Supreme Court.

Okay, I haven't made that ruling. And so I haven't

actually -- you know, if I disallowed it and didn't allow them to have it, then -- then presumably it would be under seal for him to argue to the Supreme Court, go look at that document, look, it's got all these things, there's no way for me to know, I need it, I need it, I need it.

If I denied it -- I mean, if I granted it, you're saying look at all this private tax information, she's not entitled to give this under NRS whatever. It needs to be filed at some point. But I would assume that because we have to do a written order with that, that she would want to make her own finding. I think it's kind of a no-brainer, but that's for her to decide. But it will be fairly -- that's the least complicated issue in this case.

But it still has not been filed under seal. I mean, we've talked about it, but I just want to make a record I didn't file it because there's no Order and no decision has been made. So when that happens, somebody's got to remember to file that.

MS. RAKOWSKY: Your Honor, then can we request the documents that we provided to come back to us so they're not languishing in an office somewhere that become a public record at some point.

THE COURT: (Indiscernible) there's always something (indiscernible) anyway. I will -- I'm in about ten boxes still.

MS. RAKOWSKY: Okay.
THE COURT: So it's there somewhere. And if you call my office in about a week, I will look for it between now and then and -- and return it to you. But I'm not -- like I said, I would rather return it to you, but still have you give her what you want her to have instead of me doing that.
MS. RAKOWSKY: That's fine, Your Honor.
THE COURT: Okay.
MS. RAKOWSKY: Thank you very much.
THE COURT: So how long do you need to do that?
MR. SHAFER: All I have, I guess -- I mean, the pleadings are the pleadings, right? You're not asking --
THE COURT: You have your red -- red -- you have your hot -- you have your hot button punch list? Do you have --
MR. DOERR: I think that's this, Brad, isn't it?
MR. SHAFER: Right. The chart -- the chart, I could just --
THE COURT: But that's just the pleading. I can't remember if you had filed it or you just hand it to me.
MR. SHAFER: No, I just handed it to you. And then what you did was in regard to the discovery disputes, you asked us -- you asked me to send a letter -- well, we sent letters back and forth, and then you asked the last time we were here, or maybe two times ago for us to file the document,

actually file the document and just call it something, I don't remember what it was called. It was -- you know, we sent a series of letters and --

THE COURT: Right.

MR. SHAFER: -- supplemental stuff.

THE COURT: That way she can pull that. While it needs to be in the record, because I was specifically referencing it and -- I mean, she's going to be able to read this and understand what the issues are.

MS. RAKOWSKY: And this is fine. This is part of the court record. It's -- it's the other documents that -- that the Department is concerned about.

MR. SHAFER: I can probably just figure out --

THE COURT: The list of --

MR. SHAFER: -- from my chart --

THE COURT: Okay, besides the list of the entities, there was a list of entities that --

MR. DOERR: From the large --

THE COURT: Right. What else?

MS. RAKOWSKY: We give it to -- we give you -- everything was stamped "confidential", and those items that are stamped actually confidential would be (indiscernible).

THE COURT: Okay.

MS. RAKOWSKY: Thank you.

THE COURT: But I'm just saying, just in the event

that I don't miss anything that was stamped "confidential", the paperwork, the lists, and what else?

MR. DOERR: I believe that was all. And -- and I think it came in one parcel to you in a manila envelope, and I --

THE COURT: Okay.

MR. DOERR: -- seem to recall you opening it here.

THE COURT: Do you have any problem giving me about ten minutes to -- to handle one case and walk down the hall and ask the assistant? Can we get together and give me a couple dates in the reasonably near future that I could ask her to have this matter heard?

MR. SHAFER: Sure.

THE COURT: So, I don't know. She does court call, but I think you'll want to make that first appearance.

MR. SHAFER: I agree.

THE COURT: But --

(Pause in the proceedings)

THE COURT: Okay, we're going to talk to them, you talk amongst yourselves, and then we're going to try to get you on soon. I mean, I don't know what your schedule is for trial, but soon.

MS. RAKOWSKY: Thank you, Your Honor.

MR. SHAFER: I have a trial in Anchorage starting this yeah, February 7th, so.

THE COURT: Anchorage in February?

MR. SHAFER: Yes. It could be worse. I had a trial in Fairbanks in February, so it could be worse.

THE COURT: You know, they bring their jurors in for like four or five months at a time, and they just do more than one trial.

MR. SHAFER: Oh, wow. Luckily this is a bench trial.

THE COURT: And in rural Alaska they do circle sentencings in criminal matters. The whole community stands around the defendant and they talk about what's the appropriate sentence. It's not happening here, but pretty interesting jurisdiction. You should enjoy it.

MR. SHAFER: So if we could get on that last week of January, that would be --

(Pause in the proceedings)

THE COURT: I haven't discussed with her anything substantive. What I've said is there are discovery disputes, based upon Department of Taxation's citation of some tax relevant statutes. And I've -- I've advised her there's some inherent authority issues that I don't know how she'll feel about. And then obviously, the constitutionality of live entertainment tax. That's all she knows.

And appearing in here and handling this previously, she has an understanding of it as well.

MR. DOERR: I brought an Order last time, and I brought a revised one back.

THE COURT: Okay. Did I sign it?

MR. DOERR: How about can we do that when we come back in?

THE COURT: Yes.

MR. DOERR: That way I can just have them --

THE COURT: Yes.

MR. DOERR: -- look at it. Although, I think it comports with exactly what you said, so.

THE COURT: Okay. Okay, we're checking it out.

MR. SHAFER: Thank you.

MS. RAKOWSKY: Thank you.

MR. DOERR: Thank you, Your Honor.

(Court recessed at 9:17 a.m., until 9:35 a.m.)

THE COURT: Okay, counsel for Little Darlings versus Nevada Department of Taxation. How is January 26th at 10:00 a.m.? That's a Wednesday in the last week of January. I mean, it's like, you know, this is not easy.

MR. SHAFER: Works for me.

THE COURT: Does it?

MR. SHAFER: Yes.

THE COURT: Really?

MR. SHAFER: Yes. It was one of our dates.

THE COURT: Really?

MR. SHAFER: It was one of the dates we chose.
THE COURT: Okay, nothing -- okay.
MR. DOERR: What time?
THE COURT: I -- well, I -- she has a Status Check an City Center which is stayed, and that's at 9:00 o'clock. In an abundance of caution her law clerk said 10:00. I said they're going to need an hour or more. I just thought you could maybe give her a little presentation calling it a Status Check -- on -- Status Check, on progress of case, discovery issues and pending -- you know, pending requests for any decisions you want her to make.
But I would like you to give her -- because I -- I think once this -- once these issues get resolved, then you're going to know, you know, summary judgment or not, some discovery, or not, what's left, and then you're going to -- I mean, this is going to be decided possibly, possibly -- I don't mean to speak for her, but I'm just saying by motion work. Don't you think?
MR. SHAFER: That's what we talked about last time.
THE COURT: Once she knows all the facts. I mean, I felt very strongly that you were entitled to do some -- something. Again, I'm not going to say anything that would confuse the record, but I think it's just going to be a matter of briefing it, so.
MR. SHAFER: I think that's the most likely scenario

as well.

THE COURT: Okay. So January 26th, 10:00 a.m. I told her law clerk at least an hour. So, I would ask that you make -- you start that Status Check with a presentation of where this started and the rulings I've made in general terms to today -- or from each person's -- each party's perspective, each side, so that she -- I mean, and she's familiar with it, but not out of fairness to her, I just don't want her to (indiscernible). And I'm -- I might -- I'm dying to know what happens. Will someone tell me?

MR. DOERR: Sure.

THE COURT: Seriously, I'm not kidding.

MR. DOERR: Sure, yeah.

MS. RAKOWSKY: That's fine, of course.

THE COURT: When the -- when the decision is made, will you send me a letter, somebody?

MR. SHAFER: Sure.

MR. DOERR: Yes.

MS. RAKOWSKY: Absolutely.

THE COURT: And then when the appeal is -- when the appeal is decided, then I'll -- I'm sure I'll read it by myself, because it probably will be published, I would think. There again, I'm not tying anyone's hands. Okay.

MS. RAKOWSKY: Thank you very much, your Honor.

MR. DOERR: Your Honor, we have the Order.

THE COURT: Yes. Can you approach?
MR. DOERR: Yes, yes.
THE COURT: Do you agree with it?
MR. SHAFER: No.
MR. DOERR: Well, he wanted an additional -- and we're going to ask you to write it in.
THE COURT: Sure.
MR. DOERR: Just that the issue regarding the Separation of Powers question is reserved.
THE COURT: Oh, okay.
MR. DOERR: In fact, did you want to give her the wording?
MR. SHAFER: I'm sure she can --
MR. DOERR: Okay.
MR. SHAFER: -- put in wording. But this is what I raised the last time we were on the phone. You're denying the Motion for Preliminary Injunction. But part of that motion was the Separation of Powers argument, which we're still in the middle of discussing, so.
THE COURT: So do you have a problem with, "Plaintiff's Motion for Preliminary Injunction is denied without prejudice. Further, the Court notes that the Separation of Powers has not been ruled upon herein."
MR. SHAFER: That's fine.
THE COURT: Separation of Powers issue has not been

ruled upon.

MR. SHAFER: That's fine, Your Honor. That's perfect.

(Pause in the proceedings)

THE COURT: All right. (Indiscernible) sign it before you filed it?

MR. DOERR: Yes. Yes. Thank you.

THE COURT: Okay. Well, good luck. And she promised me that you were going to be on the fast track.

MR. SHAFER: Thank you.

MR. DOERR: Thank you.

THE COURT: Anybody can put you on the fast track (indiscernible).

MR. POPE: Thank you, your Honor.

THE COURT: Thank you.

MR. DOERR: Thank you.

(Court recessed at 9:49 a.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	January 13, 2011

06A533273 Little Darlings Of Las Vegas LLC, K-Kel Inc, et al
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

January 13, 2011 **9:00 AM** **Request of Court** **Assignment D.C. XI**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette G. Sison-Britt

PARTIES PRESENT:

Deja Vu Showgirls Of Las Vegas LLC	Plaintiff
Shafer, Bradley J.	Attorney
Brown, William H.	Attorney
Nevada Dept Of Taxation	Defendant
Nevada State Board Of Examiners	Defendant
Nevada Tax Commission	Defendant
Rakowsky, Vivienne	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney

JOURNAL ENTRIES

- Status Check: Pending Ruling In Re - Separation of Powers Issue ... Discovery Issues ... Trial Scheduling Order (Transfer of Case)

Colloquy regarding assignment of the case. Based upon consideration of the suggestion of parties last date. The Court has discussed with the Presiding Civil Judge the case and the facts at issue in this case, as well as the law at issue in this case and the fact that Judge Gonzalez has some familiarity with this case as well as the fact that she is the Presiding Civil Judge, to ensure the orderly administration of justice in this matter, Pursuant to EDCR Rule 1.30(b)(15), by Authority of Chief Judge, COURT ORDERS, case ASSIGNED to Department XI. FURTHER, Court has discussed that there are two outstanding legal issues that remain undecided before this Court; inherent authority issue and

This Court declines to rule on the inherent authority issue and Discovery matters which are still pending and should be heard before the Trial Court. This Court has advised it need her immediate attention and as a result of this determination, Court asks parties to Provide Judge Gonzalez a copy of the IN-CAMERA production for her to review everything that has been provided to this Court. At the request of Ms. Rakowsky, this Court will return the IN-CAMERA production already produced back to counsel. Court directed counsel to contact Court in chambers for return of production. Mr. Shafer expressed concern regarding this Court's prior ruling. Court noted there has been no definitive ruling to date on Plaintiff's Discovery request. Court find counsel is entitled and directed counsel make Discovery request and have it ruled upon by Judge Gonzalez. Mr. Shafer indicated he provided Court with a chart listing the Plaintiff's unresolved Discovery requests.

01/26/11 10:00 a.m. Status Check: Progress of Case//Pending Issue In Re - Separation of Powers Issue//Discovery Issues (D.C. XI - 1 HOUR)

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	January 13, 2011

08A554970 K-Kel Inc
vs
Nevada Dept Of Taxation, Olympus Garden Inc, et al

January 13, 2011 **9:00 AM** **Request of Court** **Assignment - D.C. XI**

HEARD BY: Togliatti, Jennifer COURTROOM: RJC Courtroom 14A

COURT CLERK: Alan Castle

RECORDER: Yvette G. Sison-Britt

PARTIES PRESENT:

K-Kel Inc	Plaintiff
Shafer, Bradley J.	Attorney
Brown, William H.	Attorney
Nevada Dept Of Taxation	Defendant
Rakowsky, Vivienne	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney

JOURNAL ENTRIES

- Status Check: Pending Ruling In Re - Separation of Powers Issue ... Discovery Issues ... Trial Scheduling Order (Transfer of Case)

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01/26/11 10:00 a.m. Status Check: Progress of Case//Pending Issue In Re - Separation of Powers Issue//Discovery Issues (D.C. XI - 1 HOUR)

Electronically Filed
01/13/2011 10:21:25 AM

CLERK OF THE COURT

ORDR
CATHERINE CORTEZ MASTO
Attorney General
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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

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION WITHOUT PREJUDICE

Date of Hearing: July 31, 2008
Time of Hearing: 9:00 a.m.

DISTRICT COURT
CLARK COUNTY NEVADA

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION came on for hearing on July 31, 2008;

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court, having considered the papers and pleadings as well as the oral argument finds:

That the Plaintiffs cannot meet the element of showing they have suffered irreparable harm;

That this decision is not a statutory denial based on NRS 372.670 but is based upon the facts and law presented; and hereby orders:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION is DENIED without prejudice. Further, this Court notes the separation of powers issue has not been ruled upon herein.

DATED this 5th day of January, 2011.

IT IS SO ORDERED.

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By:
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Senior Deputy Attorney General
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà 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, L.L.C., 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. 06A533273 Dept. No. IX *Coordinated with:* Case No. 08A554970 Dept. No. IX **NOTICE OF ENTRY OF ORDER**

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K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. IX **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Motion for Preliminary Injunction Without Prejudice was entered on 13th day of January, 2011, and e-filed on the 3rd day of January, 2011, a copy of which is attached hereto.

DATED this 14th day of January, 2011.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ BLAKE A. DOERR
BLAKE A. DOERR
Senior Deputy Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

CERTIFICATE OF MAILING

I, hereby certify that on the 14th day of January, 2011, I served the foregoing **NOTICE OF ENTRY OF ORDER**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
The William H. Brown Law Office, Ltd.
330 S. Third St., Ste. 860
Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110

/s/ TRACI PLOTNICK
An employee of Office of Attorney General

Attorney General's Office
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CLERK OF THE COURT

ORDR
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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

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION WITHOUT PREJUDICE

Date of Hearing: July 31, 2008
Time of Hearing: 9:00 a.m.

DISTRICT COURT
CLARK COUNTY NEVADA

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION came on for hearing on July 31, 2008;

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court, having considered the papers and pleadings as well as the oral argument finds:

That the Plaintiffs cannot meet the element of showing they have suffered irreparable harm;

That this decision is not a statutory denial based on NRS 372.670 but is based upon the facts and law presented; and hereby orders:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION is DENIED without prejudice. B.A.D. Further, this Court notes the separation of powers issue has not been ruled upon herein.

DATED this 3rd day of January, 2011.

IT IS SO ORDERED.

Jennifer P. Togliatti
Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: Blake A. Doerr
Blake A. Doerr
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà 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, L.L.C., 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. 06A533273 Dept. No. XI *Coordinated with:* Case No. 08A554970 Dept. No. XI **NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983** Date:_____ Time:_____

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. . .

K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*; OLYMPUS GARDEN, INC., d/b/a *Olymic 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, v. NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; and NEVADA STATE BOARD OF EXAMINERS, Defendants.	Case No. 08A554970 Dept. No. XI

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COMES NOW, Defendants State of Nevada, ex rel. Department of Taxation (hereinafter "Department"), NEVADA TAX COMMISSION (hereinafter "NTC"), NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only, by and through their attorneys, Catherine Cortez Masto, Attorney General, and David J. Pope, Senior Deputy Attorney General, Blake Doerr, Senior Deputy Attorney General and Vivienne Rakowsky, Deputy Attorney General, and hereby moves this Court for Order granting this MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983. This Motion is filed pursuant to NRCP Rule 12(b)(5) and 56 and is also based on all

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pleadings and papers on file herein, the attached Memorandum of Points and Authorities and any oral arguments the Court may allow at the time of the hearing on this matter.

DATED this 25th day of January, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Motion for Partial Summary Judgment will be heard before the above-entitled Court on the 1 day of March, 2011 at 9:00 a.m. in Department 11 or as soon thereafter as counsel may be heard.

DATED this 25th day of January, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
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Attorneys for Defendants

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I. FACTS AND PROCEDURAL HISTORY

Plaintiffs are the above-captioned exotic dancing establishments. Defendants are the various agencies of the State of Nevada which administer and collect the Live Entertainment Tax (hereinafter "LET") and Michelle Jacobs in her official capacity only. As background, there have been two Complaints (A533273 and A554970) filed in this matter. The two cases have been coordinated for discovery and scheduling purposes, but have not been consolidated.

On December 19, 2006, the eight Plaintiffs in Case A533273[1] (hereinafter "Case 1 Plaintiffs") filed a Complaint seeking as their remedies: (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. §1983. Before filing the Complaint in District Court, none of the Case 1 Plaintiffs had ever requested a refund from the Department of Taxation pursuant to NRS 368A.290 and therefore had not exhausted their administrative remedies as required by Chapter 233B of the NRS and Nevada case law.

After filing the complaint in Case 1, six of the Plaintiffs requested refunds from the Department (hereinafter "Case 2 Plaintiffs") and pursued their administrative remedies. In January 2007, the six Case 2 Plaintiffs[2] requested a refund of the LET they remitted for January, February, March and April 2004. The Department denied the refund requests. The six Case 2 Plaintiffs appealed the Department's denial of the refunds to the NTC. Following a hearing over which it presided, the NTC upheld the Department's denials of the refunds and issued its final written decision dated October 12, 2007. *See* NTC Decision attached hereto as Ex. "A".

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[1] DÉJÀ VU SHOWGIRLS OF LAS VEGAS, L.L.C., d/b/a Déjà 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, L.L.C., d/b/a Scores

[2] The six Case 2 Plaintiffs include: K-KEL, INC.; OLYMPUS GARDEN, INC.; SHAC, LLC; THE POWER COMPANY, INC.; D. WESTWOOD, INC.; and D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC. The other two Case 1 Plaintiffs, DÉJÀ VU SHOWGIRLS OF LAS VEGAS, LLC and LITTLE DARLINGS OF LAS VEGAS, LLC, have not filed claims for a refund with the Department pursuant to NRS 368A.260.

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On January 9, 2008, the Case 2 Plaintiffs filed a Complaint initiating Case A554970. The Case 2 Plaintiffs allege in their Complaint that the LET, established by Chapter 368A of the Nevada Revised Statutes (hereinafter "NRS"), is an impermissible state tax and they request the refund of LET remitted for the tax periods at issue. The Case 2 Plaintiffs allege that the LET is an unconstitutional infringement by the State of Nevada on constitutionally protected expression. The Case 2 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 which they remitted for January, February, March and April 2004; and (3) a declaration that the LET is unconstitutional.

On or about January 28, 2009, the eight Class 1 Plaintiffs filed an Amended Complaint in order to add an "as applied" cause of action to the facial challenge to the LET contained in the initial Complaint.

On or about December 19, 2010, the Case 2 Plaintiffs' filed an Amended Complaint enlarging the caption to include all eight Case 1 Plaintiffs without leave of the Court[3] and added an "as applied" cause of action in addition to the requested declaratory relief regarding the facial challenge and claim for refund in the initial Complaint. The matrix below provides details as to the entities and causes of action in both Complaints and Amended Complaints:

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[3] This may have been an inadvertent mistake on the part of the Plaintiffs, since two of the parties listed on the Amended Complaint have never even asked for refunds (Little Darlings of Las Vegas, LLC and Déjà Vu Showgirls of Las Vegas, LLC) and the parties listed in the Amended Complaint list only the original six Case 2 Plaintiffs. *See* Case 2 Amended Complaint, pp. 3-4, paras. 6–11.

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	Déjà vu Showgirls of Las Vegas (Déjà Vu Showgirls)	Little Darlings of Las Vegas LLC (Little Darlings)	K-Kel,, Inc. (Spearmint Rhino)	Olympus Garden, Inc. (Olympic Garden)	Shac, LLC (Sapphires)	The Power Company (Crazy Horse Too)	D. Westwood, Inc. (Treasures)	D.I. Food & Beverage of Las Vegas, LLC (Scores)
A533273 (Case 1) Complaint December 19, 2006 (facial challenge to LET)	X	X	X	X	X	X	X	X
Declaratory Relief	X	X	X	X	X	X	X	X
Injunction	X	X	X	X	X	X	X	X
42 U.S.C. § 1983	X	X	X	X	X	X	X	X
Amended Complaint January 28, 2009 **A533273 (Case 1)** (added as applied to the facial challenge of LET)	X	X	X	X	X	X	X	X
A554970 (Case 2) Complaint for Refund January 9, 2008			X	X	X	X	X	X
Declaratory Relief			X	X	X	X	X	X
Refund			X	X	X	X	X	X
Injunctive Relief			X	X	X	X	X	X
Amended Complaint **A554970 (Case 2)** December 19, 2010 (Added as applied to the facial challenge)	X	X	X	X	X	X	X	X
Parties who have exhausted administrative remedies			X	X	X	X	X	X
Parties who have not exhausted administrative remedies	X	X						

By order dated January 13, 2011, the District Court denied Plaintiffs' Motion for Preliminary Injunction. *See* Order, attached hereto as Ex. "B".

The refund issues raised by the Case 2 Plaintiffs in their Complaint were adjudicated through administrative proceedings and are the subject of a final decision issued by the NTC following a hearing over which it presided. *See* NTC Decision attached hereto as Ex. "A".

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Although the NTC Decision is a final decision on the merits for purposes of judicial review pursuant to NRS 360.245, the Case 2 Plaintiffs failed to file a petition for judicial review pursuant to NRS 233B.130 but instead filed a complaint citing NRS 368A.290.

By filing a Complaint as opposed to a petition for judicial review, the Case 2 Plaintiffs initiated a civil law suit against the Defendants whereby they seek another tribunal's determination of the issues already determined by the agency regarding whether they are entitled to a refund of the LET. In addition, the Case 2 Plaintiffs also failed to timely file a petition for judicial review pursuant to NRS 233B.130.

The District Court has previously denied the injunction because there is no irreparable harm. *See* Order, attached hereto as Ex. "B". With respect to the "as applied" claims in both Amended Complaints, two of the Plaintiffs failed to exhaust their administrative remedies, and, pursuant to NRS 233B.130, the six remaining Plaintiffs in Case 2 and all eight Plaintiffs listed in Case 1 are only entitled to judicial review of an administrative agency final ruling.

As will be set forth below, damages pursuant to 42, U.S.C. §1983 are not recoverable because none of the Defendants are "persons." Therefore, the remaining requests for relief are the same for both the eight Case 1 Plaintiffs and the six Case 2 Plaintiffs: (1) a request for refund;[4] and, (2) a request for a declaration that the LET is unconstitutional. As stated above, the refund issue has already been decided through the administrative process and is the subject of a final decision on the merits by the NTC.

Accordingly, the Defendants are moving for the following relief: (1) that the "as applied" remedies in the Amended Complaints in both Case 2 and Case 1 be dismissed because, pursuant to NRS 368A.290 and NRS 233B.130, the Plaintiffs' only remedy is a petition for judicial review governed by the standard set forth in NRS 233B.135 and the Plaintiffs failed to file a petition for judicial review within 30 days of the final decision of the NTC; (2) that the refund claim made by the six plaintiffs in Case 2 be dismissed by application of administrative res judicata; (3) that Déjà Vu Showgirls of Las Vegas, LLC dba Déjà vu Showgirls and Little

---

[4] Déjà vu Showgirls of Las Vegas, LLC and Little Darlings of Las Vegas, LLC never requested a refund pursuant to NRS 368A.260 and are therefore barred from seeking refunds for the time periods at issue.

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Darlings of Las Vegas, LLC dba Little Darlings be dismissed from the Amended Complaint in Case 2 because of their failure to exhaust administrative remedies; and, (4) that the damages claim under 42 U.S.C. §1983 be dismissed because none of the Defendants are "persons" for purposes of 42 U.S.C. §1983.

Therefore, because the injunction issue has already been decided, after all the improper claims are dismissed, the only possible remaining claim is a claim for a declaration that the LET is facially unconstitutional.

II. ARGUMENT

A. STANDARD OF REVIEW

With the exception of the facial challenge to the LET, the Plaintiffs have failed to state a claim upon which relief can be granted. NRCP 12(b)(5). With respect to the Plaintiffs' causes of action regarding the "as applied" claims and its claim for damages pursuant to 42 U.S.C. §1983, the standard of review which applies is NRCP 12(b)(5).

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

When reviewing an order granting a motion to dismiss, the court considers whether the challenged pleading sets forth allegations sufficient to establish the elements of a right to relief. *Kaldi v. Farmers Ins. Exch.,* 117 Nev. 273, 278, 21 P.3d 16, 19 (2001). Dismissal is appropriate where it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Simpson v. Mars,* 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Buzz Stew, LLC v. City of N. Las Vegas,* __ Nev. __, 181 P.3d 670, 672 (Adv.Op. 21, April 17, 2008). The pleadings must be liberally construed, and all factual allegations in the complaint accepted as true. *Blackjack Bonding v. City of Las Vegas Mun. Court,* 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). The Plaintiffs' "as applied" claims and its claim for damages pursuant to 42 U.S.C. §1983 should be dismissed because the Plaintiffs failed to state a claim upon which relief can be granted.

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With respect to the refund claims, because the Complaints have been Answered, and because the Plaintiffs have taken part in the administrative process which is a part of this record, pursuant to NRCP 12(b)(5) the standard of review for the refund causes of action is as a Motion for Partial Summary Judgment. NRCP 12(b); NRCP 56.

Summary judgment is the pre-trial procedure which allows adjudication of legal issues which are not dependant upon the determination of material factual issues. Pursuant to NRCP 56(c)'s express language, the Court must enter an order of summary judgment in favor of the moving party when there is no issue of material fact, and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists only where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993).

The burden of establishing the non-existence of a genuine issue of material fact is on the moving party. *Pacific Pools v. McClains Concrete*, 101 Nev. 557, 559, 706 P.2d 849, 851 (1985). However, this burden is discharged when the moving party demonstrates that there is an "absence of evidence supporting one or more of the prima facia elements of the non-moving party's case." *NGA v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163, 167 (1997), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). The evidence presented must be admissible, and the opposing party is "not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Id.* at 1031, quoting *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 302, 662 P.2d 610 (1983).

By arguing that they need discovery, Plaintiffs have brought a need for factual determinations into the cases. As will be set forth below, constitutional challenges involving factual determinations constitute "as applied" challenges which require the exhaustion of administrative remedies pursuant to Nevada law. *Malecon Tobacco, LLC v. Department of Taxation*, 118 Nev. 837, 841, 59 P.3d 474 (2002). Because Déjà vu of Las Vegas and Little Darlings never exhausted their administrative remedies, they are not entitled to pursue an "as applied" challenge. The six Case 2 Plaintiffs who did request refunds and appealed the denials of their refund requests to the NTC and obtained a final decision from the NTC

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affirming those denials abandoned their statutorily provided means of judicial review when they failed to file a timely petition for judicial review pursuant to NRS 233B.130. Thus, none of the Plaintiffs are entitled to an "as applied" challenge. Moreover, Case 2 must be dismissed by application of administrative res judicata. All that possibly remains is the Case 1 claim for a declaration that the LET is facially unconstitutional.

B. A PETITION FOR JUDICIAL REVIEW WAS THE PROPER MEANS OF BRINGING CASE 2 BEFORE THIS COURT

Plaintiffs have chosen to file this particular action as a civil complaint, rather than a judicial review pursuant to NRS 233B.130. To the best of the Defendants' knowledge and belief, Plaintiffs did not file a petition for judicial review of the NTC's decision.[5]

Pursuant to the Nevada Rules of Civil Procedure a complaint requires that an answer be filed and ultimately that a trial on the merits is held, absent summary judgment. The foregoing procedure is inappropriate to the appeal of a state agency decision. NRS 233B.130 et. seq. With the adoption of the Administrative Procedures Act in 1965, aka Chapter 233B of the NRS, the Legislature stated its intention that the provisions in such chapter "are the exclusive means of *judicial review of, or judicial action concerning*, a final decision in a contested case involving an agency to which this chapter applies." NRS 233B.130(6) (emphasis added).

The provision under which Plaintiffs chose to file suit, NRS 368A.290, was first adopted in 2003 and is similar to NRS 372.680 which was revised in 1999. NRS 368A.290 states:

> 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

[5] Pursuant to NRS 233B.130(5) a person filing a petition for judicial review has 45 days to serve the petition on the agency and every party. No such petition has been served to date and the 45 days from the last date to file a petition has passed.

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> State where the claimant resides or maintains his or her 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. [Emphasis added.]

Following the revision, NRS 372.680 provides:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his principle place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments. [Emphasis added.]

NRS 372.680 speaks specifically to filing a claim for refund in district court after a "final decision" by the NTC. *Id.* Prior to 1999, a taxpayer could go straight to district court after the denial of the claim by the Department without going through an administrative hearing procedure. The change to a decision by the NTC ensured that there would be an administrative hearing. NRS 372.680 does not provide authority for a trial de novo and neither does NRS 368A.290.

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

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

> With the exception of Section 13 of *S.B.* 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to *S.B.* 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest the denial. The language of *S.B.* 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to (sic) Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event the taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in *S.B.* 362. Thus, *S.B.* 362 contemplates a change from past practice where refund claims upon passage of *S.B.* 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

See Ex. "C" (NDT 049). Mr. Azevedo's explanation is reiterated by other documents from the legislative record. Mr. Azevedo provided testimony to the Senate Committee on Taxation on March 23, 1999, which was recorded as follows:

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

See Exhibit D (NDT 055). The Bill Explanation provided as Exhibit G to the Assembly Committee on Taxation on May 6, 1999 states further that change to NRS 372.680 "[p]rovides

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that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in Clark County[6] as well as Carson City." *See* Ex. "E", Sect. 33 (NDT 061).

A July 1990 publication for the State Bar of Nevada sets forth the basis for applying judicial review to final administrative decisions. It states:

> Judicial review is designed to expedite the passage of an administrative case through the judicial system. It is also meant to minimize the intrusion of courts into administrative functions, such as fact-finding, while relieving district courts of the burden and expense of trying an administrative case as if the case had been filed as an original matter in district court.

INTER ALIA, July 1990, The Basics of Nevada Administrative Law, p. 8. The article goes on to discuss the reasons why trial de novo is disfavored in administrative cases and why cases involving trial de novo have been reversed by the Nevada Supreme Court:

> Litigants who have successfully convinced a district court to dispense with a review of the administrative record and hold a trial de novo have repeatedly had their original efforts reversed by the Nevada Supreme Court. Those reversals are entirely salutary. Trial de novo evades an administrative body's 'judgment based upon its specialized experience and knowledge.' It is also a particularly direct intrusion on an agency's fact-finding function.
>
> Trial de novo further destroys the effectiveness of an administrative body and the administrative process by relegating an administrative hearing to 'a meaningless, formal, preliminary, which places 'upon the courts the full administrative burden of factual determination.' The waste of administrative and judicial resources inherent in a trial de novo is obvious. The only time a trial de novo should occur is in the rare instances where it is specifically provided for by statute.

Id. (citations omitted). The article cites NRS 607.215 as an example of a specific statute that provides for trial de novo. NRS 607.215(3) states, "[u]pon a petition for judicial review, the court may order trial de novo." There is no applicable statute in the case at hand that specifically authorizes a trial de novo. Similar to NRS 372.680, the language in NRS 368A.290 states that a claimant "may bring an action." NRS 368A.290 contains no mention

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

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of a right to trial de novo and falls short of granting the court jurisdiction to order a trial de novo.

One of the cases cited in the article, *Nevada Tax Comm'n v. Hicks,* 73 Nev. 115, 310 P.2d 852 (1957), discusses the policy against a trial de novo after an agency decision. The full quote from the *Hicks* case, parts of which were included in the citation above, is as follows:

> It should be apparent that if trial de novo is permitted here it would completely destroy the effectiveness of the tax commission as an expert investigative board. The most perfunctory showing could be made before the board by a licensee with knowledge that the matter would ultimately be decided by the courts upon full evidentiary consideration. Trial de novo, in effect, could relegate the commission hearing to a meaningless, formal, preliminary and place upon the courts the full administrative burden of factual determination.

Id. at 123, 856; *see also Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 646 P.2d 549 (1982). Though the *Hicks* case dealt with a gaming licensee, the reasoning applies equally to the case at hand should the same argument be made with regard to NRS 368A.290. Allowing Case 2 to proceed as a trial de novo would render meaningless the expertise of the NTC, as well as the record that was before it.

Accordingly, based on the relevant statutes and the doctrine of judicial economy, it is clear that Case 2 should have proceeded as a petition for judicial review.[7] Inexplicably, rather than filing a petition for judicial review after exhausting their administrative remedies, the original six Case 2 Plaintiffs filed a civil complaint seeking a new civil court proceeding. The original six Case 2 Plaintiffs exercised their right to the administrative process, received an unfavorable decision from the Department, received an unfavorable decision from the NTC, accumulated an administrative record, and failed to timely serve a petition for judicial review on any of the Defendants. Because the final decision of the NTC was not the subject of a

. . .

[7] See Order to Proceed as Petition for Judicial Review, filed in the First Judicial District Court, Case No. 09 OC 00016 1B attached hereto as Ex. "F" (stating that the proceedings in a tax refund case that had been presented to a hearing officer and the Commission are controlled by NRS 233B.130(6). Further stating that the plaintiff was "not entitled to a second evidentiary hearing in district court, but is entitled to judicial review . . .." This order has been stayed pending further review).

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timely petition for judicial review filed with the District Court, the decision of the NTC is now final and preclusive.

1. CHANGES TO NRS 233B.130 AND NRS 372.680 REFLECT LEGISLATIVE INTENT THAT THIS COURT'S JURISDICTION IS LIMITED TO JUDICIAL REVIEW

Prior to 1989, Chapter 233B of the NRS specifically provided that a trial de novo was available, if provided for by an agency's statutes outside of NRS Chapter 233B. At the time NRS 233B.130(1) read in pertinent part:

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

The act of May 30, 1989, ch. 716, §6, *Assembly Bill 884, Before the Committee on Government Affairs*, 1989 Nev. Stat. 3. The 1989 legislature removed this language and replaced it with the current language in NRS 233B.130(6) which states that the provisions of NRS Chapter 233B are "the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [the] chapter applies." The legislature specifically removed the authorization to use a trial de novo and replaced it with language stating that the exclusive means for a court to exercise jurisdiction over a final decision of an agency is by way of judicial review. In testimony before the Assembly, Mr. Richard Campbell, Chairman of the state bar's Administrative Law Committee, explained the reasoning for the changes made by AB 884. The minutes state:

> He indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. He also pointed out it is not clear whether NRS 233 (sic) or the agency's law applies thereby creating general confusion among practitioners and the courts. He indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures . . ..

Minutes of the Nevada State Legislature, Assembly Committee on Government Affairs, page 7, June 6, 1989. Mr. Campbell explained the importance of allowing administrative agencies

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to exercise their expertise in a given area without interference by the courts. The minutes further provide:

> Mr. McGaughey referred to page 2, line 28, 'The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.' He asked Mr. Campbell to explain that statement. Mr. Campbell replied the Administrative Law Committee does not want the courts to substitute their expertise for the expertise of the administrative agency. Mr. Sourwine mentioned that this language exists in present law.
>
> Mr. Campbell explained the court is not required to affirm the decision of an agency. Mr. Sourwine said AB 884 allows the court to modify or reverse an agency decision if it is clearly erroneous in view of reliable evidence on the whole record. Since the court does not hear the testimony of witnesses, the court is not in a position to judge credibility. Therefore, in reviewing records of an administrative agency, the court merely looks for evidence in the record that supports the agency's decision. At that point, the court defers to the agency's expertise in the particular area.

Id. at 8.

Standing alone, NRS 372.680 fits the description from the legislative history cited above of an agency provision that is incomplete and does not specify the nature of the procedure in court. The statute was changed to read that an action would follow a decision of the NTC, not a decision of the Department. NRS 368A.290. The change ensured that requests for refund would fall within the purview of a contested case before an administrative body. The statutory change in 1999 denotes an effort on the part of the legislature to clarify the relationship between NRS 372.680 and NRS Chapter 233B.

The following legislative changes in this area demonstrate the legislative intent that all final decisions by the NTC be subject to judicial review:

1989

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

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1997

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

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after *a final decision* upon a claim filed pursuant to this chapter is rendered by the *Nevada Tax Commission*, the claimant may bring *an action* against the Department on the grounds set forth in the claim . . .." NRS 372.680 (emphasis added). "Thus, [the legislation] contemplates a change from past practice where *refund claims* upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General (emphasis added).

The Legislative history of NRS 372.680 is telling of the Legislatures' intent when enacting NRS 368A.290 because by using the same language that was used in NRS 372.680 the Legislature intended that NRS 368A.290 have the same meaning as NRS 372.680. *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 120 Nev. 575, 580-581, 97 P.3d 1132, 1135-1136 (2004) (stating, "[w]hen a legislature adopts language that has a particular [ ] meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language). Thus, the "action" to be pursued through NRS 368A.290 is a petition for judicial review.

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2. THE LEGISLATURE HAS STATED THAT THROUGH HARMONIZATION OF NRS 372.680 AND CHAPTER 233B OF THE NRS ITS INTENT WAS THAT THE ACTION AVAILABLE TO A TAXPAYER THROUGH NRS 372.680 IS A JUDICIAL REVIEW PURSUANT TO 233B.130.

In its amicus brief filed in Case #55228 currently pending before the Nevada Supreme Court, the Nevada Legislature stated its intent with regard to NRS 372.680. Nevada Legislature's Amicus Curiae Brief attached hereto as Ex. "G". The Legislature explains that by harmonizing the statutes its intent is clear from the plain language. It's further explained that the Legislature intended that the action provided for by NRS 372.680 is a judicial review pursuant to NRS 233B.130. As previously established, NRS 368A.290 has the same meaning as NRS 372.680 and therefore the action provided for by NRS 368A.290 is a judicial review pursuant to NRS 233B.130. Plaintiffs have failed to timely file a petition for judicial review pursuant to NRS 233B.130.

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

NRS 233B.130 states in pertinent part:

> 1. Any party who is:
> (a) Identified as a party of record by an agency in an administrative proceeding; and
> (b) Aggrieved by a final decision in a contested case, is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.
> 2. Petitions for judicial review must:
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county where the agency proceeding occurred; and
> (c) Be filed within 30 days after service of the final decision of the agency.
> Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

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The final decision by the NTC was dated October 12, 2007. Thirty days from the date of service would have been on or about November 11, 2007. The Case 2 Plaintiffs filed their complaint on January 9, 2008 and even if the complaint was deemed to be a petition for judicial review it was still undeniably filed after the 30 day period for filing a petition for judicial review. NRS 233B.130(2)(c). The sole means of this court taking action in this administrative case or reviewing the final decision by the NTC was by way of a petition for judicial review. NRS 233B.130(6). No petition for judicial review was filed. The failure to file a petition for judicial review in a timely manner is jurisdictional. *Kame v. Employment Sec. Dep't.*, 105 Nev. 22, 25, 769 P.2d 66, 67 (1989). The Nevada Supreme Court in *Kame* wrote:

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

Id. at 25, 68 (citations omitted).

Judicial review was the only means for the Case 2 Plaintiffs to access this court for action on the claims for refund heard by the NTC. Instead, the Case 2 Plaintiffs filed a civil complaint which should be dismissed.

C. CASE 2 IS BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA

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

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If the factors from *Britton* are applied to the facts alleged in the Complaint, it is clear administrative res judicata applies. The first factor is whether the issue decided in the prior adjudication was identical to the issue presented in the action in question. The issues decided in the previous action are outlined in the NTC's Decision. This court, in reviewing the action of the NTC, is limited to the record that was before the NTC. NRS 233B.135(1)(b). Since the court is so limited, the issues decided by the NTC are identical to the issues that are properly before this court.

The second factor is whether there was a final decision on the merits. Pursuant to NRS 360.245(5), decisions of the NTC are considered final decisions for purposes of judicial review. Moreover, because no petition for judicial review has been filed and the date for filing one has passed, the decision by the NTC is final.

The final factor is whether the party against whom the judgment is asserted was a party, or in privity with a party, to the prior adjudication. The NTC's Decision in the administrative proceeding below was against the Case 2 Plaintiffs. The judgment is being asserted against the Case 2 Plaintiffs in the case at hand.

The Court further addressed the doctrine of administrative res judicata in a case that, like the present case, related to a request for refund of taxes. *Campbell v. Department of Taxation*, 108 Nev. 215, 827 P.2d 833 (1992). The facts in *Campbell* were similar in many ways to the current case. Like the current case there had been an unsuccessful appeal before the NTC. *Campbell* at 216, 834. The taxpayer in *Campbell* also failed to file a petition for judicial review and instead filed a separate action pursuant to NRS 372.680. The district court judge granted summary judgment in favor of the Department on the grounds that "all of the elements necessary to apply the doctrine of res judicata to the decision of the administrative tribunal . . . exist in this case." *Campbell* at 218, 835 (quoting the district court decision). A significant difference between *Campbell* and the current case is that in *Campbell* the taxpayer did not pay the taxes until after he had been through the administrative procedure, whereas in the current case the Case 2 Plaintiffs remitted the taxes prior to going . . .

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through the administrative procedure. *See* NTC Decision attached hereto as Ex. "A"; *see also* Case 2 Amended Complaint, p. 8, paras. 33 and 34.

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

Because the Case 2 Plaintiffs' failed to file a petition for judicial review and because there does not exist any of the circumstances that were unique to the *Campbell* case, the Case 2 Plaintiffs' Complaint should be dismissed pursuant to the doctrine of administrative res judicata.

1. CASE 2 IS BARRED BY THE DOCTRINE OF CLAIM PRECLUSION

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

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

Id. at 711. The Court then set forth the test for claim preclusion as follows:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. These three factors in varying language, are used by the majority

. . .

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

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> of the state and federal courts. This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.

Id. at 713.

Applying those factors to the current case it is clear that the parties, the six Case 2 Plaintiffs and the Department, are the same in the administrative proceeding below and in the Complaint. As argued above, the judgment by the NTC is now final.

The third factor is whether the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. NRS 233B.130 states that a party may file for judicial review if they are "[a]ggrieved by a final decision in a contested case." NRS 233B.130(1)(b). The court in an action for judicial review is limited to the record before the agency. NRS 233B.135(1)(b). NRS 368A.290(1) states a taxpayer may file an action "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 on the grounds set forth in the claim." So, pursuant to NRS 233B.130, NRS 233B.135 and NRS 368.290, the Case 2 Plaintiffs may not bring any claims that have not been actually decided below by the NTC. All the factors are met and this matter should be dismissed based on the doctrine of claim preclusion.

2. CASE 2 IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION

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

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

Five Star at 713.

The NTC, in its final decision, affirmed the Department's denial of the refund claims filed by the six Case 2 Plaintiffs. *See* NTC's Decision attached hereto as Ex. "A". In their Amended Complaint, the six Case 2 Plaintiffs state that they filed requests for refund

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pursuant to NRS 368A.260 alleging that the LET is unconstitutional, that the requests for refund were denied by the Department, and that the NTC affirmed the denials of the requested refunds. Case 2 Amended Complaint, pp. 8-9, paras. 34-38. The Case 2 Plaintiffs essentially request a judicial determination that the LET is unconstitutional and that they are entitled to a refund. Amended Complaint, pp. 16 -17, paras. A-E. The issues raised by the Case 2 Plaintiffs in their Amended Complaint were raised and adjudicated in the administrative proceedings and the hearing presided over by the NTC. *See* NTC's Decision attached hereto as Ex. "A". Because the Case 2 Plaintiffs' issues raised in the Amended Complaint were raised by the claims for refund filed by the Case 2 Plaintiffs and adjudicated by the NTC, they were actually and necessarily litigated in the administrative proceedings below. The NTC's decision is final and the Case 2 Plaintiffs should not be permitted to re-litigate matters that have been adjudicated and finally decided.

D. THE CASE 1 CLAIM FOR DAMAGES PURSUANT TO 42 U.S.C. 1983 MUST BE DISMISSED.

The Case 1 claim for damages pursuant to 42 U.S.C. 1983 must be dismissed because none of the Defendants are "persons" for purposes of the statute. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated; and, (2) that the

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violation was committed by a person acting under the color of state law. *West v. Atkins,* 487 U.S. 42, 48 (1988). The State, its agencies, and its officials acting in their official capacities, are not "persons" within the meaning of § 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989).

The Department, the NTC, the State Board of Examiners and Michelle Jacobs, in her official capacity only, were sued under Section 1983 for allegedly enforcing an unconstitutional tax statute. However, none of the parties named as Defendants are "persons" within the meaning of Section 1983.

E. THE ONLY REMAINING ISSUE IS THE "FACIAL CHALLENGE" REGARDING THE CONSTITUTIONALITY OF THE LET.

The six Case 2 Plaintiffs exhausted their administrative remedies but failed to pursue a petition for judicial review. Because they failed to timely file a petition for judicial review, the Case 2 Plaintiffs allowed the NTC's decision to become final and lost the ability to have this court review the NTC's decision which affirmed the Department's denial of the refund claims. In addition, by abandoning the statutory right to judicial review, the Case 2 Plaintiffs lost the ability to pursue an "as applied" challenge regarding the constitutionality of the LET. *See Malecon Tobacco, LLC, et al. v. Department of Taxation,* 118 Nev. 837, 841, 59 P.3d 474 (2002) (holding, "we conclude that the Taxpayers must exhaust their administrative remedies *before filing a complaint* in the district court. Since they did not exhaust their administrative remedies, the district court properly dismissed the complaint for lack of subject matter jurisdiction."); *see also Public Serv. Comm'n of Nev. v. Eighth Judicial Dist. Court of the State of Nev., et al.,* 107 Nev. 680, 684-685, 818 P.2 396, 399 (1991) (providing, "'[i]t is well-settled that courts will not entertain a declaratory judgment action if there is pending, at the time of the commencement of the action for declaratory relief, another action or proceeding to which the same persons are parties and in which the same issues may be adjudicated.'" (citation omitted)). In the *Public Serv. Comm'n* case, the Nevada Supreme Court further stated:

> Further, a court will refuse to consider a complaint for declaratory relief if a special statutory remedy has been provided. (citation omitted). A separate action for declaratory judgment is not an

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> appropriate method of testing defenses in a pending action, [citation omitted], nor is it a substitute for statutory avenues of judicial and appellate review. We conclude, therefore, that the district court lacks jurisdiction to entertain the utilities' complaint for declaratory and injunctive relief.

107 Nev. at 685.

The complaint filed by the Case 1 Plaintiffs was amended to include an "as applied" challenge. However, the Case 1 Plaintiffs did not exhaust their administrative remedies before filing the complaint and therefore, according to Nevada law, have no right to pursue an "as applied" constitutional challenge. *See Malecon Tobacco, LLC,* 118 Nev. 841 (holding that when an "as applied" constitutional challenge involves a factual evaluation exhaustion of administrative remedies is required). The Case 1 Plaintiffs have persistently argued for discovery and for more and more discovery and, in doing so, are establishing the need for a factual evaluation which triggers the exhaustion of administrative remedies requirement. *Id.* Consequently, the "as applied" challenge in Case 1 must be dismissed because the Case 1 Plaintiffs did not exhaust their administrative remedies before filing their Complaint in this court. *Id.* (requiring exhaustion of administrative remedies before the filing of a complaint).

In addition, as previously set forth, the claim for damages pursuant to 42 U.S.C. 1983 must be dismissed.

Between the two cases, the only possible remaining claim is the claim for declaratory relief regarding the "facial challenge" to the constitutionality of the LET. In *Malecon Tobacco, LLC* case, the Nevada Supreme Court indicated that a "facial challenge" to the constitutionality of a statute is an exception to the exhaustion of administrative remedies requirement. 118 Nev. at 841 (explaining that a "facial challenge" will not involve a factual evaluation); *see also Public Serv. Comm'n,* 107 Nev. at 684 (stating, "courts will not entertain a declaratory judgment action if there is pending, at the time of the commencement of the action for declaratory relief, another action or proceeding to which the same persons are parties and in which the same issues may be adjudicated" (citation omitted)). Thus, if the court does not dismiss Case 2 for failure to timely file a judicial review or through application of the principle of res judicata, it must at least dismiss the Case 2 claim for declaratory relief

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because the Case 1 claim for declaratory relief was pending at the time that Case 2 was commenced seeking declaratory relief. *Public Serv. Comm'n,* 107 Nev. at 684.

By filing an original civil action, the Case 2 Plaintiffs are asking this court to preside over the re-litigation of issues that were the subject of administrative proceedings before the Department and the NTC. It would be a prodigious waste of judicial resources to start anew in a case that already has an administrative record and final decision. For the reasons stated above, the Amended Complaints in both Case 1 and Case 2 should be dismissed which means that the "as applied" challenge will be dismissed.

Moreover, the Case 2 Plaintiffs had an adequate legal remedy available through an NRS 233B.130 petition for judicial review whereby this court could have reviewed the final decision of the NTC for violations of constitutional or statutory provisions, acting in excess of its authority, unlawful procedure or other error of law. By failing to file a petition for judicial review within the statutory time limit under NRS 233B.130(2)(c), the Case 2 Plaintiffs abandoned their rights to review and allowed the NTC's decision to become final and Case 2 must be dismissed.

Based on the doctrine of administrative res judicata, claim preclusion and issue preclusion, the Case 2 Plaintiffs are barred from re-litigating the refund issues decided by the Department and affirmed by the NTC in its final decision.

As set forth above, a party must exhaust administrative remedies in order to pursue an "as applied" challenge to the constitutionality of a statute. Only the original six Case 2 Plaintiffs exhausted their administrative remedies. The dismissal of Case 2 is the dismissal of the "as applied" challenge. Their can be no "as applied" challenge because none of the Case 1 Plaintiffs exhausted their administrative remedies before filing the complaint. *Malecon Tobacco, LLC,* 118 Nev. 837, 841 (2002).

In addition, the Case 1 claim for damages pursuant to 42 U.S.C. 1983 must be dismissed because the Plaintiffs have failed to state a claim in which relief can be granted.

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Because the Case 1 Plaintiffs filed the Complaint prior to exhausting their administrative remedies, the only possible remaining issue from both cases is the Case 1 claim for declaratory relief on the facial challenge.

CONCLUSION

Based on the foregoing, the Department respectfully requests that this Honorable Court Order the following with respect to cases A533273 and A554790:

1. The Plaintiffs' claims for refunds are dismissed;

2. The Plaintiffs' "as applied" challenges to the LET are dismissed;

3. The Plaintiffs' claims for damages pursuant to 42 U.S.C. §1983 are dismissed; and

Respectfully submitted this 25th day of January, 2011.

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
Attorneys for Defendants

Attorney General's Office
555 E. Washington, Suite 3900
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CERTIFICATE OF MAILING

I, hereby certify that on the 25TH day of January, 2011, I served the foregoing **NEVADA DEPARTMENT OF TAXATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR REFUND AND MOTION TO DISMISS THE AS APPLIED CHALLENGE TO THE LIVE ENTERTAINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
The William H. Brown Law Office, Ltd.
330 S. Third St., Ste. 860
Las Vegas, NV 89101

Bradley J. Shafer
Shafer & Associates, P.C.
3800 Capital City Blvd., Ste. 2
Lansing, MI 48906-2110

/s/ TRACI PLOTNICK
An employee of Office of Attorney General

Attorney General's Office
555 E. Washington, Suite 3900
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JIM GIBBONS
Governor
THOMAS R. SHEETS
Chair, Nevada Tax Commission
DINO DICIANNO
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION
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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)

EXHIBIT “B”

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CLERK OF THE COURT

ORDR
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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

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION WITHOUT PREJUDICE

Date of Hearing: July 31, 2008
Time of Hearing: 9:00 a.m.

DISTRICT COURT
CLARK COUNTY NEVADA

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION came on for hearing on July 31, 2008;

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555 E. Washington, Suite 3900
Las Vegas, NV 89101

David J. Pope, Senior Deputy Attorney General, and Blake A. Doerr, Deputy Attorney General, appeared on behalf of the Defendants;

Diana Sullivan, Esq. and Bradley J. Shafer, Esq. appeared on behalf of the Plaintiffs;

The Court, having considered the papers and pleadings as well as the oral argument finds:

That the Plaintiffs cannot meet the element of showing they have suffered irreparable harm;

That this decision is not a statutory denial based on NRS 372.670 but is based upon the facts and law presented; and hereby orders:

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION is DENIED without prejudice. Further, this Court notes the separation of powers issue has not been ruled upon herein. B.A.D.

DATED this 3rd day of January, 2011.

IT IS SO ORDERED.

Jennifer P. Togliatti

Jennifer Togliatti
DISTRICT COURT JUDGE

Respectfully submitted:

CATHERINE CORTEZ MASTO
Attorney General

By: Blake A. Doerr
Blake A. Doerr
Senior Deputy Attorney General
Nevada State Bar #9001
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Attorneys for Defendants

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Las Vegas, NV 89101

EXHIBIT "C"

Writer's Direct Dial (775) 684-1232

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

Fax (775) 687-5798

MEMORANDUM

DATE: May 7, 1999

TO: Assemblyman Bernie Anderson
Chairman, Assembly Committee on Judiciary

FROM: Norm Azevedo, Sr. Depury Attorney General

SUBJECT: *Venue Sections of S.B. 362*

Pursuant to the request of the Executive Director of the Nevada Department of Taxation, I have prepared this memorandum to address your venue inquiries. The sections of S.B. 362 that contain the venue provisions are as follows:

1. Section 13 applicable to Chapter 361 of the NRS (property tax).

2. Section 26 applicable to Chapter 365 of the NRS (cigarette tax).

3. Section 30 applicable to Chapter 366 of the NRS (special fuel tax).

4. Sections 33 and 36 applicable to Chapter 372 of the NRS (sales and use tax).

5. Section 41 applicable to Chapter 374 of the NRS (sales and use tax).

I was previously requested by Senator Ann O'Connell to prepare a memorandum addressing the venue concerns. A copy of my memorandum to Senator O'Connell is enclosed for your review. As you will note in my memorandum, I made reference to NRS 233B.130(2)(b) of which a copy is also enclosed for your review.

For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised Statutes, a taxpayer has the ability to file an action in one of three locations. These locations are: (1) Carson City, (2) the county in which the taxpayer resides, or (3) the county where the agency proceeding occurred. See NRS 233B.130(2)(b). The Nevada Department of Taxation has been governed by this venue provision since its passage in

1965. Historically, only audit deficiencies were subject to the application of Chapter 233B of the Nevada Revised Statutes.

With the exception of Section 13 of S.B. 362, the remaining sections delineated above address the applicable procedures to follow in a claim for refund. Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. Historically, if a taxpayer filed a claim for refund with the Nevada Department of Taxation, which was denied by the Nevada Department of Taxation, the taxpayer was required to file an action in district court in order to contest this denial. The language of S.B. 362 now changes this procedural route. In the event that S.B. 362 becomes law, a taxpayer whose claim for refund is denied by the Department to Taxation will proceed initially to an administrative hearing officer for an administrative trial. In the event the taxpayer is aggrieved by the decision of the administrative hearing officer, the taxpayer may appeal the hearing officer's decision to the Nevada Tax Commission for an administrative appellate review. In the event a taxpayer is still aggrieved after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Accordingly, it would be advisable to make the venue provisions of S.B. 362 consistent with NRS 233B.130(2)(b).[1] By having consistent venue provisions for both audit deficiencies as well as claims for refund, it would minimize confusion among taxpayers. To the extent it is the desire to harmonize the venue provisions of S.B. 362 and the venue provisions of NRS 233B.130(2)(b), I would recommend the following language modifications to the designated sections of S.B. 362:

Sec. 13. NRS 361.435 is hereby amended to read as follows:

361.435 Any property owner owning property of like kind in more than one county in the state and desiring to proceed with a suit under the provisions of NRS 361.420 may, where the issues in the cases are substantially the same in all or in some of the counties concerning the assessment of taxes on such property, consolidate any of the suits in one action and bring the action in any court of competent jurisdiction in Carson City ~~[, Nevada,]~~ *or Clark County, in any court of competent jurisdiction*

[1] It may also be advisable to caution the language in NRS 364A.280 to follow NRS 233B.130(2)(b). See Section 73 of S.B. 362.

in Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred.

Sec. 26. NRS 365.460 is hereby amended to read as follows:

365.460 After payment of any excise tax under protest duly verified, served on the department, and setting forth the grounds of objection to the legality of the excise tax, the dealer paying the excise tax may *file an appeal with the Nevada tax commission pursuant to NRS 360.245. If the dealer is aggrieved by the decision of the commission rendered on appeal, he may* bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the excise tax so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred.*

Sec. 30. NRS 366.660 is hereby amended to read as follows:

366.660 1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or any officer thereof to prevent or enjoin the collection pursuant to this chapter of any excise tax or other amount required to be collected.

2. After payment of any such excise tax or other amount under protest, verified and setting forth the grounds of objection to the legality thereof, filed with the department at the time of payment of the tax or other amount protested, the special fuel supplier, special fuel dealer or special fuel user making the payment may bring an action against the state treasurer in ~~[the district court in and for]~~ *a court of competent jurisdiction in* Carson City *or Clark County* for the recovery of the amount so paid under protest *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the amount so paid under protest.*

Sec. 33. NRS 372.680 is hereby amended to read as follows:

372.680 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter ~~[,]~~ *is rendered by the Nevada tax commission,* the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark county* for the

recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

2. Failure to bring *an* action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments *in a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

Sec. 36. NRS 372.710 is hereby amended to read as follows:

372.710 The action must be tried in Carson City *or Clark County* unless the court with the consent of the attorney general orders a change of place of trial *the action must be tried in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred unless the court with the consent of the attorney general orders a change of place of trial.*

Sec. 41. NRS 374.685 is hereby amended to read as follows:

374.685 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ *a final decision* upon a claim filed pursuant to this chapter ~~[,]~~ *is rendered by the Nevada tax commission,* the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City *or Clark County* for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed *In a court of competent jurisdiction in Carson City, in and for the county in which the aggrieved party resides, or in and for the county where the agency proceeding occurred for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.*

To the extent you need any further information or assistance, you may contact me at 684-1222. I will be out of the office for the remainder of May 7, 1999 and will return first thing Monday morning, May 10, 1999.

Enclosures

NJA:jm

EXHIBIT “D”

SENATE BILL 362: Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association, spoke in support of S.B. 362. She said the bill clarified some issues from the original taxpayer bill of rights and the amendments in S.B. 375 of the Sixty-ninth Session.

SENATE BILL 375 OF THE SIXTY-NINTH SESSION: Clarifies authority of Nevada tax commission and makes various other changes concerning taxation. (BDR 32-1050)

Ms. Vilardo said the bill sets up a very specific procedure for determining audit dates, hearings and appeals; claims procedures; a specific procedure on the issue of deficiency determinations or overages; what procedures will be used for refunds. She noted it clarifies two provisions from S.B. 375 of the Sixty-ninth Session. Ms. Vilardo referred to *Proposed Amendments to S.B. 362* (Exhibit I).

Senator O'Connell said the bill allows the filing of a court action in Clark County. She questioned why the two counties (Clark and Carson City) were specified, as opposed to allowing filing in other jurisdictions. Ms. Vilardo said originally all of the filings were in Carson City because the attorney general's office was located in Carson City. She noted the business tax was the first and only time there was a provision made that if a court action was to be filed it could be filed in Clark County, as well as Carson City. She said the attorney general's office would be the best one to answer why it could not be filed in other courts of competent jurisdiction in Nevada. Senator O'Connell said she would like to investigate that question. Ms. Vilardo explained the amendments to the bill and said she had worked with Mr. Pursell, from the Department of Taxation, and Norman J. Azevedo, Deputy Attorney General, Taxation Section, Office of the Attorney General, on the amendments. She said the biggest thing that could be accomplished for the taxpayer and the state was to have a clear, consistent set of rules.

Mr. Pursell referred to *Section by Section Outline of S.B. 362* (Exhibit J). He called attention to page 5, section 7, lines 30-35 of the bill, recommending rather than setting the thresholds in statute, let the Nevada Tax Commission regulate the amount of taxes, penalties and interest that could be considered for a waiver. He said a statement would need to be prepared, to keep on file at the department, with the specifics of the waiver.

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Senator Neal asked for an explanation of the words "net deficiency" found on page 6, section 8, line 13 of the bill. Ms. Vilardo gave examples of how this could happen. Senator O'Connell clarified the language said there was a full year to try to balance the situation. Ms. Vilardo said there would be the reporting period and a need to balance out within the 3-year audit period. She concluded by asking for support of the bill.

Senator O'Connell asked why page 29, section 54, lines 20 and 21, specified the effective time of the act was July 1, 1999 at 12:01 a.m. Dino DiCianno, Deputy Executive Director, Department of Taxation said it had to do with the calculation of interest and penalties. Mr. Pursell stated this whole process would help him in his own budget because his revenue officers and auditors had performance indicators, and this would change the focus to education of the taxpayer and making sure the department was consistent when departing information on tax collection.

Senator Neal asked about the phrase "tax extensions." Ms. Vilardo referred to page 1, section 2, lines 10-13, saying the extension had to be caused by the department, not the taxpayer. She said if it was not the fault of the taxpayer, he would not be subject to interest and penalties. Senator Neal said under the doctrine of our law, if it is not stated, it is excluded. He clarified if the tax department audited a company and the needed records for the stated period of time could not be located, application had to be made for an extension. He continued, once an extension was requested, the company cannot be charged for the period of the extension. He noted the language is not clear on this issue. Ms. Vilardo said page 1, section 2, lines 10 - 13 says,

> If, after the audit, the department determines that delinquent taxes are due, interest and penalties may not be imposed for the period of the extension if the taxpayer did not request the extension or was not otherwise the cause of the extension.

After a short discussion, Ms. Vilardo said she would ask legal counsel to meet with Senator Neal to draft some additional wording in this section.

Senator O'Connell asked for clarification of the filing of a court action to any competent court of jurisdiction issue from the bill. She suggested removing the language referring to filing of a court action could be only in Carson City or

Clark County. Mr. Azevedo said this particular provision was addressed in NRS chapter 232B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to a court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission. Chairman McGinness asked him to review this section and send an opinion back to the committee. Senator O'Connell asked for a draft of the amendment to be brought back to the committee. Chairman McGinness summarized the amendments proposed by Ms. Vilardo; Senator Neal's concern about the language on page 1, section 2, subsection 3; the clarifying statement on the competency of the court will be reviewed.

Stephanie Tyler, Lobbyist, Nevada Bell, also representing Sprint and AT&T, testified in support of the bill. She said the business community was pleased to see additional clarification. There were protections for the taxpayers and the entities that would be receiving revenues as a result of these actions. She noted the stability of those revenues was important, as was establishing a clear set of rules for the taxpayers with regard to their abilities, rights, and their processes of appeal.

Amy Halley Hill, Lobbyist, Las Vegas Chamber of Commerce, and Barrick Goldstrike Mines Inc., and Retail Association of America, said for the record she supported this legislation.

SENATOR COFFIN MOVED TO DO PASS A.B. 174.

SENATOR O'CONNELL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RHOADS, SCHNEIDER AND TOWNSEND WERE ABSENT FOR THE VOTE.)

* * * * *

SENATOR O'CONNELL MOVED TO AMEND AND DO PASS S.B. 362.

SENATOR TOWNSEND SECONDED THE MOTION.

06

EXHIBIT “E”

Bill Explanation

SENATE BILL NO. 362

Assembly Committee on Taxation
Hearing: May 6, 1999

SUMMARY—Makes various changes to provisions governing collection and payment of taxes. (BDR 32-219)

Section 1: Adds sections 2, 3 and 3.5 of this act to chapter 360 of the NRS.

Section 2: Requires the department of taxation to notify a taxpayer concerning the date an audit will be completed.

Allows the department to extend the date that an audit will be completed if it provides a written notice to the taxpayer and an explanation of the reasons for the extension.

Provides, if after completion of an audit and if the department determines that delinquent taxes are due, that it may not impose any penalties or interest during the extension of the audit if the extension was not caused by the taxpayer.

Section 3: Provides that written notice be given to a taxpayer if someone affiliated with the department determines that the taxpayer is entitled to an exemption or has been taxed more than required by law.

The notice must be given within 30 days after a determination or, if the determination is a result of an audit, 30 days after completion of the audit. The notice must provide an explanation that the overpayment will be credited against any amount due or instructions on how a taxpayer obtains a refund of the overpayment.

Section 3.5: Requires the tax commission to adopt regulations to carry out sections 7 and 10 of this act.

Section 4: Clarifies that certain general provisions of the tax laws may be superseded by other provisions of the tax laws.

Clarifies that only parties aggrieved by a decision of the department of taxation may appeal the decision.

Clarifies that the tax commission may review any decision of the department and that the commission may reverse, affirm or modify any decision of the department that a taxpayer appeals or the commission reviews.

Exhibit G P 1-4-3
Assembly Committee on Taxation
Date: 5-6-99
Submitted by: TED ZUEGG
LCB FISCAL SVC.
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Requires the commission, when an appeal is heard, to notify the district attorney of each county which may affected by the decision.

Section 5: This section amends the taxpayer bill of rights to:

- Clarify that a taxpayer is to be notified in writing when the department of taxation determines that he is entitled to an exemption or has been taxed more than required by law.
- Provide that a taxpayer is entitled to receive written instructions from the department on how to obtain a reduction or release of a bond or other security which he is required to furnish for taxes administered by the department.
- Provide that statutes and regulations are to be construed in favor of the taxpayer if they are of doubtful validity, unless there is a specific statutory provision that is applicable.
- Provide that the provisions of the taxation statutes or regulations administered by the department may not be construed to conflict with this section or applicable regulations.
- Provide that the taxpayer bill of rights applies to all taxation statutes and regulations administered by the department.

Section 6: Clarifies that overpaid taxes are to be credited against other taxes before any overpayment is refunded.

Section 7: Provides that the department of taxation may waive any tax, penalty or interest in conformity with regulations adopted by the tax commission, if a taxpayer has relied to his detriment on written advice from a representative of the department or an opinion of the attorney general. Requires the department, if it has approved a waiver, to maintain a statement of the reason for the waiver; the amount of tax, penalty and interest owed by the taxpayer; the amount of tax, penalty or interest waived; and the facts and circumstances which led to the waiver.

Provides, upon proof that a taxpayer has in good faith collected or remitted taxes by relying on the written advice from a representative of the department or an opinion of the attorney general or the written results of an audit, that the taxpayer may not be required to pay delinquent taxes, penalties or interest if a subsequent audit determines that the taxes collected were deficient.

Section 8: Revises provisions relating to the offsetting of overpayments and underpayments by a taxpayer by:

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- Clarifying that the provisions in this section may be superseded by other provisions of the tax laws and that the provisions apply to a reporting period within an audit period.
- Requiring if there is a net deficiency, that a penalty is to be calculated against the net deficiency.
- Requiring, if there is a net deficiency, that interest imposed based on the net deficiency for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Requiring, if there is a net overpayment, the interest that the taxpayer is entitled to receive must be calculated for that period before determining whether there is an overpayment or deficiency for the next reporting period within the audit period.
- Specifying that the provisions of the section do not apply if the taxpayer has not remitted the taxes due in a timely manner.
- Defining "reporting period" to include any reporting period.

Section 9: Provides that the prerequisites of action for judicial review of a redetermination must follow a final order of the tax commission, rather than the department of taxation.

Clarifies that any amount to be credited or refunded to a taxpayer, if a court modifies a final order in favor of a taxpayer, is determined by comparing the amount paid to the amount owed, including interest.

Section 10: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Provides that the amount of any penalty must be based on a graduated schedule which takes into consideration the length of time the tax or fee remained unpaid.

Section 11: Provides that an action for collection of delinquent taxes may not be brought when an appeal to the tax commission is pending.

Section 12: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section.

Section 13: Provides that a taxpayer who wants to consolidate actions to recover property taxes may do so in a court in Clark County as well as Carson City.

Sections 14 to 15: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 16: Provides that an action for judicial review of a refund claim under the Senior Citizens' Property Tax Assistance Act follows a denial or final action of the tax commission, not the executive director of the department of taxation.

Section 17: Provides that the provisions relating to the crediting of overpayments of net proceeds taxes does not prohibit the taxpayer from requesting a refund of the overpayment.

Section 18: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in this section. Clarifies that appeals by a taxpayer over the imposition of penalties and interest are governed by the provisions of NRS 360.245.

Section 19: Clarifies that appeals by a taxpayer over the imposition of penalties are governed by the provisions of NRS 360.245.

Sections 20 to 22: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 23: Provides that an action for judicial review of a claim for refund of business taxes follows a decision of the tax commission, not the department of taxation.

Section 24: Provides, if the department of taxation fails to act on a claim for refund of the business tax in a timely manner, that an appeal must be made to the tax commission. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 90 days of the decision.

Section 25: Makes it an authorization rather than a requirement that the department of taxation cancel the license of a fuel dealer after a show cause hearing with the dealer.

Section 26: Provides that a fuel dealer after paying a tax under protest must appeal the imposition of the tax to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the state treasurer in a court in Clark County as well as Carson City.

Section 27: Provides that an action for judicial review of a claim to recover fuel taxes paid follows a decision of the tax commission after an appeal.

Sections 28 to 29: Provides that section 2 and NRS 360.320 are exceptions to the penalty or interest provisions in these sections.

Section 30: Provides that a taxpayer who has paid special fuel taxes under protest may file an action to recover the taxes against the state treasurer in a court in Clark County as well as Carson City.

Section 31: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect the state sales and use tax including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

Section 32: Provides that NRS 360.320 is an exception to the interest or penalty provisions of this section.

Section 33: Provides that an action for judicial review of a claim for refund of sales tax follows a decision of the tax commission, not the department of taxation, and that such action may be brought in a court in Clark County as well as Carson City.

Section 34: Provides, if the department of taxation fails to act on a claim for refund of the sales and use tax in a timely manner, that an appeal must be made to a hearing officer within 45 days. Provides that if the taxpayer is aggrieved by the hearing officer's decision he may appeal the decision to the tax commission pursuant to the provisions of NRS 360.245. Provides that if the taxpayer is aggrieved by the commission's decision he may bring an action against the department within 45 days after the decision.

Sections 35 to 36: Provides that certain actions relating to erroneous refunds may be brought in a court in Clark County as well as Carson City.

Section 37: Clarifies that agents of the department of taxation are bound by the confidentiality provisions of this section.

Section 38: Requires the department to provide a person receiving a seller's permit a written explanation of the liability of the seller to collect local sales taxes including:

- The circumstances under which a service is taxable;
- The procedures for administering exemptions; and
- The circumstances under which freight charges are taxable.

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EXHIBIT “F”

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C. COOPER

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

Southern California Edison, Plaintiff, vs. STATE OF NEVADA ex rel. Department of Taxation, Defendants.	Case No. 09 OC 00016 1B Department No. 1

Nevada Office of the Attorney General
100 North Carson Street
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ORDER TO PROCEED AS PETITION FOR JUDICIAL REVIEW

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

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

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

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

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

1989

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

1997

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

1999

Prior to 1999, NRS 372.680 permitted an action for a claim for refund to be filed once a refund claim had been filed with the Department of Taxation without an administrative proceeding. The legislature changed the language and it now reads in pertinent part: "Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim..." (emphasis added). "Thus, [the legislation] contemplates a change from past practice where refund claims upon passage of [the legislation] will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes." Memorandum dated May 7, 1999 to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary from Norm Azevedo, Sr. Deputy Attorney General. (emphasis added)

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

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

8. The legislative change made to NRS 372.680 in 1999 ensured that there would be the opportunity for an evidentiary hearing, findings of facts and conclusions of law and the opportunity for review by the Commission prior to a decision becoming final. With the change, the legislature limited the scope of NRS 372.680 and brought it within the umbrella of NRS Chapter 233B.

9. Plaintiff participated in an evidentiary hearing before the Commission. Plaintiff is not entitled to a second evidentiary hearing in district court, but is entitled to judicial review of the Commission's February 27, 2009 decision. *Campbell v. State of Nevada*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992).

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Therefore this matter will proceed as a Petition for Judicial Review pursuant to NRS Chapter 233B.

IT IS SO ORDERED.

Dated this ___ day of ~~October~~, 2009.

JAMES T. RUSSELL
District Judge

Submitted by:

CATHERINE CORTEZ MASTO
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By: _____
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