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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[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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EXHIBIT “G”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON,

Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CARSON CITY, AND THE HONORABLE JAMES TODD RUSSELL, DISTRICT JUDGE,

Respondents, and

THE STATE OF NEVADA, DEPARTMENT OF TAXATION,

Real Party in Interest.

Supreme Court Case No. 55228

First Judicial District Court
Case No. 09 OC 00016 1B

AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE STATE OF NEVADA IN SUPPORT OF THE DEPARTMENT OF TAXATION OF THE STATE OF NEVADA AND IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF AMICUS CURIAE

The Legislature of the State of Nevada (Legislature), by and through its counsel, hereby files its Amicus Curiae Brief in support of the Department of Taxation of the State of Nevada, which is the Real Party in Interest in this original action for a writ of mandamus. The Legislature's interest in this case is in seeing that the Legislature's intent in enacting the 1999 amendment to NRS 372.680 is given effect. The Legislature is filing its Amicus Curiae Brief under the authority of NRAP 29(a), which provides that the State of Nevada, or any officer or agency thereof, may file an amicus curiae brief in a case before the Court without obtaining the written consent of the parties or requesting leave of the Court.

SUMMARY OF THE ARGUMENT

Briefly stated, NRS 372.680[1] does not authorize or otherwise provide for a trial de novo in state district court on a claim for a refund of sales and use taxes because the Legislature amended the plain language of NRS 372.680 in Senate Bill No. 362 of the 1999 Legislative Session (S.B. 362) to govern actions for judicial review of decisions of the Nevada Tax Commission (Tax Commission) concerning such claims. The intent of the Legislature that NRS 372.680 should govern such actions for judicial review is evidenced by the plain language of the statute when read as part of the larger statutory scheme governing judicial actions concerning agency decisions.

Further, even if we assume for the sake of argument that the plain language of NRS 372.680 is not clear, the clear and consistent legislative history from 1999 confirms that the

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[1] NRS 374.685 is substantially the same as NRS 372.680 in all aspects relevant to this case. The arguments in this brief are meant to apply equally to NRS 372.680 and 374.685.

Legislature intended for NRS 372.680 to govern actions for judicial review of decisions of the Tax Commission pursuant to NRS chapter 233B. The Senate Committee on Taxation and the Assembly Committee on Taxation received uncontradicted and unquestioned explanations from knowledgeable and reliable sources that S.B. 362 would amend NRS 372.680 to govern such actions for judicial review, and thereafter, each house of the Legislature voted overwhelmingly to enact S.B. 362.

ARGUMENT

I. THE PLAIN LANGUAGE OF NRS 372.680, WHEN READ AS PART OF THE LARGER STATUTORY SCHEME GOVERNING JUDICIAL ACTIONS CONCERNING AGENCY DECISIONS, EVIDENCES THE LEGISLATIVE INTENT THAT NRS 372.680 SHOULD GOVERN ACTIONS FOR JUDICIAL REVIEW OF FINAL DECISIONS OF THE TAX COMMISSION.

The primary goal in construing a statute is to ascertain the intent of the Legislature in enacting the statute and to adopt an interpretation that best captures that intent.[2] As this Court has stated, "[w]e have long held that it is our duty to interpret statutes consistent with the intent of the legislature."[3] As to how the intent of the Legislature is determined, this Court has observed that "the plain meaning of a statute's words are presumed to reflect the legislature's intent in enacting the statute."[4] Therefore, the plain meaning of statutory language should be applied as written unless such a meaning violates the spirit of the act or leads to an absurd or

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[2] *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538 (2001).

[3] *Rose v. First Fed. Sav. and Loan*, 105 Nev. 454, 457 (1989). *See also State v. Schlein*, 854 P.2d 296, 299 (Kan. 1993) ("Interpretation of a statute is a question of law, and it is the function of the court to interpret a statute to give it the effect intended by the legislature.").

[4] *Anthony Lee R. v. State*, 113 Nev. 1406, 1414 (1997). *See also Wilson v. Valley Mental Health*, 969 P.2d 416, 418 (Utah 1998) ("When examining a statute we look first to its plain language as the best indicator of the legislature's intent and purpose in passing the statute.").

unreasonable result.[5] However, the words of a statute are not considered in a vacuum.[6] Each statute should be interpreted so as to be in harmony with the other statutes relating to the same subject, using the presumption that the Legislature enacted each statute with full knowledge of all other statutes relating to the same subject.[7]

Given these rules of statutory construction, we turn to the present language of NRS 372.680, which is the product of legislative amendments in 1999 pursuant to S.B. 362:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the

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[5] *Anthony Lee R. v. State*, 113 Nev. 1406, 1414 (1997).

[6] *City of Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. 1041, 1049 (2006) ("[P]articular words or phrases in an ordinance need not be read in a vacuum. The meaning of an ordinance's terms may be given context by the statutory scheme of which the ordinance is a part.") (footnote omitted). *See also State v. Smith*, 98 P.3d 1022, 1026 (N.M. 2004) ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.") (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05, at 165 (6th ed., rev. 2000)).

[7] *State v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295 (2000) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules or statutes. . . . [W]hen the legislature enacts a statute, this court presumes that it does so with full knowledge of existing statutes relating to the same subject.") (emphasis added and citations and quotations omitted); *Nevada Comm'n on Ethics v. Ballard*, 120 Nev. 862, 866 (2004) ("We interpret the statutes that comprise the ethics law according to their plain meaning and in the context of the entire statutory scheme, consistent with the spirit of the law.") (emphasis added and footnote omitted); *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449 (2005) ("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Further, it is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.") (emphasis added and footnote and quotations omitted).

> 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.) The plain language of NRS 372.680 governs an action on a claim brought by a claimant in district court within 90 days after a final decision on that claim is rendered by the Tax Commission. If NRS 372.680 were considered in a vacuum, it could be argued that the word "action" in subsection 1 is ambiguous. In a vacuum, the word "action" in subsection 1 of NRS 372.680 could mean an action for judicial review or, alternatively, it could mean a trial de novo. However, when the language of NRS 372.680 is read in the context of other applicable statutes, the plain meaning of the language of NRS 372.680 becomes clear.

One of the other statutes which, by its terms, applies to judicial actions concerning agencies is NRS 233B.130. NRS 233B.130(6) states that "[t]he provisions of this chapter [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 this chapter applies." (Emphasis added.) Thus, we know that IF the decision of the Tax Commission referred to in NRS 372.680 is a final decision in a contested case and IF NRS chapter 233B applies to the Department of Taxation (of which the Tax Commission is the head),[8] then the provisions of NRS chapter 233B are the exclusive means of judicial action regarding that case.

As to whether the decision of the Tax Commission referred to in NRS 372.680 is a final decision in a contested case, NRS 372.680 itself provides that the decision of the Tax

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[8] NRS 360.120(2).

Commission must be a final decision.[9] We then look to the applicable definition of "contested case" in NRS 233B.032 to see that "'[c]ontested case' means a proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . . ." Based on this definition, a proceeding governed by NRS 372.680 would be a contested case because, in accordance with the statutory language added to NRS 372.680 by the Legislature in 1999,[10] by the time the case was brought in district court, the legal right of a claimant to a refund of taxes would have been required by law to have been determined by the Tax Commission after a hearing.[11] Thus, the decision of the Tax Commission referred to in NRS 372.680 is: (1) a final decision; and (2) a final decision in a contested case.

As to whether the provisions of NRS chapter 233B apply to the Department of Taxation (of which the Tax Commission is the head),[12] we note that NRS chapter 233B governs "agencies" and that the applicable definition of "agency" states that "'[a]gency' means an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases."[13] The Department of Taxation falls within the ambit of this definition because it is a "department . . . of the Executive Department of the State Government

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[9] NRS 372.680(1). In addition, NRS 360.245(5) provides that "[a] decision of the Nevada Tax Commission is a final decision for the purposes of judicial review."

[10] As discussed in Part II, *infra*, in 1999 the Legislature added the language requiring that a final decision of the Nevada Tax Commission must precede the action in district court.

[11] NRS 360.245, 360.247 and 372.680.

[12] NRS 360.120(2).

[13] NRS 233B.020(1), 233B.031 and 233B.130.

authorized by law to make regulations or to determine contested cases."[14] Further, neither the Department of Taxation nor NRS 372.680 nor an action governed by NRS 372.680 is exempt from NRS chapter 233B.[15] In short, NRS chapter 233B applies to the Department of Taxation, to NRS 372.680 and to actions governed by NRS 372.680.

Based on the foregoing, we know that: (1) the decision of the Tax Commission referred to in NRS 372.680 is a final decision in a contested case; and (2) NRS chapter 233B applies to the Department of Taxation. Therefore, pursuant to NRS 233B.130(6), the provisions of NRS chapter 233B are the exclusive means of judicial action regarding that case. Further, if the provisions of NRS chapter 233B are the exclusive means of judicial action regarding that case, then the procedural and other requirements of NRS chapter 233B governing the adjudication of contested cases, as found in NRS 233B.121 to 233B.150, inclusive, govern the judicial action regarding that case. Finally, if the provisions of NRS 233B.121 to 233B.150, inclusive, govern the judicial action regarding that case, then the judicial action regarding that case is an action for judicial review pursuant to NRS chapter 233B. This result allows the plain language of NRS 372.680 to be read in harmony with the entire statutory scheme described in the preceding paragraphs.[16] Specifically, by reading the word "action" in NRS 372.680(1) as

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[14] NRS 360.090 (authorizing the Tax Commission, as head of the Department of Taxation, to make regulations), 360.120 (creating the Department of Taxation with the Tax Commission as its head) and 360.245 (providing for determination of cases by the Tax Commission).

[15] NRS 233B.039 (setting forth agencies, statutes and actions which are exempt from NRS chapter 233B).

[16] Although NRS 233B.130(6) refers to the provisions of NRS chapter 233B as the "exclusive means of . . . judicial action concerning[] a final decision" (emphasis added) of the Tax Commission, provisions such as those in NRS 372.680 may also govern the judicial action because, pursuant to NRS 233B.020(2), "[t]he provisions of this chapter [NRS chapter 233B]

referring to an action for judicial review, the language of NRS 372.680 is harmonized with the other statutory provisions in the statutory scheme. However, if the word "action" in subsection 1 of NRS 372.680 is read to mean a trial de novo in district court, then the statutory scheme described in the preceding paragraphs is in conflict. For this reason, the plain language of NRS 372.680 can and should be read, as part of the statutory scheme in which it is embedded, to govern actions for judicial review of final decisions of the Tax Commission pursuant to NRS chapter 233B.

II. THE LEGISLATIVE HISTORY OF S.B. 362 CLEARLY AND CONSISTENTLY SHOWS THAT THE LEGISLATURE INTENDED NRS 372.680 TO GOVERN ACTIONS FOR JUDICIAL REVIEW OF FINAL DECISIONS OF THE TAX COMMISSION.

As shown in Part I, *supra*, the plain language of NRS 372.680, read in the context of the statutory scheme in which it is embedded, governs actions for judicial review of decisions of the Tax Commission pursuant to NRS chapter 233B. However, if we assume for the sake of argument that the plain language of NRS 372.680 is ambiguous on this point, then we turn to the rules for interpreting an ambiguous statute. According to this Court, "[w]hen construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance."[17] As stated in the treatise *Statutes and Statutory Construction*, "the history of

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are intended to supplement statutes applicable to specific agencies." *See Mineral County v. Bd. of Equalization*, 121 Nev. 533, 536 (2005) ("[W]e conclude that the provisions of NRS Chapter 361 supplement, rather than preempt, the provisions of NRS Chapter 233B . . . . This interpretation is optimal because it permits harmonious construction of NRS Chapter 233B and NRS Chapter 361.") (emphasis added).

[17] *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302 (2006); *Clark County Dist. Att'y v. Eighth Judicial Dist. Court*, 123 Nev. 337, 345 (2007) ("Since the statute

events during the process of enactment, from its introduction in the legislature to its final validation, has generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act."[18] Consistent with the treatise, this Court has often determined legislative intent using the testimony and documentation provided to legislative committees.[19] Also, as noted by a California court, "legislative staff analyses of a measure may be used to discover legislative intent where . . . the analysis is in accord with a reasonable interpretation of the enactment."[20]

Turning now to the legislative history, NRS 372.680 was amended into its present form in 1999 pursuant to S.B. 362. S.B. 362, as a bill introduced in the Senate concerning taxation, was first referred to the Senate Committee on Taxation.[21] *Compiled Legislative History of SB362 — 1999* at 1. After the intent and effect of the bill was explained to the Senate committee, the bill was passed out of the committee and approved by the Senate on a 21-0 vote

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is ambiguous, we look to its legislative history to understand its meaning.").

[18] 2A Norman J. Singer, *Statutes and Statutory Construction* § 48:4 (7th ed. 2007).

[19] *See, e.g., Att'y Gen. v. Nev. Tax Comm'n*, 124 Nev. ---, 181 P.3d 675, 682 (2008) (using a memorandum provided by Patrick Pine, Executive Director of the Department of Taxation, to the Assembly Committee on Taxation); *City Plan Dev., Inc. v. Office of the Labor Comm'r*, 121 Nev. 419, 435-36 (2005) (using testimony provided by the Labor Commissioner to the Assembly Committee on Government Affairs); *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548-49 (2005) (using testimony provided by Mary Lau, Executive Director of the Retailers Association of Nevada, to the Assembly Committee on Taxation).

[20] *Am. Tobacco Co. v. Superior Court*, 255 Cal. Rptr. 280, 283-84 (Cal. Ct. App. 1989).

[21] The Research Division of the Legislative Counsel Bureau compiled a legislative history of S.B. 362 of the 1999 Legislative Session (hereinafter referred to as the Compiled Legislative History of SB362 — 1999), which is available on the Legislature's website at http://www.leg.state.nv.us/lcb/research/library/1999/SB362,1999.pdf. The pages of the Compiled Legislative History of SB362 — 1999 were numbered from 01 to 104 by the Research Division using Bates stamp numbers in the lower right corner of each page. When referring to page numbers in the Compiled Legislative History of SB362 — 1999, the Legislature is referring to these Bates stamp numbers from the Research Division.

without any specific remarks entered into the Senate Daily Journal. *Id.* at 1, 95-98. S.B. 362 was then transmitted to and introduced in the Assembly and referred to the Assembly Committee on Taxation. *Id.* at 1. Here the effect and intent of the bill was explained in even greater detail before the bill was passed out of the committee and approved by the Assembly on a 40-0 vote (2 excused) without any specific remarks entered into the Assembly Daily Journal. *Id.* at 1, 99-104. According to the legislative history of S.B. 362, there was not any opposition to the bill nor was there any disagreement concerning the intent or effect of the relevant provisions of the bill. While there were alternative ideas as to what the bill should provide in some instances, the bill was amended accordingly and approved with virtually universal support.

A. **Proceedings before the Senate Committee on Taxation.**

When S.B. 362 was referred to the Senate Committee on Taxation, the bill was in its "as introduced" form, and section 33, which amended NRS 372.680, read as follows:

> 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.

Id. at 62. As introduced, section 33 made two substantive changes to NRS 372.680. (Similar amendments were made to various NRS sections throughout the bill.) First, section 33 changed the procedural step preceding an action in district court from the mailing of the notice of the Department of Taxation's action upon a claim to the date of the final decision of the Tax

Commission upon a claim. Second, section 33 authorized the action to be filed in Clark County in addition to Carson City.

In response to questioning concerning the bill, Senior Deputy Attorney General Azevedo, representing the Department of Taxation, provided for the record an explanation of the purpose of the substantive changes in the bill. According to the minutes of the Senate Committee on Taxation:

> [Mr. Azevedo] 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.

Id. at 6 (emphasis added). Based on this testimony, every legislator at that committee meeting would have understood that the amendments contained in S.B. 362 would, and were intended to, provide for cases proceeding to a district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review.

The legislators had every reason to believe Mr. Azevedo's explanation of the intent and effect of S.B. 362. Mr. Azevedo worked for the Attorney General's Office and, in his capacity as a Senior Deputy Attorney General, he represented the Department of Taxation, so he spoke for the agencies which would enforce and administer these statutes and which should know these statutes better than any other agency. *Id.* at 4. Moreover, the legislators had no reason to doubt Mr. Azevedo's explanation. No one from the committee or the audience contradicted or even questioned Mr. Azevedo's explanation, despite the presence of several people who would have known if Mr. Azevedo was misstating the intent or effect of the bill. Specifically, Mr.

Azevedo's explanation was not contradicted or questioned by legislative staff, by Senator O'Connell, who was the sponsor of the bill, by David Pursell, who was the Executive Director of the Department of Taxation, or by Carole Vilardo, who represented the Nevada Taxpayers Association and who, as a proponent of the bill, had provided an overview of the bill to the committee earlier during the same hearing. *Id.* Shortly after Mr. Azevedo's explanation to the committee that S.B. 362 would provide for cases proceeding to district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review, the committee voted to pass the bill out of committee with various unrelated revisions. *Id.* at 6.

B. <u>Proceedings before the Assembly Committee on Taxation.</u>

When S.B. 362 was referred to the Assembly Committee on Taxation, the bill had incorporated the Senate amendment and so was in its "first reprint" form. However, the Senate had not revised section 33 (amending NRS 372.680), so in the first reprint of S.B. 362, section 33 appeared exactly as it had in the "as introduced" form of S.B. 362 and, therefore, section 33 as examined by the Assembly Committee on Taxation was identical to section 33 as examined by the Senate Committee on Taxation.

At the first hearing on S.B. 362 in the Assembly Committee on Taxation, legislative staff member Ted Zuend of the Fiscal Analysis Division of the Legislative Counsel Bureau provided to the committee a written bill explanation for S.B. 362. *Id.* at 20, 26-32. Mr. Zuend's bill explanation described section 33 (amending NRS 372.680) as follows:

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

Id. at 30 (emphasis added). Here Mr. Zuend expressly explained that section 33 (amending NRS 372.680) provided that "an action for judicial review" followed a decision of the Tax Commission and that "such action" could be brought in Clark County or Carson City. This is significant for two reasons. First, Mr. Zuend communicated to the members of the committee that section 33 would amend NRS 372.680 to govern an action for judicial review in a district court of a decision of the Tax Commission, not a trial de novo in a district court. Second, Mr. Zuend's explanation of the language of section 33 indicated that the word "action" in the phrase "the claimant may bring an action" meant an action for judicial review.[22] The legislators had every reason to believe Mr. Zuend, as the members of the Legislature regularly depend upon their legislative staff to provide accurate and unbiased analyses of legislation. Also, the legislative history of S.B. 362 shows that no one contradicted or even questioned Mr. Zuend's bill explanation at the hearing at which it was provided to the committee or at any other hearing.

At the second hearing on S.B. 362 in the Assembly Committee on Taxation, Assemblyman Anderson advised the committee that the Attorney General's Office had provided him with a memorandum concerning S.B. 362 and that he had provided that memorandum to Assemblyman Goldwater, the Chairman of the Assembly Committee on Taxation. *Id.* at 37. Chairman Goldwater thereafter "referred the committee to the memorandum from the attorney general regarding S.B. 362, on which action would be taken

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[22] Use of the word "action" to mean an action for judicial review is not unique to NRS 372.680. Significantly, NRS 233B.130(6) states: "The provisions of this 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 this chapter applies." (Emphasis added.)

next meeting." *Id.* at 39.

This memorandum from the Attorney General's Office, to which the members of the committee were referred by Chairman Goldwater and told that it would be the subject of upcoming committee action, contained a detailed and unequivocal explanation of the effects of the amendments in section 33 of S.B. 362 (amending NRS 372.680). *Id.* at 46-47. The memorandum began by identifying the sections of S.B. 362 to which it applied. *Id.* at 46. Specifically, the memorandum indicated that its analysis applied to sections 13, 26, 30, 33 (amending NRS 372.680), 36 and 41. *Id.* These sections all contained provisions amending the procedure preceding an action in district court or amending the venue options for an action in district court, or both. *Id.* at 57-64. The memorandum then continued in relevant part as follows:

> For all actions which are subject to the requirements of Chapter 233B of the Nevada Revised States, 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 [i.e., sections 26, 30, 33 (amending NRS 372.680), 36 and 41] 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 [of] 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).

Id. at 46-47 (emphasis added). This memorandum clearly and unequivocally communicated that the amendments contained in section 33 of S.B. 362 would, and were intended to, provide for cases proceeding to a district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review. Further, this memorandum was written and provided by Senior Deputy Attorney General Azevedo who, as previously discussed, the legislators had every reason to believe because he worked for the Attorney General's Office and, in his capacity as a Senior Deputy Attorney General, he represented the Department of Taxation. Thus, as previously discussed, Mr. Azevedo spoke for the agencies which would enforce and administer these statutes and which should know these statutes better than any other agency. Moreover, the legislators had no reason to doubt Mr. Azevedo's explanation as no one contradicted or even questioned Mr. Azevedo's explanation.

As a final note, when the Assembly Committee on Taxation voted to pass S.B. 362 out of committee, the committee took the advice Mr. Azevedo included in the memorandum, thereby further indicating that the committee both understood and gave consideration to the views expressed in the memorandum. *Id.* at 47. As Mr. Azevedo advised, the committee amended the venue provisions in NRS 372.680 to be consistent with NRS 233B.130(2)(b), thus making the venue provisions consistent among these statutes governing actions for judicial review of final decisions of agencies.

C. **Summary of the legislative history.**

The legislative history of S.B. 362 shows that knowledgeable and reliable sources explained clearly and consistently to the legislators that the amendments in S.B. 362 to NRS 372.680 would, and were intended to, provide for cases proceeding to a district court from the Tax Commission to be governed by NRS chapter 233B and to be in the form of a petition for judicial review. These explanations were provided by a senior deputy attorney general representing the Department of Taxation and by legislative staff. The legislative history also shows that no one at any hearing (or otherwise) contradicted or even questioned these explanations of the intent and effect of S.B. 362. Finally, after the legislators received these explanations, each house of the Legislature voted overwhelmingly to enact S.B. 362.

CONCLUSION

Based on the foregoing, the Legislature hereby respectfully requests that this Court interpret NRS 372.680 in accordance with the intent of the Legislature that NRS 372.680 should govern an action for judicial review of a final decision of the Tax Commission pursuant to NRS chapter 233B and not provide for a trial de novo in district court, and for this reason deny the Petition for Writ of Mandamus.

DATED: This 3rd day of March, 2010.

Respectfully submitted,
BRENDA J. ERDOES, Legislative Counsel

By: _____
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Legislature's Amicus Curiae Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the Amicus Curiae Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Amicus Curiae Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the Amicus Curiae Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This 3rd day of March, 2010.

Respectfully submitted,
BRENDA J. ERDOES, Legislative Counsel

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 3rd day of March, 2010, I served a true and correct copy of the document:

AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE STATE OF NEVADA IN SUPPORT OF THE DEPARTMENT OF TAXATION OF THE STATE OF NEVADA AND IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

by depositing the same in the United States Mail, postage prepaid, addressed to the following:

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An Employee of the Legislative Counsel Bureau

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	January 26, 2011

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

January 26, 2011 10:00 AM **Status Check: Status of Case**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Dameda Scott

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney
Shafer, Bradley J., ESQ	Attorney

JOURNAL ENTRIES

- As Mr. Brown, Plaintiff's counsel, is in trial and unavailable today, COURT ORDERED, matter CONTINUED.

2/3/11 10:30 AM STATUS CHECK

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	January 26, 2011

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

January 26, 2011 10:00 AM **Status Check: Status of Case**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Dameda Scott

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney
Shafer, Bradley J., ESQ	Attorney

JOURNAL ENTRIES

- As Mr. Brown, Plaintiff's counsel, is in trial and unavailable today, COURT ORDERED, matter CONTINUED.

2/3/11 10:30 AM STATUS CHECK

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	February 10, 2011

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

February 10, 2011 10:30 AM **Status Check**

HEARD BY: Gonzalez, Elizabeth COURTROOM: RJC Courtroom 14C

COURT CLERK: Dameda Scott

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
RAKOWSKY, VIVIENNE, ESQ	Attorney
Shafer, Bradley J., ESQ	Attorney

JOURNAL ENTRIES

- Colloquy regarding status of the case and issues. Documents presented to the Court which COURT ORDERED SEALED (see Vault Exhibit Form). COURT ALSO ORDERED, case DEEMED COMPLEX. COURT FURTHER ORDERED, SET Status Check.

3/15/11 9:00 STATUS CHECK

CLERKS NOTE: Minutes placed in A554970 and A533273 (DS 2/11/11)

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Filing	COURT MINUTES	February 10, 2011

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

February 10, 2011 10:30 AM **Status Check**

HEARD BY: Gonzalez, Elizabeth COURTROOM: RJC Courtroom 14C

COURT CLERK: Dameda Scott

RECORDER: Jill Hawkins

REPORTER:

PARTIES PRESENT:

Brown, William H.	Attorney
	Attorney
Doerr, Blake A.	Attorney
Pope, David J.	Attorney
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JOURNAL ENTRIES

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3/15/11 9:00 STATUS CHECK

CLERKS NOTE: Minutes placed in A554970 and A533273 (DS 2/11/11)

ORIGINAL

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

LITTLE DARLINGS OF LAS VEGAS, INC., et al. Plaintiffs vs. NEVADA DEPARTMENT OF TAXATION. et al. Defendants	CASE NO. A-533273 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

STATUS CHECK

THURSDAY, FEBRUARY 10, 2011

APPEARANCES:

FOR THE PLAINTIFFS:	WILLIAM H. BROWN, ESQ. BRADLEY J. SHAFER, ESQ.
FOR THE DEFENDANTS:	BLAKE A. DOERR, ESQ. DAVID J. POPE, ESQ. VIVIENNE RAKOWSKY, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

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

LAS VEGAS, NEVADA, THURSDAY, FEBRUARY 10, 2011, 10:40 A.M.

(Court was called to order)

THE COURT: Is there anybody here on anything except the live entertainment tax and my trial? Then let's talk about live entertainment tax issues.

(Pause in the proceedings)

THE COURT: Mr. Brown, thank you for being here. I'm sorry for the confusion last week, but in my court I try and always have local counsel here because I've had issues historically, not with anybody related to this particular case, totally unrelated case, but it was a big deal, and it caused some issues, and I'm trying to be really cautious now.

MR. SHAFER: I explained that to him, Your Honor.

THE COURT: And since he has other cases here, I think he's heard me say that before, but he was in a Federal Court trial, and, you know, they're important.

MR. SHAFER: Which I didn't know when I -- I thought from his staff that he was on another motion --

THE COURT: I thought he was in the building here, too.

MR. SHAFER: I did, too.

THE COURT: Which was why I made you guys wait while we tried to find him.

All right. I now have two status reports. Did everybody get both of them? I got yours and yours. Did

everybody get both?

MR. POPE: Yes, Your Honor.

THE COURT: And I have notes all over them. What do you want to tell me before I start trying to parse through the issues you guys think I have?

MR. POPE: First of all, Vivienne Rakowsky, Blake Doerr, and David Pope with the AG's Office on behalf of the defendants, Your Honor. Good morning.

MR. SHAFER: Brad Shafer and William Brown appearing on behalf of the plaintiffs, Your Honor.

THE COURT: Okay. So what do you want to do first?

MR. POPE: Well, if Your Honor's ready to --

THE COURT: I'm ready to tell you stuff.

MR. SHAFER: We're ready to listen.

THE COURT: If you want to argue about anything first, I'd be happy to do that. But I've got stuff written down. Okay. I think the --

MR. SHAFER: I didn't take this that this was argument on any motions. I took this --

THE COURT: Well, I'm trying to clarify where you are and get you on the right track so I can get you an ultimate decision. I think that's what you want me to do.

MR. SHAFER: Correct.

MR. POPE: That's correct.

MS. RAKOWSKY: That's correct, Your Honor.

THE COURT: Is that what you want me to do? That's why you gave me information, so that I could try and go through some of the history. And I appreciate the two boxes of documents at the AG's Office, especially with a DVD that assisted me in going through it in a quick fashion.

MR. SHAFER: Your Honor, the one other thing I wanted to add in light of what you just told the counsel in the last case is, as I'm sure, hopefully, that Judge Togliatti explained to you, we've got a five-year deadline in --

THE COURT: I know.

MR. SHAFER: Okay.

THE COURT: You're going to be done before then.

MR. SHAFER: Okay.

THE COURT: Your case isn't going to take that long.

MR. SHAFER: Okay.

THE COURT: How many depositions are you going to do, four?

MR. SHAFER: I've got -- yeah. Probably three, maybe four.

THE COURT: You guys aren't going to be that long.

MR. SHAFER: Right. And as we --

THE COURT: Once you get the documents, you're going to be good to go regardless of what documents they are.

MR. SHAFER: Correct. And, Your Honor, as I think we have indicated, I don't remember if to you, but certainly

to Judge Togliatti, I don't think anybody believes that a trial is going to be necessary. We -- I think everybody believes that this will be cross-motions for summary judgment.

THE COURT: I believe it is going to be what I call an evidentiary hearing that does not necessarily include the presentation of witnesses --

MR. SHAFER: Okay.

THE COURT: -- but does include the presentation of evidence and does include a lot of argument and connecting the evidence to the argument. That's what I perceive this to be. But Judge Togliatti may have had a slightly different idea, but that's what I look at it. Cross-motions for summary judgment maybe. I think it's going to take a little bit more of an evidentiary issue to get through some of the issues.

MR. SHAFER: Okay.

THE COURT: Okay. Let me go first to the separation of powers issue, because I think that is an easier thing for me to handle. That issue is currently moot because Judge Togliatti made the factual and legal determination that it was not appropriate to issue injunctive relief at this time, so she didn't have to get to the issue of whether there's a separation of powers. And so I'm not going there, either. If there comes a time where you want to renew your preliminary injunction request and have new information or new evidence or arguments that you want to raise, I will certainly address all

of the issues that are relevant in a ruling that I make.

MR. SHAFER: Thank you, Your Honor.

THE COURT: Did I say that in a way that you got my hint?

MR. SHAFER: Absolutely, Your Honor.

THE COURT: Okay. Let's go to the discovery issue. First, do you believe that Judge Togliatti gave you back everything that you had submitted to her in camera? Because she asked me on Tuesday -- she thought she might still have some stuff. Do you think she has more than what I handed you when you were here at my last hearing?

MS. RAKOWSKY: We actually turned the envelope back over to you without reopening it, Your Honor.

THE COURT: Is that this one right here?

MS. RAKOWSKY: Yes.

THE COURT: Okay. I've opened it now. But, I mean, do you think Judge Togliatti has anything else that you submitted in camera to her that wasn't in the materials I handed back to you that you've now handed back to me?

MS. RAKOWSKY: May I take a look, Your Honor?

THE COURT: You may. I added something. Hold on. Let me take out what I added.

(Off-record colloquy - Court and Marshal)

THE COURT: I added something for my ease of transportation last night.

(Pause in the proceedings)

THE COURT: Do you think Judge Togliatti has anything else?

MR. DOERR: We do not.

THE COURT: Okay. Good. Then I will assure her that she has completed her responsibilities on this case and may go back to just being the Chief Judge.

MR. POPE: Thank you, Your Honor.

THE COURT: All right. I have a concern, and this is a concern I will express, and yours is not the first case where I've expressed this. I have a concern when a party in litigation takes a position in one court and takes another position in a different court. And I will tell you what my concern relates do, and I'm not going to say you don't have a chance to explain or try to convince me you didn't do this.

It appears that there is a position that may have been taken at least at one point in time before the Ninth Circuit that refunds could not be provided unless identification of customers could be provided by the plaintiff entities. That seems to me to be inconsistent with the positions that you're taking in this litigation, and so I'm just telling you that's a concern for me and it's going to be a concern for me that we're going to have to address at some point in time. I am not saying at this time that there's any estoppel or waiver issues that have impacted, because I

haven't had enough briefing on that particular issue to deal with it. But it is an issue that I anticipate will be one that we will talk about at some later point. I'm giving you the warning now so nobody blindsides you later, okay.

MR. POPE: Thank you, Your Honor.

THE COURT: And we go to what seems to be my next issue. There is a definition of "taxpayer" in the statute, and this is why I'm saying what I just said. And the definition of "taxpayer" appears to me to be an entity that is actually the person collecting the tax and distributing or remitting the tax to the State. Whether that means it's really the taxpayer or not is a whole different group of issues, but that's how the legislature has defined "taxpayer," which in my mind is the entity who is actually the remitter of the tax. That may also raise some issues for us as we go through this process.

In examining the spreadsheet that the Discovery Commissioner had previously ordered be produced in its redacted format I believe the production of that document at a minimum in a legible form, which means that gray column has to be converted to something that's not so gray so it can actually be read, is critical, and that needs to be done on an immediate basis. The reason I say that is my calculation that we did was that there was above 80 percent in that first category of remitters of where the tax funds were coming from,

and that I think is an important consideration as part of the discovery that must be done in this case.

With respect to the confidentiality that is included in NRS 368A.180 there is an exception to that provided in the second subsection where there is testimony or production of records that need to be made by the Board as part of a proceeding. This clearly is a proceeding, and it relates to this particular taxpayer. So any -- or, I'm sorry. I'm going to try and use the term "remitter." So those records that relate to these remitters must immediately be provided, including the Department's internal records related to this remitter.

With respect to other remitters I do think there is a different argument that applies, and there will need to be redactions of the identity of those remitters. But there is a method that you're going to have to propose on behalf of the State which you think adequately protects the interests of the State and those remitters, but provides the financial data that is included in those reports so that we can address that. Because I went through and looked at the chart, and I was trying to figure out how the Summerlin Community Association could be what it was designated as in the spreadsheet, and I couldn't figure out how that could possibly be. So I have a number of concerns about the assignment of categories by the Department. But that example was not a significant enough

amount of money to deal with some of the other issues we were looking at, so I just use that as anecdotal, because I don't think Summerlin Community Master Association would be offended that they paid a small live entertainment tax on behalf of somebody else.

But my concern is we have to provide a method for the plaintiffs to be able to identify other than the calculation I did that it's about 80 percent to what you attributed as the first category on that spreadsheet. We have to give them the backup data. And I am open to redactions of identifying information for those remitters, but it's got to -- we've got to produce it and able to get to the end of what I have to do here. Because they're going to argue that given the amount that is being attributed to the first category on your spreadsheet that it's clearly -- it's clearly improper and that I need to make a separate determination as to whether there is -- it is constitutional as applied. Whether it's constitutional as written is a different issue.

Do you understand what I'm saying?

MR. DOERR: I do. I think maybe a clarification of the spreadsheet is in order here.

THE COURT: That'd be good. I also have a concern -- wait. Let me hit the other concern. I have a significant concern, and the lawyers who are here all the time in Business Court will tell you this is one of the things that gets me

going, when we start with a spreadsheet and then we decide there's a problem with it because we have either a math error or a transposition of numbers or the data was incorrectly entered or whatever, it really throws me for a loop, and I generally at that time order every piece of backup information you ever had produced. So that is also of concern to me. And I certainly understand the explanation that there are audited issues and that there are certain transpositions that may have occurred, but that is a significant concern to me when we have different versions appearing.

Okay. Now for your clarification.

MR. DOERR: Well, and --

THE COURT: Because I've finished my notes.

MR. DOERR: Okay. I really want to address both of your concerns. The first concern -- and you said you've done a calculation of 81 [sic] percent. I mean, I think it's kind of -- I'm not sure what you're looking at, because there are --

THE COURT: That totals in the last column and the total at the bottom.

MR. DOERR: Well, I think that percent -- that percentage you're looking at is confusing because that's only -- well, number one, that's only the group of 10 percent taxpayers who remit to the Department. The second page is the 5 percent of taxpayers that remit to the Department, and the

total on the second page, there's a component of this tax that is not remitted to the Department. In fact, the majority part of this is remitted to the Gaming Control Board, the Gaming Commission.

THE COURT: For those people who have the gaming entities.

MR. DOERR: That's correct. So I'm not sure what numbers you took to get the 80 percent, but --

THE COURT: I used the one on the bottom of the first page to get to my 80 percent number.

MR. DOERR: So that would be only the 10 percent taxpayers who remit to the Department.

THE COURT: I understood that.

MR. DOERR: There's another -- the 5 percent who remit to the Department are also people who came under the live entertainment tax when it was enacted and changed from a casino entertainment tax to the live --

THE COURT: But even if I'm using that number and adding it to the number on the first page, I'm still at a very high percentage for that first category you have on the spreadsheet.

MR. DOERR: Well, "high" is a relative term.

THE COURT: I understand. Which is why I used it as a relative term. Because it's certainly no determinative at this point of anything. It's just a discovery issue for me.

MR. DOERR: Understood.

THE COURT: And that's all I'm dealing with today is a discovery issue.

MR. DOERR: Right. Now, let me address the sort of -- the taxpayers in that group, in the first group.

THE COURT: Are they taxpayers, or is it the people who actually -- the customers? See, that's where the Ninth Circuit issue is really going to be an interesting discussion.

MR. DOERR: You know, we filed a motion regarding the claims for refund and whether they're even appropriate to discuss at this time. And so this issue may be moot, depending upon how that comes out.

THE COURT: It may.

MR. DOERR: Regarding those taxpayers, some of them are plaintiffs in this case, and some of them are not. We've always been willing to produce -- in fact, they said that they didn't want their own records, that they had them, and the Discovery Commissioner --

THE COURT: That's why I included the internal records that you've done related to their submission. It's because you don't need to give them their reports if they say, you know, I've got my report, I don't need you to give it to me.

MR. DOERR: And in fact the Discovery Commissioner said, well, look, these -- even though they're plaintiffs'

they don't necessarily want you to give the other plaintiff your information. And they eventually said, well, we don't really need our own information, we want to see what -- you know, what the groups have paid. And there were some on there where they just wanted to -- they were asking the judge to verify that what was on the larger list weren't actually in fact gentlemen's clubs under --

THE COURT: The larger list being the --

MR. DOERR: Yes.

THE COURT: -- DV15 through 18.

MR. DOERR: That's correct, uh-huh.

THE COURT: Because the master -- Sun City Summerlin Community Association is clearly not a gentlemen's club; right? We'd all agree it's not a gentlemen's club?

MR. DOERR: It's not listed in -- under a gentlemen's club.

THE COURT: Yeah, I know. I can't understand how it's listed in the group it's in, but --

MR. DOERR: Well, I'll -- let me explain to you that those are done by what's called the NAICS code, North American Industrial something code. That is when they come in -- when a proposed business owner comes into the Department to tell them what they do, the Department assigns it a code based on this list.

THE COURT: And it's the what I'm calling the

remitter who makes that selection of what category they'll be in, and somebody screwed up when they decided that Sun City Summerlin Community Association was a drinking place, alcoholic beverage.

MR. DOERR: Well --

THE COURT: And it probably wasn't you guys, but somebody made a mistake, because that's not what they do.

MR. DOERR: Well, if they -- if the Association owns a bar or restaurant that has live entertainment, that could be the explanation for that.

THE COURT: That could be why they chose that code.

MR. DOERR: It could be.

THE COURT: It could be, but that's probably not an accurate code for them to have chosen to tell you was their main business.

MR. DOERR: We don't -- you know, we don't --

THE COURT: And you don't question when they tell you.

MR. POPE: That would be their classification for the Department's purposes

MR. DOERR: And that's the way that the list was put together.

THE COURT: But the whole -- the whole Taxation Department isn't going to calculate -- to determine that Sun City Summerlin Community Association is a drinking place,

alcoholic beverage place. I mean, they're not really. That's not their business. And you -- don't you collect other taxes from them as a business?

MS. RAKOWSKY: At the time that they opened they did own a bar and restaurant up there.

THE COURT: I'm not saying they didn't own a bar and restaurant.

MS. RAKOWSKY: And that's probably why they were classified --

THE COURT: They may well have owned a bar and restaurant.

MS. RAKOWSKY: And that's probably why they were classified in that, because they did have a restaurant going up there.

THE COURT: Okay.

MR. POPE: I'm not sure, Your Honor, what taxes are collected from them. It could be [inaudible] sales and use tax.

THE COURT: And I'm not concerned with all the taxes. I'm just saying when I looked at this I went, hmm, and it was one of those things that I go, yeah, that just doesn't sound right. There were some others that I had to ask my male staff members about, and they were able to explain most of them for me, because some of them I didn't understand. But they did. They understood.

MR. DOERR: We didn't, either, Your Honor. In fact, when we were given the list from our client we -- you know, I went through the list and I thought, well, this sounds like it could be, what is this business. I would call the client, and they'd say, well, this is what we have in our records, here's their location. And I determined that that could not be a gentlemen's club given the location. So I did that.

THE COURT: Because of certain zoning and licensing restrictions.

MR. DOERR: I also wanted to explain sort of the error in the spreadsheet.

THE COURT: Yeah.

MR. DOERR: The plaintiffs here asked for tax records for fiscal year beginning in '03, and I got the information from the Gaming Commission and from the Department, and I gave them that request. Well, there was no live entertainment tax in fiscal year '03, so Gaming -- but there was a casino entertainment tax --

THE COURT: Right.

MR. DOERR: -- so Gaming had records.

THE COURT: The old cabaret tax.

MR. DOERR: So when I got the information from the Gaming folks, the first year that they gave me I put under the first year that the Department gave me. So I really just transposed those numbers.

With respect to what has been reported as the Department's numbers there was no -- in other words, I got no backup information from Gaming because that's not how they -- well, that really wasn't what was asked for.

THE COURT: No, it's not.

MR. DOERR: And so it was really just a shifting of the column that included a fiscal year that really isn't part of this claim. And the plaintiffs have brought up, and this bears explaining, too, that there was a document produced by the Department, it's a published document, where the numbers on the sheet that I've prepared aren't the same as the numbers on the Department's record. And that's why I created the percent error sheet. And what we did is we said, well, we don't think -- he's going to depose people from the Department who can tell him why there would be changes from what the Department receives as gross receipts from the taxpayers to get to the number that's netted out in the report that's prepared.

We looked at that over the six or seven years, and it's a very small percent. And we said, look, add 1 percent to the figures for those taxpayers, take that, assume it's yours, we don't think it came from there, but those are -- those come out, and, you know, if your argument is targeting or it's a small group, I don't think 1 percent -- he's going to be able to depose the witnesses who can explain why there's

reductions from the numbers we produced to the numbers that are produced at the end of the year. And part of that is in the way they asked for it.

THE COURT: I understand what you're saying.

MR. DOERR: He asked for what the Department receives.

THE COURT: And I'm not saying there's any fault in it.

MR. DOERR: I understand that.

THE COURT: I'm just saying it's one of those things that typically bells go off in my head that says there's an issue.

MR. DOERR: I completely understand that. And we have -- you know that the discovery in this has sort of had a history, and, you know --

THE COURT: Okay. What else do I do?

MR. DOERR: Well, Judge Togliatti -- we sort of -- she followed this because she -- she was the judge in its evolution.

THE COURT: Yes.

MR. DOERR: And so I just wanted to -- I think that actually the plaintiffs kind of understand what we just told you, and so --

MR. SHAFER: Your Honor, could I make a comment?

THE COURT: Yes.

MR. SHAFER: Thank you.

THE COURT: Since I made you fly here from Michigan.

MR. SHAFER: Glad to do it.

THE COURT: There's no snow here.

MR. SHAFER: Sixth time on this motion, but --

Your Honor, the way that this all started, as Mr. Doerr explained to you, in their response -- in their reply to my response to their motion for summary judgment, which Judge Togliatti dismissed without prejudice, they attached two charts, okay. And so I asked discovery in regard to what is the backup documentation for this so that I can challenge the numbers and I can look at the numbers.

The chart you're looking at was not the first chart.

THE COURT: The chart the Discovery Commissioner ordered produced?

MR. SHAFER: Correct.

THE COURT: Yes.

MR. SHAFER: But you have to understand --

THE COURT: And for the record, that's DV1194 and 1195, I believe.

MR. SHAFER: I don't know which one you have, because they produced the first chart, then they were here at a hearing, I pointed out to Judge Togliatti that there were mistakes in the chart. Then they went back, then they did another chart, which is probably the one that you're looking

at.

But, Your Honor, what you have to understand is Mr. Doerr acknowledged to you two times that chart was not prepared by the Department.

THE COURT: No. He said he did it.

MR. SHAFER: That's right.

THE COURT: I know.

MR. SHAFER: And if I don't know what the backup documentation is, I have to depose him to figure this out.

THE COURT: We're going to avoid that.

MR. SHAFER: I want to.

THE COURT: We're going to try and avoid that. But I also have to find a way to try and honor at least the purpose of --

MR. SHAFER: Understand.

THE COURT: -- NRS 368A's confidentiality even though it appears to me that the records are directly involved in this action or proceeding. So I have to come up with a way to be able to carry out the procedures or at least some ability to have confidentiality for the remitters that are not parties to this case.

MR. SHAFER: Yes. And, Your Honor, I will explain to you what I explained to Judge Togliatti probably four times. I'm an officer of the court. You can give me documents that I am precluding from --

THE COURT: Only if I give you an attorney eyes only agreement. And I haven't decided to do that yet.

MR. SHAFER: Okay. But all I'm saying, Your Honor, is that I have offered to Judge Togliatti, and I'll offer the same thing to you, I will file every pleading under seal, we can have the hearing under seal, I don't care. I mean, you know, I'm not trying to put --

THE COURT: I'm not going to seal the hearing.

MR. SHAFER: Okay. All I'm saying is --

THE COURT: We will find a way --

MR. SHAFER: Okay.

THE COURT: We're going to find a way --

MR. SHAFER: Thank you.

THE COURT: -- to carry out the purpose of 368A, which the legislature said they wanted this information to be confidential as much as possible, and yet to also provide you the records and files related to 368A.180(2)(a) which I believe are directly involved in this action or proceeding.

MR. SHAFER: Thank you, Your Honor.

MS. RAKOWSKY: Your Honor --

THE COURT: Yes.

MS. RAKOWSKY: -- 368A.180 specifically says the Board, Department, and any employee of the Board or the Department may not be required to produce any of the files -- any of the records, files, and information for the inspection

of any person for use in any action or proceeding.

THE COURT: And then you go to subsection (2).

MS. RAKOWSKY: Right. And it gives five places where you can --

THE COURT: And I have found that the records are directly involved the action or proceeding. But I also want to try and carry out the purpose of the statute even though I think that these records are directly involved in the purpose of this action or proceeding to try and insure the confidentiality of what I am calling remitters of the tax so that we can try and protect that. Because I understand that was the purpose that was expressed by the legislature, but I believe that the records are directly involved in the issue that I have to ultimately decide.

MS. RAKOWSKY: And you're -- but when you say "directly involved," that refers to taxpayers who are directly involved, because it's different than the federal statute.

THE COURT: I know that's your interpretation. I don't think that is what it says.

MS. RAKOWSKY: But other gentlemen's clubs have chosen not to become directly involved --

THE COURT: I know that.

MS. RAKOWSKY: -- so why should their information be dragged in here?

THE COURT: Some of them are waiting, because I know

from other cases I've had in Business Court they're holding the LETs and fund as part of certain transactions that haven't gone to either the buyer or seller because they're in a special fund that they're waiting to see what the resolution is. And I've got no idea why they're doing that. I just know that from other cases I've handled and in particular the Olympic Garden-Sapphire separation, I think.

MR. SHAFER: Your Honor, just to let --

THE COURT: Wait, wait, wait.

MR. SHAFER: Oh. I'm sorry.

THE COURT: I'm on Mr. Doerr.

MR. SHAFER: I'm sorry.

THE COURT: I'm trying to go --

MR. DOERR: Your Honor, part of the reason that the larger multi-page spreadsheet was produced --

THE COURT: Which is DV sealed 15 through 18; right?

MR. DOERR: Correct.

THE COURT: I just want to make sure that --

MR. DOERR: That's correct.

THE COURT: Okay.

MR. DOERR: Mr. Shafer was concerned that in some specific groups -- and I'll let him tell you, because they're on a sheet that he asked to be included where he marked four groups where he could be assured that a gentlemen's club had not been included in that group or excluded from the group in

the consolidated spreadsheet. And so I -- if we could ask you to have that review either now or --

THE COURT: Which, this one?

MR. DOERR: -- at some other time where you just look at the rest of the people listed on the thing and say, I don't believe any of these are gentlemen's clubs --

THE COURT: Well, that was what I -- are you saying just the first category?

MR. DOERR: Yes.

THE COURT: As opposed to the Sun City Summerlin Community Master Association which we talked about?

MR. DOERR: Well, in fact, I believe it was the category that's perfume shops, it's the category that's gift and novelty shops. And what was the third?

MR. SHAFER: Your Honor, the request goes a little bit beyond that. It's just not whether there's a gentlemen's club in there, there's a provision under the statute that allows people to petition for an exemption. And the history of this is that -- without arguing everything all over again, it's like this was a general tax and then they exempted everything out except the adult gentlemen's clubs. But it turned out --

MR. DOERR: The State can exempt what it believes --

MR. SHAFER: -- it turned out that some of the exemptions weren't broad enough, so in 2005 they had to add

some additional exemptions to make sure they were getting people out, like, for example, NASCAR, and I believe 2005 was also when they put in the Minor League Baseball exemption.

So what the Court will see is that there are some times when there are business categories that are paying during some years, but not paying in others. And I'm trying to find out why that is, because I believe -- you know, they petitioned for exemptions --

THE COURT: I'm not making that decision. That's not my job. That's a discovery issue. You're going to find out about categories and whether certain -- for instance, we can probably agree that the Western Folk Life Center, if arguably they were on this list, is not a gentlemen's club.

MR. SHAFER: You can. I have no idea what that is, but I'll agree with you, Your Honor. I don't know what it is.

THE COURT: It's in Northern Nevada, and it's my recollection that it's one of those performing arts kind of things. But, you know --

MR. SHAFER: I just wanted to clarify what --

THE COURT: I'm not going to go through and tell you which of the guys on this list are or not gentlemen clubs. I had to ask my male staff about some of them that were in the first category.

MR. DOERR: Well, I think one of the questions Mr. Shafer has is is there any gentlemen's club on the longer list

that wasn't included in the short list. I -- you know --

THE COURT: Oh. Is that what he's asking me?

MR. DOERR: Yes.

THE COURT: Is that what you're really asking me?

MR. SHAFER: Well, no --

MR. DOERR: I'll represent that the answer is no, that I went through the list. That was the purpose of producing the larger spreadsheet.

THE COURT: I can tell you from looking at the totals that the total on DV1194, if it is accurate, is the same total for the category that is the first category on DV sealed 15 through 18, which is characterized, not by me, but by other people, as gentlemen's clubs. And I will tell you it does not under the NAICS description say a gentlemen's club anywhere in there.

MR. SHAFER: Your Honor, and that's why I stood up a couple minutes --

MR. DOERR: Well, in fact --

MR. SHAFER: That's why I stood up a couple minutes ago, because I gave Judge Togliatti a copy of the chart that has a number of the categories underlined. I was trying to limit it down as much as possible what I was asking for, you know, so that she would have to do less work on this. But what I want the Court to understand is my only concern was not just whether it's a gentlemen's club or not. I have two other

concerns, one of which, are they throwing other type of adult businesses in there that are subject to the tax, adult bookstores could be subject to the tax because they could have live entertainment inside and they're not a strip club.

In addition, I want to know why some of these categories -- why people were paying a tax then all of a sudden they're not. And there are three potential explanations for that, Your Honor. One is that there were regulations enacted after the 2003 statute that created some exemptions, that in 2005 there were additional statutory exemptions and some of the regulatory exemptions were then codified in the statute, and, third, it might have been somebody that just petitioned to be exempted out. And if they're exempting out everybody under the sun that asks to be exempted as long as they're not a strip club, that kind of goes towards my argument.

THE COURT: Or they could have gone out of business.

MR. POPE: Your Honor --

MR. SHAFER: Could have.

MR. POPE: -- exemptions are statutory.

MR. SHAFER: Don't know.

MR. POPE: And in 2003 there was a rush to create some revenue, so the statute was enacted.

THE COURT: Sort of like this session, huh?

MR. POPE: Then there were regulations -- then there

were regulations that were enacted, and then a lot of those regulations became part of the statute in 2005. All that's public record.

THE COURT: And I'm not worried about that. I understand it's going to be a subject of discussion during depositions and you're going to try and establish there's been an arbitrary and capricious application, and we'll deal with that if you get some information that you think supports that. But if what you're asking me is are those entities that are listed in the first category of DV sealed 15 through 18, the total matches on what has been called gentlemen's club on DV1194, although the description "gentlemen's club" does not appear anywhere on DV sealed 15 through 18, because you came up with the term "gentlemen's club."

MR. DOERR: Well, in fact, gentlemen's clubs isn't codified under the NAICS. So the gentlemen's clubs had different NAICS numbers. I got all the information from the Department and sorted it out to determine which of the NAICS numbers were gentlemen's clubs, and I separated that out. And I know that that's what he wants verified, and that was the purpose preparing that second sheet, the larger sheet.

THE COURT: If you want, I can ask my assistant, Dan, to go through this list and tell me if there's any other gentlemen's clubs on here, because he would be the one who knows.

MR. DOERR: I think that is what he's wanted. I think -- that's what I understood his question to be.

THE COURT: I mean, because I don't know that, and I'm not going to know. But Dan would be able to figure it out, and he'd love to have that assignment.

MR. SHAFER: I understand, Your Honor. But I would really like to articulate my own argument, as opposed to having the State of Nevada do it.

MR. DOERR: Well, I think his argument is changing now in front of you than it was before.

THE COURT: His argument is changing, absolutely.

MR. DOERR: And that's why I'm trying to clarify what I understood when we came in here.

THE COURT: Well, and I did what I thought was the appropriate thing. And if there is something else that needs to be done as you go through the process of discovery, I have decided that your case is complex, and I will be handling all of your discovery disputes without the necessity of your going to see the Discovery Commissioner.

If you could do whatever flag in the system says that, Dimita.

THE CLERK: Yes, Your Honor.

THE COURT: So I think the initial thing that you wanted me to say was how are you going to get the backup information you need to show that this is unfairly aimed at

the strip clubs.

MR. SHAFER: Correct.

THE COURT: I think we've come up with a way, although it is not final, because I want the State to make a proposal as to the methodology for the redactions to protect the confidentiality to the extent possible of those who are remitters in the first category.

MR. DOERR: Okay. We can come up with --

THE COURT: And I'm looking for suggestions from you, because there are ways to do it, a number of them, and I don't know if you guys have a good solution to that.

MR. POPE: I just still had a question, Your Honor. What documents is it that you have found that are directly related and what do you consider backup?

THE COURT: The directly related is the source information that is provided to the State of Nevada that supports the tax calculations for the remitters of the amount of tax they're remitting for those entities who are in the first category on DV sealed 15 through 18.

I am not ordering DV sealed 15 through 18 to be produced in its entirety. My request is that we figure out if there is a way to redact the category you have called LET taxpayer so that those names of those entities do not appear. That will require us to assign an identifier for each of the redacted remitters so that you can refer to them as remitter

identification. And I'll tell you we do this in healthcare cases where I have doctors who are fighting over their practice and I have to deal with patient issues. We assign patients a number or a letter, and then when we refer to patients as part of the discovery they all know who they're talking about, because they're talking about Patient 727, and they can talk about the treatment or billings related to Patient 727 intelligently. I know that Patient 727 is an individual I've ordered some confidentiality protection to. I have a backup if I ever have to get to there as to that person's actual identity. But when we talk about it in front of the jury or in a public setting, we have found a way to protect that identification. Typically I order that on an attorneys' eyes only basis. I have not gotten to that point yet. I'm looking to you to make suggestions as to ways you think the remitters' identification can be protected, but the backup information, the reporting from those remitters that is supplied to the State of Nevada and any documentation the State does, spreadsheets or charts or whatever you do to calculate whether those are appropriate -- because you have auditors look at it to make sure it's right --

MS. RAKOWSKY: Your Honor --

THE COURT: Yes.

MS. RAKOWSKY: -- I'm sorry. How about 49.025, which does not permit a report to be -- to be given in this

discovery for as far as tax goes?

THE COURT: Hold on. Let me go to NRS 49.025 with you.

MR. POPE: To go along with that, Your Honor --

MS. RAKOWSKY: And that privilege belongs to that taxpayer, so we have to write to every one of those taxpayers and get their permission to divulge their stuff on this case.

THE COURT: Which is why I have made a determination that protecting the confidentiality of those remitters, as I'm calling them, because I think you have used the term "taxpayer" incongruously in other pleadings, that in order to carry out the purpose of NRS 368A.180, I certainly understand your position, but it's my intention to protect the confidentiality of the identity of those remitters but to provide the factual information that is needed for me to make a determination as to the constitutional of the live entertainment tax.

MS. RAKOWSKY: And, Your Honor, can I get -- not one time has Counsel actually said why he needs individual taxpayer information of a category of gentlemen's clubs who are saying that the live entertainment tax is unconstitutional, because it singles out live entertainment tax. So what difference does it make what Deja Vu pays or what -- or what Little Darlings pays?

THE COURT: He's not going to find out what each of

them pay. He's going to find out what Remitter A pays, what Remitter D pays, what remitter F pays, but he's not going to find --

MS. RAKOWSKY: Why individually, Your Honor?

THE COURT: Why individually? Because I think it is important given some of the concerns related to the math error or other error that we had on the chart that we have that backup documentation so an appropriate calculation can be made to insure that the information that is being provided is accurate so that when I make a determination, regardless of what that determination is, all of you can go to Carson City with the right record for them to then make a decision as to the appropriateness.

MS. RAKOWSKY: Thank you, Your Honor.

THE COURT: You understand what I'm saying?

MS. RAKOWSKY: I get it.

THE COURT: I'm trying to carry out the confidentiality, and I certainly understand there's an issue. And the other option, and I hate this option because I've had to do it before, is we've got to write to every one of them and ask their permission and let them all come visit with us. And while they all come on the taxicab case, and I'm sure that Mr. Brown will be on the other side of the room when we're here on the Taxicab Authority case, I don't think you could get them all to agree to anything, because they don't all

agree, and they're all on the same side of that room all the time.

MR. POPE: Your Honor, if I can jump in here just for a second. I think --

THE COURT: Yes.

MR. POPE: -- part of the reason for the categories was because if you have fewer taxpayers, a description of that taxpayer and what they do identifies the taxpayer, and then if you have their numbers, you can match them.

THE COURT: What numbers?

MR. POPE: Their reporting numbers.

THE COURT: Their revenue numbers?

MR. POPE: Yeah. The tax return information is one of the more confidential items, and you can back into whose that is by knowing --

MR. DOERR: Who it isn't, because there are eight of them, eight of that group --

THE COURT: Not on this list there's not eight.

MR. DOERR: Well, there's eight plaintiffs. There's more than that on the list. So if they take their eight numbers out, they're left with a handful of numbers that in their industry we believe conceivably they could determine whose those numbers were.

THE COURT: So part of your proposal of how we produce that information may include a restriction on who that

information is disseminated to, what I typically call an attorney eyes only, which I sometimes call a highly confidential, and then it depends on how you want to structure that disclosure. And my goal, and I don't know how you want to achieve this, because I'm leaving it in your hands because you know the documents and the reporting better than I do, is to find a way that the confidentiality of the remitter is protected --

MR. DOERR: Okay.

THE COURT: -- but the backup documentation is provided so that I can then make a determination with the aid of that information which appears to be directly involved in this action or proceeding in my opinion is available, you're able to do whatever discovery has to be done, you can then file whatever briefing you think is appropriate. If I decide that I need to hear some evidence and argument or you guys stand up there and show me the evidence as we're going, I can then make an appropriate determination so you all have the adequate record you need to go to Carson City to have them decide whether I was right or wrong. But I want you to all have an adequate ability to get to that point, because this case has been around for a long time, and we need to get rid of it.

MR. DOERR: I understand. And I think we -- I think we can come up with something. And if there's a way --

THE COURT: And I'm giving you --

MR. DOERR: -- we determine we cannot do that, we will come back to you.

THE COURT: Then we're going to talk. Let me give you a status check before you leave.

MR. DOERR: I wanted to -- I wanted to go back to the error again. I want -- I want to be clear that the numbers that we're coming up with, the error had nothing to do with those numbers, because it was really a transposing of the Gaming's number, which is at the bottom of the list, so the total line moved over.

THE COURT: And nothing I'm saying today has anything to do with gaming, just so we're clear.

MR. DOERR: Well, that -- that was the cause of the error --

THE COURT: That's a huge other issue.

MR. DOERR: -- so the numbers -- the gaming numbers actually didn't change at all, they were simply transposed across the row. And the change was to really just transpose the row back. So --

THE COURT: And those are errors that happen all the time in practice. Not that you make them all the time, but they happen in practice all the time.

MR. DOERR: I said it was my mistake. When I realized it, I produced a new sheet immediately.

I want to just go back for a minute to you actually offered to have your law clerk look at the --

THE COURT: No, not my law clerk --

MR. DOERR: I'm sorry.

THE COURT: -- my assistant. My law clerk wouldn't know them.

Could you go get Dan.

Have you guys met Dan?

MR. DOERR: We've spoken on the phone.

THE COURT: You want to meet Dan.

MR. SHAFER: Is Dan being inundated with this?

THE COURT: Oh, Dan's going to love this assignment. He's going to ask if he can go make site visits. Just watch. Just watch. That's what he's going to do.

MR. SHAFER: Am I going to have to give him a free VIP card, Your Honor, on behalf of my clients?

THE COURT: You cannot give VIP cards to him. That would give him a bias issue, and we can't do that.

MR. DOERR: I just -- I --

THE COURT: I know what you're asking. You want --

MR. DOERR: I'm really -- I just want --

THE COURT: It's okay. I won't -- I'm not going to be able to determine, okay, just trust me. You don't want me trying to figure it out. I have enough trouble when it's -- when I figure out that a Business Court case is really about a

brothel, I blush, okay. It's -- you don't want me doing this.

MR. DOERR: Your Honor, also, if he -- some of those taxpayers, some of the names listed he's not going to be able to find where they are. They're gone.

THE COURT: Believe me, he's going to know what they are.

Hey, Dan, have you met the warriors in the live entertainment tax case?

MR. KUTINAC: Not yet.

MR. SHAFER: Hi, Dan.

THE COURT: Dan, they wanted to meet you. Dan, come here. I have an assignment for you, and the only reason I'm giving it to you is you are uniquely qualified to do this.

MR. KUTINAC: Okay.

THE COURT: I want you as part of your duties as my assistant, without making site visits --

MR. KUTINAC: Okay.

THE COURT: -- to go through the sheets that are DV sealed 16 through 18, I want you to make a copy, and I want you to identify for me any entity that you are able to to determine whether it is an adult entertainment establishment, a concert promoter, a fight promoter, or somebody else who provides live entertainment services in the state of Nevada, and then if there are some that you are unable to identify, to please put a question mark next to that. And I don't want you

to write on that one, I want you to make a copy before you do this. You don't have to do it today. You are not to make site inspections, you are not to take any VIP passes that anyone offers you, you can't go do anything over there; but because you have a familiarity because of some of the past history --

MR. KUTINAC: Right.

THE COURT: -- the some of these institutions, you are in a better position than I to be able to do that. And the parties have said that's okay with them.

MR. KUTINAC: Okay.

THE COURT: Good luck, Dan.

MR. KUTINAC: Easy one.

THE COURT: See, he said it was easy.

Okay. I'm going to get that, and then I am going to tell you if it appears from Dan's investigation if there is any significant deviation from the grouping that appears to be adult entertainment related that in the first group or category, okay. I call it adult entertainment. Gentlemen's clubs, whatever.

MR. SHAFER: Okay. But, you know, Your Honor, I don't even know what that document is.

THE COURT: I know you don't.

MR. SHAFER: And I've never seen that document.

THE COURT: I'm not going to let you see it yet.

MR. SHAFER: Well, I understand.

THE COURT: I may let you see it at some point in time when we insert other identifiers for the remitters so that I can carry out the confidentiality purposes of NRS 368A.180, which I may not agree with the State's interpretation, but I do agree with the purpose, which is to protect the confidentiality of the remitters.

MR. SHAFER: As do the plaintiffs. And we've said that from day one of this case, Your Honor -- or from day one when we started arguing about discovery.

THE COURT: Okay. All right. Anything else I can do to help you?

MR. POPE: A final question, Your Honor, please. We came up with the category totals as our way of working with the statute, and --

MR. DOERR: Well, that's the way we were ordered to by the Discovery Commissioner, but --

THE COURT: It's okay.

MR. POPE: Yeah, that's true. That was even beyond. So --

THE COURT: But, see, what Dan's going to do, he's going to go on that list and he's going to figure out if Great White Entertainment is really a concert promoter, which I know from listening to advertisements on the radio, or if Great White Entertainment is something else. And he's going to

provide it back to us, and I'm going to be able to tell you if there appears to be a deviation from the categorizations that you have provided on DVD1194 and 1195 from the actual names and remitters that are on DV sealed 15 through 18. And if it does not appear after Dan's investigation and his providing that information to me, which I will also place in a sealed exhibit, that there's not a deviation from the categories that you created -- because I know counsel created DV1194 through 5 -- if they appear to track, then I'm not going to worry about it. If there appears to be a deviation, we'll talk about it. I'm not ordering anything else to be done. But since I'm not in a position to do this, to identify those, we'll let somebody who probably is better suited to do it than me.

MR. POPE: And I take it that you're looking for something more than what we've come up with so far --

THE COURT: Yes.

MR. POPE: -- providing totals for categories.

THE COURT: Yes.

MR. POPE: Okay. So if we come back to you with the same approach and say, this is all we think we can do --

THE COURT: But I think what you really want to do is start with something that looks like DV sealed 15 through 18 and figure out a way to make the people who are in what you've called LET taxpayer, that column, to be confidential. I think that's a starting point.

MR. DOERR: Now --

THE COURT: And then we've got to figure out how to protect the backup information, and my anticipation is you're going to come up with either a system for redaction or you're going to decide that is too burdensome and you want to have an attorney eyes only provision with a clawback provision. And I don't know if that's what you want to do because of the balance between the burden and the potential cost of doing that or if you want to do something else. I'm leaving that for you to give me your best solution to arrive at what I want, which is to protect the confidentiality to the extent possible of the remitter, but to provide the backup information that we need to finish the discovery so that you can do an argument so I make a decision.

MR. DOERR: Now, this new thing we're creating, does this only relate to the first group, the gentlemen's clubs, or are you --

THE COURT: Yes.

MR. DOERR: Okay.

THE COURT: The others -- if in the investigation that is conducted by Dan turns out that there's -- you know, appears to be a deviation -- because from my --

MR. DOERR: I've done a subtotal on the larger list, and that should track exactly with the lines on the shorter list.

THE COURT: Yeah. That's what I -- I was confirming for counsel what it does.

MR. DOERR: And, Your Honor --

THE COURT: If I see there's deviations, when Dan looks at it and he says no, the next-to-the-last entry is really an adult entertainment entry, which I wouldn't think from reading the name of it, then we'll have a discussion about whether I've got to do something else about it. But I am at this point accepting that it is in fact a fine arts school. Do you understand what I'm saying?

MR. DOERR: I do. I do.

THE COURT: Okay.

MR. DOERR: I do.

THE COURT: All right. I am going to give to the clerk and ask her to seal as part of the record that I have reviewed those items that are numbered DV sealed 1 through 18 so that there is a record of what I reviewed, and since I've tried to refer to them as Bates numbers, I think it's not going to be a large concern.

With respect to the sheets that are DV1194 and DV1195, those have been previously produced; correct?

MR. DOERR: Correct.

THE COURT: So is there any reason that anyone feels I need to mark that as a Court's exhibit for today? It's not a sealed document. You want to come up and look at it and see

if you've seen it before?

MR. SHAFER: Yeah. I don't know what it is.

MR. DOERR: Brad, I believe it's the sheet you're looking at right there.

MR. SHAFER: This one, the first one or --

THE COURT: Both of them.

MR. SHAFER: Okay. Well, these are two different versions.

THE COURT: Well, I need the one that's the one I'm referring to, which is why I'm referring by Bates numbers, because I'm really anal and paranoid, so my record typically will actually refer to the document I'm looking at. If you want to approach and look at the one that I'm referring to.

MR. SHAFER: Thank you, Your Honor.

THE COURT: And that was why I said we need to do something to make that last column not as gray if there's a way to figure it out.

MR. DOERR: And as you see, we've given him a large version of that. And --

THE COURT: And was easier to look at on the DVD, too.

MR. DOERR: And we produced a larger one to Judge Togliatti, and --

THE COURT: I have a magnifying glass to read building plans that somebody decided to shrink to an 8-1/2 by

11 sheet of paper.

MR. SHAFER: Okay. I think this is the second one, Your Honor.

THE COURT: It doesn't matter to me. It's the one with the Bates number I referred to.

MR. SHAFER: Your Honor, could you give me that Bates number just so I have this marked, then.

THE COURT: DV1194 through 1195. And it has another number, so it looks like it had a prior production, DVDISC001475 through 1476.

MR. SHAFER: Thank you, Your Honor.

THE COURT: So do you want me to mark it as Court's Exhibit 1 since there seems to be confusion about what it is, or is it okay if I've just referenced it by the Bates numbers that are on it?

MR. SHAFER: I'm good with the Bates numbers, Your Honor.

THE COURT: Okay. I'm glad you guys are all good with that. I am going to ask John to shred the copies of the sealed documents that I reviewed separately so that I could make notes on them so that they're now shredded. John, the shredder's in the back room.

Dan, why are you back?

MR. KUTINAC: I didn't know if there was anything else.

THE COURT: Oh, no. But no site visits.

Anything else?

MR. DOERR: How about -- I'm not sure how much time we're going to need to do this.

THE COURT: I was going to give you about three weeks to figure out, because a protocol to figure it out is a little -- that's going to be -- and then somebody's got to put it into effect and do the elbow grease of either using a Sharpie or redacting tape or making some other determination as to a way to produce them. Three weeks?

MR. DOERR: Three weeks.

THE COURT: You don't have to come. You can be on the phone, if you'd like.

MR. DOERR: You know --

THE COURT: And that's not for you to say what you've decided, that's for you to give me your proposal.

MR. DOERR: Okay.

THE COURT: And if you want to do your proposal in writing and send it to Counsel the day before so he will have a basis to have an intelligent discussion with us, that would be lovely. Okay.

MR. DOERR: Okay. I have some thoughts on it already, but we'll -- let's discuss it.

THE COURT: I'm going to let you guys caucus it. I'm not going to try and pin you down, because it's a

complicated process, it's a big thing.

Yes, some --

MR. SHAFER: I was just going to say I'm already going to be here twice in March anyway because I have a convention one week.

And then what was the date that we set for the -- your motion?

MR. DOERR: The 15th.

MR. SHAFER: Yeah. So I'll be out here two weeks in March anyway.

THE COURT: So when are you going to be here in March?

MR. SHAFER: Well, I'll be here the week of the 7th, but they I think were not available.

MR. DOERR: We're not all available the week of the 7th.

THE COURT: So do you want to come the week before, the week of the 3rd -- or, I'm sorry, the week of -- what is it --

MR. DOERR: How about -- can we suggest we do it the 15th, when our current motion is --

THE COURT: Yes, you can suggest that.

MR. DOERR: -- set.

THE COURT: Yep. And I guess we'll talk about those other issues on that day.

Has the Ninth Circuit made a decision on that pending issue?

MR. POPE: That case was dismissed.

THE COURT: It was dismissed?

MR. DOERR: Yeah.

THE COURT: Okay. You may have told me that and I forgot.

MR. SHAFER: Yes. It was a [inaudible], Your Honor, one-sentence type of thing.

THE COURT: Okay.

MR. SHAFER: Right?

MR. DOERR: Well --

THE COURT: I don't care. It doesn't matter today. It may matter on March 15th, but it doesn't matter today. So instead of March 3rd, we're going to come for a status check on March 15th, on the same day, and we're going to talk about whether you've come up with a -- I'm going to call it a protocol. You can call it whatever you want. But that will remind me of what I'm trying to get out of you.

MR. POPE: Your Honor, we had attached the decision from the Ninth Circuit to one of our motions.

THE COURT: And that may be -- I may have seen it and forgotten, because you may have noticed I was dealing with some other issues with whether spurious allegations which are inflammatory and newsworthy were made in a proposed amended

complaint that I'd already let be sealed for purposes for the motion.

MR. POPE: -- reality and belief.

THE COURT: Things like that, yeah.

MR. DOERR: Truthfulness and --

THE COURT: Despicable. Despicable. Whether any of those are true or not is a whole different issue, but they have to allege certain things in a fraud claim to be good.

MR. DOERR: Okay.

MR. BROWN: Like dishonor. Oh, is that not particularity pleading?

THE COURT: Argumentative, Mr. Brown.

Anything else that I can do to help you?

Okay. 'Bye, guys.

THE PROCEEDINGS CONCLUDED AT 11:36 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.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

2/19/11

DATE

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 06A533273
Dept. No. XI

Coordinated with:

Case No. 08A554970
Dept. No. XI

PLAINTIFFS' OPPOSITION TO 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 ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983

Date of Hearing: March 15, 2011
Time of Hearing: 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND SUMMARY

These two "coordinated" actions involve constitutional challenges against, and requests for refunds concerning taxes paid pursuant to, Title 37, Chapter 368A, of the Nevada Revised Statutes, which imposes taxes on certain aspects of "live entertainment." This statutory scheme and the tax mandated thereby are sometimes referred to hereinafter as "Chapter 368A," the "Live Entertainment Tax," or simply the "LET."

Defendants have filed a motion to dismiss and/or for summary judgment on most of the claims contained in the two lawsuits. In part, they contend that the "as applied" aspect of the first lawsuit, which sets forth a constitutional challenge to the Live Entertainment Tax pursuant to, among other things, the federal civil rights statute, 42 U.S.C. §1983, should be dismissed because, prior to the filing of that action, the Plaintiffs had not exhausted their administrative remedies. They take this position even though ***every United States Supreme Court decision that has addressed this issue has concluded that exhaustion of administrative remedies is not required when raising constitutional claims (whether facial or "as applied") pursuant to 42 U.S.C. §1983.***

In addition, Defendants assert that the refund action pending before this Court should be dismissed because it was brought as a *civil action,* instead of a petition for judicial review. Consequently, the Defendants also argue that the Plaintiffs are now ***forever*** barred in seeking refunds because the decision of the Nevada Tax Commission upholding the tax is, as a result, deemed "final," binding, and preclusive of further requests for refund. This is the second time that the State has tried this stunt in an effort to deprive an innocent taxpayer of the ability to obtain a refund of illegally collected taxes. In fact, the Defendants here refer this Court to that

other action. ***Yet, the District Court there (in Carson City) refused to dismiss the action and thereby deprive the aggrieved taxpayer of a refund remedy.*** Rather, that court ruled that the matter would simply proceed pursuant to the judicial review standards, with that ruling now pending before the Nevada Supreme Court (and a stay in place in the District Court). While, for the exhaustive reasons set forth below, Plaintiffs believe unequivocally that judicial review standards are inappropriate here, like the matter in the Carson City District Court, these Plaintiffs have properly preserved their rights to seek refunds.

NRS 368A.290, the statutory provisions pursuant to which the Plaintiffs filed the second action at issue here, states, in part, that: "1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by ... (b) [t]he Nevada Tax Commission, the claimant ***may bring an action against the department on the grounds set forth in the [administrative] claim.***" (Clarification and emphasis added). The statute goes on to state that ***"[a]n action*** brought pursuant to subsection 1 must be brought in a court of competent jurisdiction "***for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.***"" NRS 368A.290(2) (emphasis added). "Failure to bring ***an action*** within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments." NRS 368A.290(3) (emphasis added).

The complaint for refund filed in, and pending before, this Court is that "***action.***" ***Plaintiffs followed the statutory provisions for judicial requests for refund to the letter***, and there is no basis in law or fact for this Court to dismiss the timely filed "***action***" specifically provided for in the statutory scheme at issue. In addition, while referencing the necessity of filing an ***action*** to obtain a refund, Chapter 368A is absolutely silent in regard to the requisite filing of a petition for judicial review (even though other portions of the tax code specify the

filing for such relief).

Moreover, the State of Nevada has a Taxpayers' Bill of Rights, which states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto ***construed in favor of the taxpayer*** if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable." NRS §360.291(1)(o) (emphasis added).[1] Here, the Defendants assert that the provisions of NRS §368A.290 simply do not say what they say, and that Plaintiffs should have, rather, filed a petition for judicial review. Under the Nevada Taxpayers' Bill of Rights, Plaintiffs are entitled to have relied upon the plain and unequivocal language of the statute, which they followed ***to the letter.***

For the reasons as set forth below, Plaintiffs respectfully request that this Honorable Court reject those arguments of the Defendants and the other claims they have made (also discussed herein). In addition, Plaintiffs apologize in advance for the length of this response, and the fact that they are required to reiterate some of the briefing that is already in front of this Court by way of the Plaintiffs' renewed motion for preliminary injunction. However, in light of the gravity of the claims made by the Defendants, the importance of the constitutional rights involved, the complex nature of the responses that are required in order to properly and fully refute the contentions of the Defendants, and the fact that the Plaintiffs need to ensure that their "record" on this motion is appropriately preserved, Plaintiffs felt compelled to respond in the very detailed fashion as is set forth below.

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[1] The Taxpayers' Bill of Rights further states that the provisions of Title 32 (which include the taxes challenged in these two lawsuits) "governing the administration and collection of taxes by the Department must not be construed in such a manner as to interfere or conflict with the provisions of this section [*i.e.*, the Bill of Rights] or any applicable regulations." NRS 360.291(2) (clarification added).

I. FACTS AND PROCEDURAL HISTORY.

Plaintiffs operate commercial entertainment establishments in the City of Las Vegas, which present on their business premises live performance dance entertainment to the consenting adult public. Verified Complaint for Declaratory and Injunctive Relief, Damages, and Attorney Fees and Costs, in Case No. A533273 ("Comp."), at ¶¶ 27-34. The entertainment presented by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by the First and Fourteenth Amendments to the United States Constitution,[2] as well as by Art. I, §§ 9 and 10 of the Nevada Constitution.[3] Comp., ¶ 36.

The Defendants (the department, board, commission, and individual charged with enforcing the tax laws at issue here) take the position that Plaintiffs' establishments are subject to Chapter 368A, which places an excise tax on certain revenue sources of specified facilities that provide defined "live entertainment." Comp., ¶¶ 17-20, 27-34, 37. Plaintiffs contend that the Live Entertainment Tax is unconstitutional, both facially and as applied, in that it is

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[2] Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see* **S.O.C., Inc. v. Mirage Casino-Hotel**, 117 Nev. 403, 414, 23 P.3d 243 (2001)), the federal case law cited herein is applicable to Plaintiffs' Nevada constitutional challenges as well.

[3] Exotic dancing, in the form of clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.,* **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560, 565(1991) (nude dancing receives protections under the Constitution); **City of Erie v. Pap's A.M.**, 529 U.S. 277, 289 (2000) (same); **Schad v. Borough of Mt. Ephraim**, 452 U.S. 61, 65-66 (1981) ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections form official regulation"); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396 (6th Cir. 2001), *citing* **Roberts v. United States Jaycees**, 468 U.S. 609, 622 (1984) (Court held that "the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a 'collective effort on behalf of shared goals'").

violative of the constitutional protections enumerated above, [4] and that even if that is not the case, they are specifically exempted from paying the LET pursuant to the statutory exemptions as contained therein. Comp., ¶¶ 38-39, 53. Nevertheless, under threat of criminal prosecution and the imposition of fines and other penalties against them, Plaintiffs have all, beginning at various times, paid the LET mandated by Chapter 368A. Comp., ¶¶ 38. A copy of the initial version of Chapter 368A adopted in 2003 is attached hereto as Ex. 1; the amendatory provisions enacted in 2005 by passage of Assembly Bill No. 554 is attached hereto as Ex. 2; and the regulations promulgated pursuant to Chapter 368A are attached as Ex. 3.

In order to safeguard their constitutional rights, Plaintiffs, on April 18, 2006, filed suit in the United States District Court for the District of Nevada, Case Number CV-S-06-00480-RLH-RJJ, seeking similar remedies sought in the instant lawsuits: A declaration that the LET is unconstitutional, an injunction against the enforcement of Chapter 368A, and return of the live entertainment taxes that had been paid. These same Defendants filed a motion to dismiss the federal action, claiming that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, precluded the federal court from having jurisdiction over the claims because there existed a "plain, speedy, and efficient remedy" in state court. The district court dismissed Plaintiffs' complaint on that basis (Ex. 6), and Plaintiffs appealed that dismissal to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court's decision on May 20, 2008, in a three-paragraph order. Ex. 7.

Consequently, Plaintiffs then filed Case No. A533273 (referred to in the Defendants'

[4] Indeed, a recent state court decision in Texas has invalidated a similar type of law, and the Attorney General of Tennessee previously issued an opinion declaring that a similar tax proposed in that state would be unconstitutional. *See* Exhibits 4, and 5.

instant motion and herein as "Case 1") in December 2006.[5] The Parties agreed, however, to extend the date for the Defendants to answer that complaint because, in an abundance of caution, a number these Plaintiffs filed, at approximately the same time, administrative claims for refunds which, theoretically, are statutory prerequisites to the filing of a judicial claim for refund under Chapter 368A (referred to in the Defendant's Motion and herein as "Case 2").

Specifically, on February 27, 2007, within the three year statutory period under N.R.S. § 368A.260(1) for the filing of administrative refund claims, Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc. and D.I. Food & Beverage of Las Vegas, LLC (identified herein as the "K-Kel Plaintiffs") filed individual requests for refunds of the LET that they had paid during certain months.[6] A redacted copy of one of those refund requests is attached as Ex. 8, which illustrates that the ***sole*** basis for the request for refund was the asserted unconstitutionality, and therefore inapplicability to the Plaintiffs, of the LET.

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[5] Because the tax in question is specifically directed at activities protected by the First Amendment, Plaintiffs brought this action, in part, pursuant to a federal civil rights statute, 42 U.S.C. § 1983, which permits actions at law and suits in equity to redress deprivations of constitutional rights. Comp., ¶¶ 1, 3, and 66.

[6] Case 1 Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC (the "Deja Vu Plaintiffs"), did not become subject to the LET until Chapter 368A was amended in June of 2005, to reduce the seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See* N.R.S. § 368A.200(5)(d). Pursuant to N.R.S. § 368A.260(1), the statutory three year period for those two Plaintiffs to file their administrative requests for refunds did not then expire until mid 2008, and those Plaintiffs were not required to have, and had not yet filed, administrative claims for refund when Case 2 was filed. However, starting in August, 2008 (for the July 2005 tax period), the Deja Vu Plaintiffs began filing administrative claims for refund, and responded to the inevitable denials from the Department of Taxation with monthly notices of appeal to the Nevada Tax Commission. Subsequent to the filing of Case 2, the Department has responded to the monthly notices of appeal with identical acknowledgment letters stating that ***each appeal was being held in abeyance during the pendency of Case 2.*** A sample of the Department's acknowledgment letter is attached hereto as Ex. 10.

The K-Kel Plaintiffs' refund requests were all denied by the Nevada Department of Taxation ("Department") (example copy attached as Ex. 9). Those Plaintiffs all filed timely notices of administrative appeals, and the Nevada Tax Commission ("Commission") held hearings regarding the first set of denials in July and August of 2007. The Commission denied Plaintiffs' appeals in October of 2007 (Ex. 11). On January 9, 2008, in full accordance with N.R.S. §§ 368A.290(1)(b) and 368A.300(3)(b), which govern adverse decisions by the Commission, the K-Kel Plaintiffs timely filed a judicial complaint for refund, which was assigned Case No. A554970 (*i.e.*, Case 2). The parties to Case 1 then agreed that the Defendants would answer the complaint in that matter in accordance with their deadline to answer the complaint in Case 2.

Defendants filed answers to both complaints on March 3, 2008, and filed their first motion to dismiss Case 1 on April 18, 2008. On September, 2008, Defendants additionally filed a motion for summary judgment regarding Case 1. Both of these motions were subsequently denied by Judge Togliatti. Ex. 12, Orders, December 9, 2010.

Plaintiffs filed an Amended Complaint in Case 1 on or about January 28, 2009, to add an "as applied" cause of action to the challenge to the LET. In addition, Plaintiffs filed an Amended Complaint[7] in Case 2, on or about December 19, 2010, which added the Deja Vu Plaintiffs to the action for refund, as they were now required to file administrative claims for refunds, which had all been denied (*see* footnote 3, *supra*), in addition to an "as applied" cause of action. The Department attempts to point to the late addition of the Deja Vu Plaintiffs as some procedural problem (Department's Motion for Partial Summary Judgment and to Dismiss, "Dept. Mtn.", pp. 4-7), ignoring the fact that pursuant to Chapter 368A.260(1), those

[7] It should be noted that the Defendants never filed answers to either of the amended complaints.

particular Plaintiffs were not required to have filed their administrative claims for refund at the time the first four appeals were denied by the Commission, thereby forming the initial cause of action for Case 2.

The only reason why the appeals regarding the denial of the Deja Vu Plaintiffs' administrative claims for refund were not heard by the Commission was because the State ***itself*** decided to hold all of Plaintiffs' appeals in abeyance pending the outcome of Case 2. Ex. 10. The chart contained on page 6 of the Department's instant Motion only serves to show that the Deja Vu Plaintiffs were not involved in the beginning of Case 2. This is irrelevant, as the Deja Vu Plaintiffs were not required to file administrative claims for refund at the time the K-Kel Plaintiffs filed their first sets of administrative claims for refund. Now that the Deja Vu Plaintiffs are monthly filing their administrative claims for refund as required pursuant to Chapter 368A, and are now named Plaintiffs in Case 2, the Department's chart and arguments regarding the Deja Vu Plaintiffs' initial exclusion, are rendered pointless and moot.

The Department filed its instant motions on January 25, 2011.

II. STANDARD OF REVIEW.

A. SUMMARY JUDGMENT STANDARDS.

Summary judgment is appropriate only where the movant can "demonstrate that no genuine issue of material fact exists, and the moving party in entitled to judgment as a matter of law." **Wood v. Safeway, Inc.**, 121 New. 724, 731, 121 P.3d 1026, 1031(2005).

> Summary judgment is a drastic remedy, therefore, all evidence favorable to the party against who such summary judgment was rendered will be accepted as true. All favorable inferences will be drawn in favor of the party.

Ottenheimer v. Real Estate Division of the Nevada Department of Commerce, 91 Nev. 338, 342, 535 P.2d 1284, 1286 (1975) (reversing the district court where "summary judgment

was granted without an opportunity for full discovery, and [plaintiff] had no opportunity to demonstrate that the legislation in question fails to meet constitutional standards") (clarification added). *See also* **Weiner v. Beatty**, 121 Nev. 243, 246, 116 P.3d 829, 830 (2005) ("In determining whether summary judgment is proper, the non moving party in entitled to have all the evidence and all reasonable inferences accepted as true.") (citation omitted) and **Butler v. Bogdanovich**, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985) (". . . pleadings and documentary evidence should be construed in a posture which is most favorable to the party against whom the motion of summary judgment is directed.") (citation omitted).

B. MOTION TO DISMISS STANDARDS.

When considering a motion to dismiss made under NRCP 12(b)(5), "a district court must construe the complaint liberally and draw every fair inference in favor of the plaintiff," and the complaint should not be dismissed "unless it appears ***to a certainty*** that the plaintiff could prove no set of facts that would entitle him or her to relief." **Cohen v. Mirage Resorts, Inc.**, 119 Nev. 1, 22 (2003) (emphasis added). *See also* **Buzz Stew, Inc. v. City of North Las Vegas**, 181 P.3d 670 (2008) (district courts' dismissals under NRCP 12(b)(5) receive "rigorous standard of review on appeal").

III. SUMMARY JUDMENT ON THE MATTERS PRESENTED BY THE DEAPRTMENT IS PREMATURE.

NRCP 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In applying this rule, the Nevada Supreme Court has declared that "summary judgment is improper when a party seeks additional time to conduct discovery to compile facts to oppose

the motion." **Aviation Ventures, Inc. v. Joan Morris, Inc.** 121 Nev. 113, 118 (2005). The courts have typically looked to two guideposts in determining whether to deny or stay a motion for summary judgment in order to allow the non-moving party additional time to muster facts in opposition to the motion.

Initially, the Court looks to whether the party requesting NRCP 56(f) relief has identified a need for further discovery. **Aviation Ventures**, 121 Nev. 113 at 119 ("Vision clearly enunciated how discovery would allow it to develop the record in order to properly oppose LVTB's motion"); **Summerfield v. Coca Cola Bottling Company of the Southwest**, 113 Nev. 1291, 1295, 948 P.2d 704, 706 (1997) ("Roitman had affirmed that should a continuance be granted, Summerfield would be able to procure an expert to testify as to proximate cause"); and **Harrison v. Falcon Products, Inc.**, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987) ("From Harrison's affidavit it is apparent that she had not yet been able to gather enough information to support her claims").

Once it is palpable that further discovery would allow the nonmoving party to more fully oppose a motion for summary judgment, the court looks to whether the nonmoving party has been dilatory in pursuing discovery. **Aviation Ventures**, 121 Nev. at 118-119, 110 P.3d at 62-63. The decision whether to grant NRCP 56(f) relief is within the discretion of the trial court. **Id**. However, the Nevada Supreme Court has customarily held the denial of such relief to be an abuse of discretion where the nonmoving party was not dilatory in pursuing discovery:

> Preliminarily, we note that not even two years had passed since the filing of the complaint until the time summary judgment was granted. The harsh result of granting summary judgment is obvious when had a motion to dismiss been before the district court, the court would not have had the power to dismiss the action. *See* NRCP 41(e).

Harrison, 103 Nev. at 560, 746 P.2d at 642.

In **Summerfield**, 113 Nev. at 1294-1295, 948 P.2d 705-706, the court (citing **Harrison**, *supra*) again found the district court's denial of NRCP 56(f) relief to be an abuse of discretion when the nonmoving party was not dilatory. The Court explained that ". . . in both **Harrison** and the present case, the award of a motion for summary judgment and the concurrent denial of a request to continue operated to fatally limit the plaintiffs' abilities to conduct discovery." **Id**.

The same is obviously true here. Plaintiffs submitted their written discovery on March 24 and 26, 2009; their motion to compel discovery was filed on September 30, 2009; the Discovery Commissioner's report and recommendation was issued on February 22, 2010; Plaintiffs' objections to the Discovery Commissioner's ruling were filed on March 3, 2010; out-of-state counsel has flown into Nevada ***no fewer than six times*** for hearings pertaining to the discovery disputes; although previously scheduled, depositions of representatives of the Defendants have not yet occurred because the Plaintiffs are awaiting rulings on their requests for additional documents; and this Court is still in the process of ruling on those matters. Plaintiffs believe that obtaining the documents in dispute and being able to then take appropriate depositions of the Defendants' representatives will permit them to place additional evidence into the record in response to the instant motion. Shafer Aff., Ex. 13, ¶¶ 4-8.

Plaintiffs have certainly not been dilatory in their fight for discovery, and the summary judgment aspect of Defendants' motion is then premature.

IV. THE DE NOVO ACTION FOR REFUND WAS THE PROPER MEANS OF BRINGING CASE 2 BEFORE THIS COURT.

A. THE DEPARTMEN HAS WAIVED ITS RIGHT TO RAISE THIS ARGUMENT.

Plaintiffs filed Case 2 on January 9, 2008. Pursuant to agreement between the parties,

Defendants filed their Answer and Affirmative Defenses on March 3, 2008. Ex. 14. ***Nowhere therein*** did the Defendants raise the affirmative defense that the type of action brought by these Plaintiffs was improper, or that Plaintiffs should have brought a Petition for Judicial Review instead. Exhibit 14, pp. 9-10. Therefore, the Defendants waived their right to raise this defense now. *See* **Pierce Lathing Co. v. ISEC, Inc.**, 114 Nev. 291 (1998) (if an affirmative defense is not pleaded, it is deemed waived and no evidence can be submitted relevant to that issue); and **Elliot v. Resnick**, 114 Nev. 25 (1998) (if affirmative defenses are not pleaded or tried by consent, they are waived).

B. PLAINTIFFS ARE NOT LIMITED TO BRINGING A PETITION FOR JUDICIAL REVIEW, NOR ARE THEY REQUIRED TO FILE SUCH A PETITION IN ORDER TO SEEK A TAX REFUND.

The Department itself admits that the refund provision of Chapter 368A, NRS 368A.290, is similar to the refund provision for the general Nevada sales and use taxes contained in NRS 372.680 (Dept. Mtn., p. 10), and goes on to argue that "NRS 372.680 does not provide authority for a trial de novo and neither does NRS 368A.290." Dept. Mtn., p. 11. The Nevada sales and use tax statute provides that:

> 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 or her principal place of business or a county in which any relevant proceedings were conducted by the Department, ***for the recovery*** of the whole or any part of the amount with respect to which the claim has been disallowed.

NRS 372.680(1) (emphasis added). In almost identical wording, Chapter 368A provides:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:
>
> (a) The [Nevada Gaming] Commission, the claimant may bring an action against the [State Gaming Control] 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 Department, ***for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.***

NRS 368A.290(1) and (2) (emphasis and clarification added). Given that the Department cites no cases relevant to NRS 368A.290 (possibly due to its recent enactment and lack of case law), and relies basically on evaluating NRS 372.680, Plaintiffs will address this argument in the same manner, given the virtually identical nature of the refund provisions.

1. Relevant Precedent Establishes that Plaintiffs' Action is Appropriate.

Irrespective of the question of the *scope* of judicial redress available under NRS 368A.290 (a matter that will be discussed more fully below), it is clear that the original action filed by the K-Kel as Case 2 is the proper legal procedure to seek refunds of the LET. The Department is simply, but *clearly*, incorrect in its assertion that an action brought against the Department pursuant to NRS 368A.290 should be governed by the Administrative Procedures Act's ("APA") judicial review standards, pursuant to NRS 233B.130. Dept. Mtn., pp. 10-15. Statutory text and relevant Nevada case law supports the fact that NRS 372.680 (and therefore NRS 368A.290) entitles taxpayers who seek a refund of taxes (either sales and use, or Live Entertainment) to a trial de novo, and not a mere judicial review of the Commission's decision, in direct contradiction to the Department's contentions.

The plain language of NRS 372.680 and NRS 368A.290, in no way describes an appeal from, or a judicial review of, the legal or factual findings of the Commission. Those statutes

talk about, rather, the taxpayer bringing an "action." For numerous reasons, the remedy suggested by the Department is not such a proceeding.

First, the Nevada Rules of Civil Procedure ("NRCP") define an "action" as a "civil action," which is commenced by filing a *complaint* in district court against the defendant. *See* NRCP 2 ("There shall be one form of action to be known as 'civil action.'"); NRCP 3 ("A civil action is commenced by filing a complaint with the court"). Both NRS 372.690, and NRS 368A.300(4), which govern how a refund must be credited or repaid if the taxpayer prevails in its sales or use tax refund action or in a LET action, make clear that the taxpayer is the "plaintiff" in an action brought under NRS 372.680 and NRS 368A.290. Thus, the taxpayer brings a civil action under NRS 372.680 or NRS 368A.290 as the plaintiff against the Department as defendant, by filing a complaint. Neither NRS 372.680 nor NRS 368A.290 require the taxpayer to name the Commission or any other party as a co-defendant. In a petition for judicial review, on the other hand, the taxpayer is the "petitioner" and is required to name the body that rendered the decision (in this case, the Commission) as primary "respondent," as well as all parties of record to the administrative proceeding. NRS 233B.130(2)(a). The judicial review procedures that follow are governed by the APA, not the NRCP. *See* NRCP 81.

Second, NRS 372.680(1) and NRS 368A.290(1)(b) require a taxpayer to bring an action against the Department on the grounds set forth in the taxpayer's claims for refund, whereas NRS 233B.130(1) authorizes an aggrieved party to seek judicial review of the administrative agency's decision. Bringing an "action against the department on the grounds set forth in the claim" is incompatible with language requiring only a judicial review of the Commission's decision. Indeed, Nevada's deficiency determination procedure makes clear that the Legislature knows how to specify judicial review as the available judicial remedy for a

taxpayer when it wants do to so. In the case of such matters (*i.e.*, determinations by the Department that a taxpayer has *underpaid* its tax liability), NRS 360.395 expressly provides that the taxpayer's judicial remedy is "*judicial review pursuant to NRS 233B.130 from a final order of the Nevada tax commission* upon a petition for redetermination[.]" (Emphasis added.) In contrast, NRS 372.680 and NRS 368A.290 use altogether different language in authorizing "*an action against the Department* on the grounds set forth in the claim." (Emphasis added). When the Legislature amended NRS 372.680 in S.B. 362, it could have amended the statute to include the language used in NRS 360.395, *but it intentionally did not.* Nor does that language appear in Chapter 368A.

Third, the requirement that a taxpayer bring an action against the Department only "after a final decision upon a claim filed pursuant to [NRS Chapter 372 and Chapter 368A] is rendered by the Nevada Tax Commission" is simply a condition precedent to bringing the civil action authorized by NRS 372.680 and NRS 368A.290. The reason for this is to require the taxpayer to exhaust administrative remedies, which, the State would presumably argue, promotes judicial economy because, as discussed below in Section IV(B)(3)(b), the Department cannot appeal a Commission decision granting a taxpayer's claim for refund. *See* NRS 360.245(5).

Fourth, precedence in this State establishes that the Department is simply *wrong*. In **Sparks Nugget, Inc. v. Nevada ex rel. Dep't of Tax'n**, 124 Nev. Adv. Rep. 15, 179 P.3d 570 (2008), a case brought pursuant to NRS 372.680 to recover an overpayment of use taxes that was tried in the district court *as a civil action and not as a judicial review proceeding*, our Supreme Court described the taxpayer's administrative proceedings as follows:

> In May 2002, the Nugget filed a claim with the Tax Department, seeking a refund of [use tax payments] . . . Following the denial of its claim, the

> Nugget administratively appealed the Tax Department's decision to the tax commission. That appeal proved unsuccessful, however, and *having exhausted its administrative remedies, the Nugget then sued the Tax Department in district court, again seeking a refund of the use taxes that it had paid.*

Id. at 573 (All emphasis and clarification added.)

Indeed, our Supreme Court has repeatedly affirmed that tax refund actions, including sales or use tax refund actions brought pursuant to NRS 372.680, are new proceedings in the district court, and are not judicial reviews of the Commission's decision, notwithstanding that in each such case the taxpayer participated in hearings before, and received a final decision from, the Commission before bringing its refund action against the Department. This is the same procedural process followed by the Plaintiffs in the instant cases.

In the seminal case of **State v. Obexer & Sons, Inc.**, 99 Nev. 233, 237 (1983), which was an action for a refund of sales taxes brought under NRS 372.680, the Supreme Court held: "Actions to recover taxes paid are equitable in nature, and *the burden of proof is on the taxpayer to show that the taxing body holds money that in equity and good conscience it has no right to retain.*" (Emphasis added).[8] Reaffirming this holding in **Saveway Super Serv. Stations, Inc. v. Cafferata**, 104 Nev. 402, 404 (1988), the Supreme Court stated that "[t]he burden of proof so articulated, certainly implies that *the burden is not that of showing a lack of substantial evidence, rather, it is to support the elements of an independent action for restitution.*" (Emphasis added).

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[8] In **Obexer & Sons**, the taxpayer had received a denial of its claim for refund from the Department and then an adverse decision from the Commission; in the district court the parties stipulated to some facts and submitted a partial administrative record, and the case was resolved on summary judgment in favor of the taxpayer. Summary judgment is a procedural device available in civil actions governed by the NRCP, and is not a permissible means of conducting a judicial review proceeding brought under the APA.

In fact, **Saveway** demonstrates the folly of the Department's argument here. In that case, the taxpayer paid fuel excise taxes and penalties assessed by the Department pursuant to NRS Chapter 365 and filed an appeal with the Commission. After receiving an adverse decision from the Commission, Saveway filed *a petition for judicial review* of the Commission's decision. The district court *dismissed* the petition and the Supreme Court *affirmed* because "NRS 233B.130 is specifically limited by NRS 365.460, and under NRS 365.460 Saveway's remedy was to pay the excise tax under protest *and bring an action against the state treasurer in the district court.*" **Id.** at 403-04 (emphasis added). NRS 365.460 uses the same "may bring an action" language as is found in NRS 372.680 and NRS 368A.290.[9] *Consequently, had the K-Kel Plaintiffs filed a petition for judicial review, the Department would be citing* ***Saveway*** *to this Court as precedent to dismiss the petition!*

In addition, the subject statute in **Saveway**, NRS 365.470(1), provides that the tax refund action is a taxpayer's exclusive judicial remedy for recovering its excise tax overpayment. *See* NRS 365.470(1) ("No action authorized by NRS 365.460 may be instituted more than 90 days after the last day prescribed for the payment of the excise tax without penalty. Failure to bring suit within the 90 days shall constitute a waiver of any and all demands against the State on account of alleged overpayment of excise taxes"). And, NRS 368A.290(3), as well as the "guiding" statute of NRS 372.680(2), are virtually identical.

Saveway also refutes the *scope* of judicial review argued for here by the Department. There, in Saveway's subsequent refund action properly brought pursuant to NRS 365.460, the district court nonetheless applied the standard of review set forth in NRS 233B.135 and granted

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

summary judgment against the taxpayer because the Commission's decision "was neither clearly erroneous, arbitrary, nor capricious," even though the form of the taxpayer's action was "not a complaint for judicial review." **Id.** at 404. The Supreme Court again *reversed* the district court's decision, holding that the district court *erred in applying NRS 233B.135's judicial review standard* because the action authorized by NRS 365.460 was "for the refund of a tax overpayment," and therefore authorized a trial de novo, where the taxpayer's burden of proof "is not that of showing a lack of substantial evidence, rather, it is to support the elements of an independent action for restitution." **Id.** at 404 (citing **Obexer & Sons**, 99 Nev. at 237). Accordingly, the Nevada Supreme Court has already expressly rejected — ***twice*** — the position urged by the Department. While **Saveway** addresses a different refund statute, this is a distinction without a difference.

Cases brought under NRS 372.680 subsequent to the enactment of S.B. 362 (which the Department relies upon in support of its contention that a petition for judicial review is appropriate, *see* Dept. Mtn., pp. 11-13), have been conducted as new civil actions against the Department governed by the NRCP, and not as judicial review proceedings of the Commission's decision subject to the APA. In **Sparks Nugget**, *supra*, the taxpayer filed a complaint under NRS 372.680 against the Department after the Commission had denied its claim for refund. The Department answered and the case was ultimately resolved on summary judgment by the district court in favor of the Department, a judgment that was reversed by the Nevada Supreme Court on appeal. As discussed above, the Supreme Court characterized the taxpayer's administrative proceedings as simply the exhaustion of administrative remedies prior to bringing a civil action against the Department. Furthermore, summary judgment is a civil trial procedure and has no place in a judicial review proceeding.

The Department has participated in at least one other sales tax refund action brought pursuant to NRS 372.680 since it was amended by S.B. 362. In **Lohse v. Nevada ex rel. Dep't of Tax'n**, Case No. CV-05-00376 (Nev. 2 Jud. Dist., Jan. 18, 2007), the Department moved to prevent the taxpayer from presenting evidence at trial on its sales tax refund claim, arguing primarily that, because the taxpayer had failed to conduct discovery, the case should be limited to the record developed before the Department and Commission and should proceed in a manner similar to a petition for judicial review. The district court *rejected* the Department's argument. During the ensuing bench trial, both the taxpayer and the Department presented evidence and testimony. The district court's Findings of Fact, Conclusions of Law and Judgment expressly held:

> 1. Plaintiffs fully exhausted all administrative remedies prior to bringing this action under NRS 372.680.
>
> 2. An action brought pursuant to NRS 372.680 is an original proceeding, not an appeal from a final decision by an administrative agency. **State of Nevada v. Obexer & Sons, Inc.**, 99 Nev. 233, 237, 660 P.2d 981, 984 (1983). The Court is not limited to a review of the record before the administrative agency; the Court is free to take new evidence on issues of fact, and owes no deference to findings by the administrative agency on issues of fact or on issues of law.

The district court's decision in favor of the taxpayer was affirmed in an unpublished opinion by the Supreme Court.

Fifth, NRS 372.680 and NRS 368A.290 identify the manner in which a lawsuit under those statutes are to be initiated (through the commencement of an "action"), the timeframe in which the action can be brought (within 90 days after a final decision is rendered by the Commission), against whom (the Department) and on what grounds (the grounds set forth in the taxpayer's claim for refund). In fact, the plain language of the NRS 372.680 and NRS 368A.290, in contrast to NRS 233B.130, shows that the *only* way in which they are alike is that

the permissible venues for filing are the same.

In sum, the plain language of NRS 372.680 is plainly incompatible with the judicial review standards imposed by the APA, and Nevada case law that is *directly on point* confirms that a tax refund action under NRS 372.680, and - - under the same analysis - - therefore, NRS 368A.290, is an original civil action, conducted pursuant to the NRCP, without deference to the Commission's decision. Therefore, the Plaintiffs properly brought Case 2 before this Court as a civil action for refund.

2. <u>When the Legislature Adopted NRS 372.680 from California's Statutory Scheme in 1955, It Was Already Well-Settled Law That the Action Authorized by the Statute Was a Trial De Novo</u>.

As additional evidence that NRS 368A.290 authorizes a trial de novo, despite the Department's claims to the contrary, this Court should, respectfully, look to the source of NRS 372.680, which provides for the same type of original action. Nevada modeled its Sales and Use Tax Act on a then-existing similar California law. *See* Nev. A.G.O. 19 (Apr. 21, 1971) ("Nevada's Sales and Use Tax Act (Chapter 372 of the Nevada Revised Statutes) enacted by the Legislature in 1955 was substantially an adoption of the Sales and Use Tax Law then in effect in California"). NRS 372.680 was derived from, and is materially identical to, California Revenue and Taxation Code ("RTC") § 6933, which provides:

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

A statute "adopted from another jurisdiction will be presumed to have been adopted

with the construction placed upon it by the courts of that jurisdiction before its adoption." **Ybarra v. State**, 97 Nev. 247, 249 (1981). By the time of Nevada's adoption of NRS Chapter 372 from California in 1955, it was already well-established law in California that sales and use tax refund actions were trials de novo. *See* **Marchica v. Bd. of Equalization**, 237 P.2d 725, 733 (Cal. Ct. App. 1951) ("[I]n a suit for refund the statute does not give any finality to the determination of the board. The board does not exercise judicial power in administering the Sales Tax Act and the act, in effect, in a suit for refund authorizes a hearing de novo"). The Nevada Supreme Court relied on **Marchica** when it held in **Saveway** that tax refund actions in this State are original civil actions conducted as trials de novo, rather than judicial review proceedings subject to the APA. *See* **Saveway**, 104 Nev. at 404.

It is also indisputable that the phrase in California RTC § 6933 -- "bring an action against the board on the grounds set forth in the claim" -- authorizes a civil action in a California superior court governed by the California Rules of Civil Procedure. In an action brought under RTC § 6933, the ***trial court*** is the finder of fact, notwithstanding that the California State Board of Equalization (the "Board"), *California's equivalent to the Tax Commission*, has held hearings and made findings during the administrative process. As in the case of an action brought under NRS 372.680 or NRS 368A.290, in a proceeding brought in California under RTC § 6933:

> The burden of proof is on the taxpayer . . . to produce evidence from which a proper tax determination can be made. The taxpayer must affirmatively establish the right to a refund by the preponderance of the evidence, and cannot simply assert error and shift to the state the burden of justifying the tax.

Paine v. Bd. of Equalization, 137 Cal. App. 3d 438, 442 (1982) (citations omitted).

In California, the trial court conducts a bench trial and the parties may present evidence

and witnesses. *See, e.g.,* **Delta Air Lines, Inc. v. Bd. of Equalization**, 214 Cal. App. 3d 518, 524 (1989) (following a hearing before and decision from the Board, the taxpayer brought a refund action under RTC § 6933 and the "parties stipulated to certain facts, presented agreed-upon exhibits and deposition testimony, as well as the testimony of two witnesses"); **Jimmy Swaggart Ministries v. Bd. of Equalization**, 204 Cal. App.3d 1269 (1988); and **Fujitsu IT Holdings, Inc. v. Franchise Tax Bd.**, 120 Cal. App. 4th 459, 470 (2004) (income tax refund action under RTC § 19382, where the taxpayer appealed the Franchise Tax Board's decision to the Board, the ensuing refund action in superior court was tried "largely on stipulated facts, supplemented by the testimony of witnesses and documentary evidence"). While there is less controlling authority in Nevada, all of the existing precedence indicates that an action under NRS 372.680 or NRS 368A.290 would proceed in the same manner as one under RTC § 6933.

3. Changes to NRS 233B.130 and NRS 372.680 Do Not Have an Effect on the Judicial Remedy to be Used in This Case.

a. The 1989 Changes.

The Department cites to the statutory amendments to the APA enacted in 1989 as part of Assembly Bill 884 ("A.B. 884") as authority for its contention that the Legislature intended to limit a taxpayer's remedy to judicial review pursuant to APA in a tax refund action. Dept. Mtn., pp. 15-17. A.B. 884 removed language from NRS 233B.130(1) which stated that the APA "does not limit utilization of trial de novo to review a final decision of the agency where provided by statute, but this chapter provides an alternative means of review in those cases." In addition, A.B. 884 added NRS 233B.130(6), which provides that the APA is 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."

Neither of these amendments is relevant to a taxpayer's refund action. First, neither

NRS 372.680, nor more importantly NRS 368A.290, authorizes a taxpayer to seek judicial review. Since the plain language of NRS 372.680 and NRS 368A.290 makes clear that the action in district court is not an appeal *from the Commission's decision*, but is instead an *original proceeding in the district court against the Department*, neither the APA nor its judicial review standards have any application to a refund action under NRS 372.680 or NRS 368A.290. Consequently, neither NRS 372.680 nor NRS 368A.290 need to expressly state that a trial de novo is permitted to review an agency decision because they do not authorize a judicial review proceeding in the first instance.

Second, whether or not expressly provided in the APA, when a petition for judicial review *is* the appropriate judicial remedy, the judicial review standards imposed by the APA are trumped if a more specific statute imposes a different standard. *See* NRS 233B.020(2) (stating that the APA "supplement[s] statutes applicable to specific agencies" but "does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law"); **Western Realty Co. v. City of Reno**, 63 Nev. 330, 337 (1946) (providing that a specific statute "dealing expressly and in detail with a particular subject" controls over a "general provision relating only in general terms" to the subject). Both NRS 372.680 and NRS 368A.290 impose requirements that are inconsistent with the judicial review standards imposed by the APA. *See* Section IV(B)(1), *supra.*

In addition, the Department is incorrect in asserting that NRS 233B.130(6) requires an action brought under NRS 372.680 to be governed by the APA's judicial review standards. NRS 233B.130(6) simply provides that the APA is 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." The plain language of NRS 372.680 and NRS 368A.290 in no way

describes an appeal from, or a judicial review of, the legal or factual findings of the Commission (instead, treating the Commission's denial of a taxpayer's refund claim as simply a prerequisite to "bring[ing] an action against the Department"). As such, NRS 233B.130(6) is simply inapplicable here.

Nor do the actions authorized by NRS 372.680 and NRS 368A.290 "concern[] a final decision in a contested case," because the district court's role is to conduct a new trial against the Department on the grounds set forth in the claims, during which the Commission's decision receives no deference. The Department's overbroad interpretation of NRS 233B.130(6) would mean that whenever a litigant has received a decision from an administrative agency in a contested case, the litigant's judicial remedy must be limited to a "judicial review" in the district court in accordance with the APA's judicial review standards *regardless* of whether a separate and more specific statute plainly provides the litigant with a different judicial remedy; *e.g.*, an original civil action in district court. *See* NRS 233B.020(2) (providing that the APA does "not abrogate or limit additional requirements imposed . . . by statute or otherwise recognized by law"). Such a construction would abrogate and nullify NRS 372.680, NRS 368A.290, and all materially identical statutes authorizing tax refund actions.[10]

b. <u>The 1997 Changes</u>.

In addition to the 1989 changes, the Department claims that subsequent changes

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[10] NRS 363A.190 (refund action for Nevada's financial institutions tax), and NRS 363B.180 (refund action for Nevada's business tax), are all materially identical to NRS 372.680 and NRS 368A.290, authorizing the taxpayer to "bring an action against the Department on the grounds set forth in the claim" in district court following a denial of its refund claim by the Commission. In addition, both NRS 372.685 and NRS 368A.300 specify an administrative procedure, and authorize a refund action identical to the ones authorized by NRS 372.680 and NRS 368A.290, in circumstances where the Department fails to act on a taxpayer's tax refund claim within a specified time period.

demonstrate "the legislative intent that all final decisions by the NTC be subject to judicial review." Dept. Mtn., pp. 16-17. The Legislature enacted Senate Bill 375 ("S.B. 375") in 1997, adding NRS 360.245(5), which prohibits the Department from seeking judicial review of Commission decisions, and NRS 360.245(7), which specifically authorizes local governments that were parties to the proceeding before the Commission to seek judicial review if they are aggrieved by the decision. Contrary to the Department's contention, neither of these provisions has any effect on the judicial remedy provided by NRS 372.680 or NRS 368A.290.

The Legislature enacted S.B. 375 to resolve a turf war between the Department and the Commission which came to a head in **Dep't of Tax 'n v. Newmont Gold Co.** (Nev. 1st Judicial Dist., Sept. 3, 1996). In that case, the taxpayer (Newmont Gold) received a deficiency determination following a sales tax audit by the Department. The taxpayer filed a petition for redetermination and the matter was heard before a Department hearing officer. The hearing officer upheld the deficiency determination and the taxpayer appealed to the Commission. The Commission voted unanimously to reverse. The Department filed a petition for judicial review in district court and the taxpayer filed a motion to dismiss, arguing that the Department had no standing to file a petition for judicial review because the Commission is the statutory head of the Department. The Department asserted that, since "its members are not selected based upon their tax law expertise, . . . the Commission's decisions should be appealable." The district court granted the taxpayer's motion to dismiss because existing statutes "clearly established" the Commission as the head of the Department and, thus, the "Department. . . cannot be aggrieved by a decision of [the Commission]." **Id**.

NRS 360.245(5) precludes the Department from challenging Commission decisions in court and, contrary to the Department's argument here (Dept. Mtn., p. 17), has no bearing on

the judicial remedy afforded to a taxpayer in a refund action under NRS 372.680 or NRS 368A.290. NRS 360.245(5) clarifies that only decisions of the Commission, as opposed to "decisions of the executive director or other officer of the department" (NRS 360.245(1)(a)), are subject to judicial review, and expressly precludes the Department from appealing decisions of the Commission that were adverse to the Department. The plain language of the statute accomplishes the Legislature's objectives.

The first sentence of NRS 360.245(5), which states that "[a] decision of the [Commission] is a final decision *for the purposes of judicial review*," must be read in connection with NRS 360.245(1)(a), which states that "all decisions of the executive director or other officer of the department made pursuant to this Title *are final unless appealed to the [Commission]*." (Emphasis and clarification added.) These two provisions establish that a person aggrieved by an administrative decision of the Department cannot appeal the Department's decision to district court. Rather, the aggrieved person must first appeal to the Commission.[11] Furthermore, if the Department's decision becomes final because it is not appealed to the Commission pursuant to NRS 360.245(1)(a), all avenues for further appeal are *closed*. In sum, the first sentence of NRS 360.245(5) simply provides that only a decision of the Commission is subject to judicial review; *not* that a decision of the Commission can only be judicially challenged via a petition for judicial review.

The second sentence of NRS 360.245(5) – "The executive director or any other employee or representative of the department shall not seek judicial review of such a decision"

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[11] As discussed at length in Section IV(B)(3)(c), *infra*, S.B. 362 amended NRS 372.680 and other tax refund statutes to require denial of a taxpayer's refund claim from the Commission before the taxpayer may bring an action in district court against the Department. This is consistent with the changes made by S.B. 375, ensuring that the Commission's decision, not the Department's, is the final decision within the agency.

-- speaks for itself, and expressly prohibits the Department from seeking judicial review of Commission decisions. Together, the two sentences of NRS 360.245(5) do no more than affirm the Commission's authority over the Department in the context of tax cases at the administrative level by establishing the Commission's ruling as the *final decision* within the agency, and in no way conflict with NRS 372.680 or NRS 368A.290. Importantly, NRS 360.245(5) neither authorizes any party to seek judicial review nor states that a final decision of the Commission is *only* subject to judicial review. Instead, one must consult other statutes to determine the specific judicial remedy that applies in a particular set of circumstances.[12] Nothing in NRS 360.245(5) has any bearing on the ***specific and explicit*** judicial remedy afforded to taxpayers in refund actions under either NRS 372.680 or NRS 368A.290.

As further example, NRS 360.245(7) has no relevance to a taxpayer's refund action. It

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[12] For example, NRS 360.395 makes clear that a taxpayer may file a petition for judicial review pursuant to NRS 233B.130 following the Commission's decision upholding a deficiency determination by the Department. Similarly, NRS 360.245(7) authorizes a county or other local government that is a party to the proceeding before the Commission and aggrieved by the decision to petition for judicial review (NRS 360.245(5), of course, prohibits the Department from filing a petition in that case). On the other hand, however, both NRS 372.680 and NRS 368A.290 authorize a taxpayer to bring *an action* against the Department on the grounds set forth in its refund claims following the Commission's denial of its refund claims. It is a fundamental doctrine of statutory construction that when a provision is found in one section of a law but not in another, that difference is deemed to be intentional on the part of the legislature. *See* **Dept of Taxation v. Daimler Chrysler Services North America, LLC**, 121 Nev. 541, 548 (2005) (Nevada law provides "that omissions of subject matters from statutory provisions are presumed to have been intentional") (citing **Galloway v. Truesdell**, 83 Nev. 13, 26 (1967) ("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS,' the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.")); and **Jama v. Immigration and Customs Enforcement**, 543 U.S. 335, 357 (2005) (following "the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'") (quoting **Sosa v. Alvarez-Machain**, 542 U.S. 692, 711 n. 9 (2004), and citing **United States v. Gonzales**, 520 U.S. 1, 5 (1997) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion")).

provides: "A county or other local government which is a party and is aggrieved by the decision of the Nevada Tax Commission is entitled to seek judicial review of the decision." Accordingly, if the Commission grants a taxpayer's claim for refund, a county or local government that was a party to the proceeding may file a petition for judicial review of the Commission's decision. The Legislature used *different words* in NRS 372.680/NRS 368A.290, than it did in NRS 360.245(7). The latter grants local governments with only the limited right "to seek judicial review of the decision," while the former provides taxpayers with the more expansive right to "bring an action against the department on the grounds set forth in the claim." Thus, the legislature clearly meant to provide different parties with different judicial remedies. *See* **Butler v. State**, 120 Nev. 879, 892-93 (2004) (providing that statutes must "not be read in a way that would render words or phrases superfluous or make a provision nugatory").

NRS 360.245(7) was enacted in 1997, and the Legislature amended NRS 372.680 in the following legislative session in 1999. If the Legislature had intended to create parity between the judicial remedies for local governments and taxpayers, it could easily have done so by revising NRS 372.680 in 1999 to provide the *identical* judicial remedy it had just made available to local governments in the prior legislative session. The Legislature did not do so. Rather, it retained the statutory language in NRS 372.680, which provides for the bringing of a *civil action against the Department*. Similarly, such changes could have been made when drafting NRS 368A.290 in 2003, however, the Legislature incorporated language which was virtually identical to NRS 372.680. The clear legislative intent cannot, respectfully, be ignored by this Honorable Court. *See* n. 12, *supra*.

Furthermore, taxpayers pursuing a claim for refund, and local governments aggrieved

by a decision of the Commission, are not similarly situated. Unlike the taxpayer, a local government that was a party to a refund claim proceeding before the Commission would not be suing for a tax refund; *i.e.*, would not be pursuing the type of *equitable action for restitution* discussed in **Obexer & Sons**, 99 Nev. at 237, and **Saveway**, 104 Nev. at 404. A local government would only be alleging error with regard to the Commission's decision (rather than seeking restitution), and therefore judicial review is the appropriate judicial remedy for a local government. Nevada's statutory scheme provides for just this result.

c. The 1999 Changes.

The Department erroneously claims that the changes made in 1999 by Senate Bill 362 ("S.B. 362") further demonstrate that the judicial remedy under NRS 372.680 was intended to be a petition for judicial review. Dept. Mtn., p. 17. The amendments to NRS 372.680 made by S.B. 362 did not change the nature of the judicial remedy afforded to a taxpayer. Both before and after S.B. 362, NRS 372.680(1) authorized a civil action as follows: "The claimant may bring an action against the department on the grounds set forth in the claim . . . for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed." Since the statute was enacted in 1955, its "may bring an action" language has not been changed by the Legislature.

Prior to the enactment of S.B. 362, NRS 372.680 provided that a taxpayer whose claim for refund of sales or use taxes had been denied by the ***Department*** could "bring an action against the department on the grounds set forth in the claim *in a court of competent jurisdiction in Carson City.*" Ex. 15. After the passage of S.B. 362, NRS 372.680 provided (and continues to provide) that a taxpayer whose claim for refund of sales or use taxes has been denied by the ***Commission*** may "bring an action against the department on the grounds set forth in the claim

in a court of competent jurisdiction in Carson City, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department . . . ."

As the italicized language shows, S.B. 362 amended NRS 372.680 in *only two respects*. First, the reference to the "Department" was changed to the "Commission." This change was required because S.B. 362 also amended NRS 360.245(1). Ex. 16. The amendment to NRS 360.245(1) provided that a taxpayer whose claim for refund was denied by the Department must appeal to the Commission. The jurisdictional prerequisite for the *district court action* authorized by NRS 372.680 had to be changed accordingly. Second, the venue in which a district court action could be brought was expanded to include jurisdictions other than just Carson City.

This change is a natural accompaniment to the modifications made by the Legislature two years earlier, in 1997, in S.B. 375 (discussed in Section IV(B)(3)(b), *supra),* which clarified that the Commission, and not the Department, has ultimate authority for determining how Nevada's tax laws are interpreted, administered and enforced. Consistent with this Legislative determination, S.B. 362 ensured that the Commission's decision, not the Department's, would always be the *final decision within the agency*, thus providing the Commission with the ability to ensure that all decisions of the Department are consistent with the tax policy directives set by the Commission. In addition, since the Department may not appeal a decision of the Commission (*see* NRS 360.245(5)), the involvement of the Commission in the refund claim administrative process promotes judicial economy by limiting

the number of cases that require resolution by the courts.[13]

To support the position that the intent of the Legislature in amending NRS 372.680 was to subject refund actions to the APA, the Department relies primarily on a memorandum from then-Deputy Attorney General Norman J. Azevedo to Assemblyman Bernie Anderson, the Chairman of the Assembly Committee on Judiciary, dated May 7, 1999, entitled "Venue Sections of S.B. 362" (the "Venue Memorandum," which was attached to the Department's motion as Exhibit C). Dept. Mtn., p. 17. The Venue Memorandum was provided in response to specific questions relating to the venue provisions in S.B. 362; *i.e.*, the amendments to existing tax refund statutes that expanded the jurisdictions in which tax refund actions could be brought. *See* Affidavit of Norman J. Azevedo, dated May 8, 2009 ("Azevedo Affidavit"). As shown above, in addition to inserting the Commission into the statute, the only other change to NRS 372.680 made by S.B. 362 was to add additional venues for a resulting judicial action. Although there is a statement in the Venue Memorandum suggesting that, following a final decision from the Commission, the taxpayer may file a petition for judicial review, that statement was part of an overview that was not specifically addressing actions seeking refunds of sales and use taxes pursuant to NRS 372.680. (*See* Azevedo Affidavit, at 7b.)

In any event, the Venue Memorandum does not constitute legislative history, and cannot be viewed as reflecting the intent of the Legislature. It is well established that

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[13] *See* Ex. 17, Excerpts of Minutes, Assemb. Comm. on Tax'n, May 6, 1999, p. 3 ("The change allowed the taxpayer to appeal to the Tax Commission before the business and the state had incurred the legal expenses" of bringing (or defending) an action in district court). The Department attached the Bill Explanation as Exhibit E to its instant motion, but left out the relevant minutes. *Accord* **Atari, Inc. v. Bd. of Equalization**, 170 Cal. App. 3d 665, 673 (1985) ("Prior to seeking relief from the superior court, a taxpayer must present matters of law and fact to the State Board of Equalization so that the Board may be afforded the opportunity to rectify any mistake in tax collection. Such a rule prevents having an overworked court consider issues and remedies available through administrative channels").

"testimony before a committee is of little value in ascertaining legislative intent, at least where the committee fails to prepare and distribute a report incorporating the substance of the testimony," and where the party makes "no showing that [the] testimony was endorsed or relied on by the committees." *See* **Robert E. v. Justice Court**, 99 Nev. 443, 446 (1983). There is simply no evidence before Your Honor establishing that any legislator relied on or endorsed the Venue Memorandum to reach the conclusions urged by the Department, and, as stated above, Plaintiffs have not even been able to take any depositions yet.

Had the Legislature intended to change the taxpayer's judicial remedy from "an action against the department" governed by the NRCP, to a judicial review of the Commission's decision subject to the APA, it would have amended the text of the statute to so state. None of the amendments made by S.B. 362, however, add any reference to "judicial review" or to the APA to Nevada's tax statutes, including NRS 372.680. Instead, the Legislature retained the taxpayer's right to "bring an action" against the Department on the grounds set forth in the claim after the completion of the administrative process, rather than requiring a taxpayer to seek judicial review of the Commission's decision.[14]

In fact, one of the other tax refund statutes amended by S.B. 362 was NRS 365.460 – the statute at issue in **Saveway**. 104 Nev. at 403-405. As discussed in Section IV(B)(1), in **Saveway** the Nevada Supreme Court held that NRS 365.460 authorized an independent action for restitution, and not judicial review of the Commission's decision pursuant to NRS

[14] This retention of language authorizing a civil action against the Department was not a legislative oversight. In 2003, four years after S.B. 362 was enacted, the Legislature enacted three new taxes: The tax on financial institutions, the business tax, and the tax on live entertainment (which is at issue here). For each new tax the Legislature adopted a statutory provision authorizing a tax refund action that is identical to NRS 372.680, providing "an action against the department on the grounds set forth in the claim" following a final decision from the Commission on the claim. *See* n. 10, *supra.*

233B.135, even though in **Saveway** the taxpayer's refund claim had been reviewed and denied by the Commission. Subsequent to **Saveway**, S.B. 362 amended NRS 365.460 to require a taxpayer to appeal to, and receive an adverse decision from, the Commission before bringing an action under NRS 365.460, but retained the judicially interpreted "may bring an action" language describing the taxpayer's judicial remedy:[15]

> 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 . . . for the recovery of the excise tax so paid under protest.

Our Supreme Court has held that: "It is presumed that the legislature approves the supreme court's interpretation of a statutory provision when the legislature has amended the statute but did not change the provision's language subsequent to the court's interpretation." **Silvera v. Employers Ins. Co. of Nevada**, 118 Nev. 105, 109 (2002). Although the Legislature amended NRS 365.460 after the Supreme Court's decision in **Saveway** to require an appeal to the Commission before bringing an action in district court, it did *not* amend the language in the statute that had been interpreted by the Supreme Court to authorize an *independent action for restitution* as opposed to a judicial review proceeding.

The Legislature's deliberate decision to retain the language describing the taxpayer's judicial remedy in NRS 365.460 establishes beyond a doubt that the Legislature intended for taxpayers filing claims for refund to be entitled to a new civil action, *i.e.*, a trial de novo,

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[15] S.B. 362 set the amendments to NRS 365.460 to expire by limitation on December 31, 2001, because, beginning in 2002, the Department of Motor Vehicles took over administration of the motor fuel excise tax imposed by NRS Chapter 365. Ex. 16. Accordingly, the current version of the statute no longer requires the taxpayer to appeal to the Commission before bringing an action in district court.

following the completion of the administrative process. If the Legislature had wanted to overturn the Supreme Court's holding in **Saveway** when it enacted S.B. 362, it could have done so. But it did not. Instead, it ratified **Saveway**. Accordingly, since NRS 365.460 is in all relevant respects identical to NRS 372.680 and NRS 368A.290, the Department is incorrect in its argument that by enacting S.B. 362, the Legislature indirectly changed the judicial remedy afforded to a taxpayer by NRS 372.680 (and therefore NRS 368A.290) into a judicial review proceeding.[16]

For all the reasons set forth above, Plaintiffs are not limited to bringing a Petition for Judicial Review, and this Court is not deprived of the jurisdiction to hear this matter as the Department claims. Dept. Mtn., pp. 18-19. But what should be most important, however, to this Court is the simple fact that the Department argues form over substance. ***These Plaintiffs filed the EXACT type of legal action spelled out in NRS 368A.290 and discussed in the rulings of the Nevada Supreme Court quoted above; Plaintiffs attempted from the beginning to litigate their constitutional challenges in Federal Court but were thwarted by the Department; the Plaintiffs had a motion for preliminary injunction pending for almost 2 ½ YEARS in front of this Honorable Court to address their constitutional grievances, during***

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[16] The Department attempts to argue, however, that the Legislature's Amicus Curiae Brief in Case No. 55228 before the Nevada Supreme Court should be persuasive to this Court. This is not "legislative history." It is an after-the-fact judicial assertion interposed to win a case, and cannot serve to alter, or "clarify," in any way, the legislative history leading up to the adoption of the challenged tax laws. **Blanchett v. Connecticut General Ins. Corp.**, 419 U.S. 102, 132 (1994) (in regard to an amicus brief filed in the Supreme Court on behalf of 36 congressmen, the court noted: "But post-passage remarks of legislators, however, explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." (Citing **United States v. Mine Workers of America**, 330 U.S. 258, 282 (1947)). Rather, it is clear from the discussion above that this issue has been addressed more than once by the Nevada Supreme Court. The Legislature's comments are yet another attempt by the Department to limit a taxpayer to judicial review does not bear credence here.

which time the Plaintiffs were required to pay literally MILLIONS OF DOLLARS IN TAXES without judicial intervention; and the Department NEVER previously raised this claim in their affirmative defenses. While the parties may argue about the proper *scope* of the legal proceeding that is Case 2, to rule that this Court simply does not have the jurisdiction to hear the Plaintiffs requests for refunds at this late date, in these circumstances, would be nothing short of unconscionable and a clear violation of the Plaintiffs' Due Process rights.[17]

As a result, if, irrespective of all of the matters discussed above, this Court should conclude that Plaintiffs should have filed a petition for judicial review instead of the original action that is Case 2, Plaintiffs respectfully request that this Court merely simple consider that filing as such a petition (as another district court did, as is discussed immediately below), or permit the Plaintiffs to amend their Case 2 complaint to explicitly plead such a petition. Certainly, Plaintiffs did not sleep on their rights and were not dilatory in their attempt to obtain judicial relief.

4. The Case Referenced by the Department Does Not Support its Arguments.

The history of the case cited by the Department in support of the legislature's intent regarding the petition for judicial review as the sole remedy under NRS 372.680 (Dept. Mtn.

[17] Pursuant to the decision of the Nevada Supreme Court in **Nevada Department of Taxation v. Scotsman Manufacturing Company, Inc.**, 109 Nev. 252 (1993), even if a plaintiff has missed the statutory deadline for filing of a refund action to obtain reimbursement of unlawfully collected taxes, the taxpayer could still seek and obtain a refund, with the court identifying such an action as "the only effective remedy available to Scotsman; prospective relief alone (i.e. future exemption from tax) would hardly afford Scotsman a meaningful remedy for the unconstitutional deprivation of its property. To relieve the State of its obligation to refund the unlawful and coerced tax payments would contravene the Fourteenth Amendment." **Id.** at 255 (citing **McKesson Corp. v. Division of Alcoholic Beverages and Tobacco**, 496 U.S. 18, 39 (1990)). Therefore, under this precedent, should this Court find that a petition for judicial review is the appropriate remedy, the passage of the expiration of the deadline to bring such a petition should not foreclose this simply construing Case 2 into a petition for judicial review.

Ex. G, **Southern California Edison v. The First Judicial District Court of the State of Nevada et al.**, Case No. 09-OC 00016 1B; Supreme Court Case No. 55228, hereinafter "**Edison**"), is enlightening in regard to the Department's arguments regarding dismissal.

Virtually identical to the procedures here, the taxpayer in **Edison** filed for a refund of the use tax it paid to the Department. When the Commission denied Edison's claim for a refund, Edison filed a *complaint* in district court (In Carson City) against the Department in accordance with the procedures set out in NRS 372.680. As here, the Department filed for a motion to dismiss Edison's case, arguing, like here, that the exclusive remedy was to file a petition for judicial review under the APA. The district court in **Edison** ***denied*** the Department's motion for dismissal because the Department's "***argument would have this Court ignore and give no meaning to NRS 372.680.***" Order Denying Defendant's Motion to Dismiss, June 30, 2009 (emphasis added). After denying the Department's motion to dismiss, the district court in **Edison** determined that the standards for judicial review would apply, a stay was issued, and that ruling is now up before the Nevada Supreme Court.

The procedural history of the **Edison** case demonstrates that the Department's motion to dismiss should ***not*** be granted, and it further eviscerates the Department's arguments that Case 2 is barred under the doctrines of res judicata, claim preclusion and issue preclusion (Dept. Mtn, pp. 19-23).

V. CASE 2 IS NOT BARRED BY THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA, THE DOCTRINE OF CLAIM PRECLUSION, OR THE DOCTRINE OF ISSUE PRECLUSION.

The Department's arguments that Case 2 is barred by the doctrines of administrative res judicata, claim preclusion and issue preclusion, contained on pages 19 through 23, are all based upon the premise that Plaintiffs were solely entitled to judicial review and not a separate civil

action. As set forth extensively above, Plaintiffs clearly show that they are entitled to a trial de novo. Therefore, this Court is not limited to the record that was before the Commission as the Department claims. Further, since this civil de novo trial is an appropriate method of seeking judicial redress, it is irrelevant that the Department asserts that decisions of the Commission are considered final decisions for the purposes of judicial review. Finally, the Department insists that the parties are identical in both the administrative proceedings before the Commission and Case 2. However, the Department is contradicting itself, as the Deja Vu Plaintiffs are now Plaintiffs in Case 2 by virtue of the Amended Complaint, and the Department's position in the instant motion, as well as its handy chart, confirm that the Deja Vu Plaintiffs were not involved in the administrative proceedings before the Commission.[18] The Department cannot have it both ways. Therefore, because the Plaintiffs are entitled to a trial de novo, the Department's request that Case 2 be barred by these three doctrines should be denied.

There is an additional reason why neither res judicata nor collateral estoppel would bar any future administrative proceedings by the K-Kel Plaintiffs, and that is because the law (*i.e.*, Chapter 368A) has changed since the time frame that was at issue in those prior appeals. The previous proceedings before the Commission only concerned appeals from decisions of the Department with regard to a limited number of months that the LET was paid in 2004.

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[18] The Department erroneously states that in "their Amended Complaint, the ***six*** Case 2 Plaintiffs state that they filed requests for refund pursuant to NRS 368A.260 alleging that the LET is unconstitutional, that the requests for refund were denied by the Department." Dept. Mtn., pp. 22-23 (emphasis added). The Amended Complaint added the Deja Vu Plaintiffs to make the total number of Plaintiffs eight. The only reason, as explained above, that the Deja Vu Plaintiffs were not included in the original Case 2 complaint was because, pursuant to Chapter 368A, the time for them to file their requests for refund had not expired. Therefore, the Deja Vu Plaintiffs were not included in the Commission's initial affirmation of the Department's denials, and the Deja Vu Plaintiffs' appeals are not being considered by the Commission due to the pendency of Case 2. *See* Ex. 10.

However, as discussed above, Chapter 368A was amended in ***2005***, with those amendments serving as additional substantiation of the targeting and gerrymandering of the Live Entertainment Tax.

Neither res judicata nor collateral estoppel apply when there has been a change in the law. *See, e.g.,* **Commissioner of Internal Revenue v. Sunnen**, 333 U.S. 591, 600 (1948); **B.N. Spradling v. City of Tulsa**, 198 F.3d 1219, 1223 (10th Cir. 2000); **Southwest Exploration Co. v. Riddell**, 362 F.2d 833, 836 (9th Cir. 1966) (judicial decisions dealing with "tax years other than those presently under consideration, would not operate under the doctrine of res judicata to prevent the relitigating of the question of liability with respect to a deficiency for such other years. ***Each year is the origin of a new liability and a new separate cause of action***") (emphasis added) (citing **Sunnen**, 333 U.S. at 598). In fact, as the Ninth Circuit has stated, "[c]ollateral estoppel itself is applied ***more strictly in tax cases than others***." **Parker v. Westover**, 221 F.2d 603, 605 (9th Cir. 1955) (emphasis added).

VI. THE CASE 1 CLAIMS PURSUANT TO 42 U.S.C. 1983 SHOULD NOT BE DISMISSED.

The Department relies on **Will v. Michigan State Dep=t of State Police**, 491 U.S. 58, 71 (1989), in alleging that the Plaintiffs have failed to state a claim under 42 U.S.C. ' 1983 for the reason that the "States, its agencies, and its officials acting in their official capacities" are not "persons" under Section 1983 of Title 42 of the United States Code. Dept. Mtn., pp. 23-24. First, the Department misreads **Will**. It clearly holds that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under ' 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" **Will**, 491 U.S. at 71 n.10 (citing **Kentucky v. Graham**, 473 U.S. 159, 167 n.14 (1985); and **Ex Parte Young**, 209 U.S. 123, 159-160 (1908)). Here, of course, Plaintiffs seek injunctive relief, and

have sued Department official Michelle Jacobs in her official capacity in order to be able to obtain just such judicial relief.

Second, however, case law *does* support a plaintiff=s right to bring suit under 42 U.S.C. ' 1983 against a state agency. For example, in **G&V Lounge, Inc. v. Michigan Liquor Control Comm=n**, 23 F.3d 1071, 1073 (6th Cir. 1994), the plaintiff filed a civil rights action under §1983 against the Michigan Liquor Control Commission, ***a state agency***, challenging the revocation of its liquor license if it presented topless dancing. The court held that the plaintiff *did* have standing to so challenge the regulations of the state agency. **Id.**

VII. THE "FACIAL CHALLENGE" REGARDING THE CONSTITUTIONALITY OF THE LET IS NOT THE ONLY REMAINING ISSUE BEFORE THIS COURT.

The Department claims that 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." Dept. Mtn., p. 24. In addition to its continued contention that Plaintiffs were limited to a judicial review action and failed to avail themselves of that option, the majority of the Department's argument that only the "facial challenge" remains properly before this Court involves its assertion that Plaintiffs did not exhaust their administrative remedies. Dept. Mtn., pp. 24-27.

The Department argues that Plaintiffs had not exhausted their administrative remedies at the time they filed their complaint and, therefore, cannot bring an "as applied" challenge to the LET. This is basically the same argument that the Defendants raised before Judge Togliatti in Defendants' Motion to Dismiss, p. 5-8, filed on April 18, 2008. While Plaintiffs do not wish

to re-litigate that Motion which was denied by Judge Togliatti, since the Department has once again raised this issue, Plaintiffs will respond again.

As admitted by the Defendants in the related federal proceedings, exhaustion of administrative remedies is ***not*** a prerequisite for the filing of Case 1. First, as a general proposition, the United States Supreme Court has observed that a person suffering a deprivation of their federal constitutional rights should not have to exhaust state administrative remedies as a condition to bringing suit to protect those liberties. The Court has "on numerous occasions ***rejected*** the argument that a civil rights action under 42 U.S.C. § 1983 should be dismissed where the plaintiff has not exhausted state administrative remedies." **Patsy v. Bd. of Regents of Florida**, 457 U.S. 496, 500, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (emphasis added). *See also* **Barry v. Barchi**, 443 U.S. 55, 63 n.10, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); **Gibson v. Berryhill**, 411 U.S. 564, 574, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). Plaintiffs have brought Case 1, in part, pursuant to the Federal Civil Rights Statute found at 42 U.S.C. § 1983. Complaint, at ¶¶ 3, 65, 66.

This exception to the exhaustion doctrine that has been carved out for claims under § 1983 is a result of the sensitive nature and supreme importance of constitutional rights. *See* **Steffel v. Thompson**, 415 U.S. 452, 472-73, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). The Court has also analyzed the intent of Congress in enacting § 1983, and observed that the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be

executive, legislative, or judicial.'"[19] **Mitchum v. Foster**, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) (*quoting* **Ex parte Virginia**, 100 U.S. 339, 346, 25 L.Ed. 676 (1879)). Requiring the Plaintiffs here to exhaust potentially lengthy – and as proven in this case, futile – repeated state administrative remedies would clearly go against the intent of Congress.

Correspondingly, state courts have recognized that the Supreme Court's decisions in **Pasty** and **Felder v. Casey**, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), mean that state courts, like federal courts, may not require exhaustion of state administrative remedies as a subject matter bar to hearing federal claims under 42 U.S.C. § 1983. *See, e.g.,* **Maryland Reclamation Associates, Inc. v. Hartford County**, 677 A.2d 567, 575, 342 Md. 476, 492-493 (Md. 1996) ("The Supreme Court has held that a plaintiff is ***entitled*** to maintain an action under 42 U.S.C. § 1983 in a state court without having exhausted available administrative remedies") (*citing* **Felder**, 487 U.S. at 146-147) (emphasis added); **Farm Bureau Town and Country Ins. Co. of Mo. v. Angoff**, 909 S.W.2d 348, 354 (Mo. 1995) ("Generally, state administrative review need not be exhausted before a § 1983 claim may be brought in state or federal court") (citing **Patsy**, 457 U.S. at 516); **National Camera, Inc. v. Sanchez**, 832 P.2d 960, 966 (Colo. App. 1991); **Allen v. Bergman**, 400 S.E.2d 347, 348-349, 198 Ga.App. 57, 58 (Ga. App. 1990) ("In **Felder** [ ], the Supreme Court held that states may no longer require litigants to exhaust administrative remedies before asserting claims pursuant to 42 U.S.C. 1981 and 42 U.S.C. 1983 in state courts"); and **Zeigler v. Kirchner**, 781 P.2d 54, 60, 162 Ariz. 77, 82-83 (Az. App. 1989) ("***The holding in Felder clearly demonstrates that a state court may not condition a Plaintiff's § 1983 claim upon the exhaustion of state administrative***

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[19] State courts have concurrent jurisdiction with the federal courts to adjudicate claims under 42 U.S.C. § 1983. *See, e.g.,* **Miller v. County of Santa Cruz**, 39 F.3d 1030, 1038 n.10 (9th Cir. 1994); and **DeHorney v. Bank of America Nat. Trust and Sav. Ass'n**, 879 F.2d 459, 463 n.4 (9th Cir. 1989) (citing **Martinez v. California**, 444 U.S. 277, 283 n.7 (1980)).

remedies") (emphasis added).

Of course, the best exposition of this doctrine comes from the Court itself:

> In **Patsy** [ ], we held that plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court. The Wisconsin Supreme Court, however, deemed that decision inapplicable to this state-court suit on the theory that States retain the authority to prescribe rules and procedures governing suits in their courts. [ ]. As we have just explained, however, that authority does not extend so far as to permit States to place conditions on the vindication of a federal right.

Felder, 487 U.S. at 147 (citation omitted).

> While the exhaustion required by Wisconsin's notice-of-claim statute does not involve lengthy or expensive administrative proceedings, ***it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place.***

Id. at 149 (emphasis added).

> In enacting 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. ***A state law that conditions that right of recovery upon compliance with a rule . . . that directs persons to seek redress from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.*** Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right ***when that right is asserted in state court.***

Id. at 153 (emphasis added).

Moreover, the Department again has not identified a single reason why requiring Plaintiffs to exhaust administrative remedies (although most have already done so) will assist this Court in deciding the constitutional claims Plaintiffs have brought before it. This then leads to the next point.

Second, in addition to and irrespective of the Federal remedy under 42 U.S.C. § 1983, the Nevada Supreme Court has determined that because of the importance of constitutional rights, a taxpayer may in fact bypass administrative remedies and seek judicial redress ***directly***

in the state courts if the challenge relates to the constitutionality of the taxing law. In **Nevada Dep't of Taxation v. Scotsman Mfg. Co., Inc.**, 109 Nev. 252, 849 P.2d 317 (Nev. 1993), the court stated that the "exhaustion doctrine will not deprive the court of jurisdiction 'where the issues relate solely to the interpretation or constitutionality of a statute." **Id.** at 255, *citing* **State of Nevada v. Glusman**, 98 Nev. 412, 419, 651 P.2d 639, 644 (Nev. 1992). *See also* **Malecon Tobacco, LLC v. State Dept. of Taxation**, 118 Nev. 837, 839-41, 59 P.3d 474, 476-77 (Nev. 2002) (exhaustion of administrative remedies is not required when the constitutionality of a tax statute is challenged on its face).

Under **Scotsman**, then, as acknowledged by these same Defendants in the federal proceedings and as recognized by the federal district court,[20] Plaintiffs have the ability to litigate this "direct action remedy," irrespective of whether or not they have exhausted administrative remedies, and the "as applied" challenges in both suits should not therefore be dismissed.

Third, where the seeking of administrative redress would be futile, exhaustion of such a remedy is not a prerequisite to filing for legal redress in the courts of this state. *See* **Scotsman**, 109 Nev. at 255 (exhaustion under Nevada law is not required where "initiation of administrative proceedings would be futile"). This exception applies here as well (and is really only applicable to the Deja Vu Plaintiffs since all others have now undergone full administrative review).

Initially, the Nevada Supreme Court has recognized that if the State simply defends the

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[20] In the federal district court, the Department acknowledged the applicability of the relief available under **Scotsman** (Ex. 18, Reply Brief, pp. 3 n.2, 5-6, 8), and the district court recognized it as well as a basis for dismissing the federal action on the basis that there was a "plain, speedy, and efficient remedy" available in state court (Ex. 6, Order, p. 6).

constitutionality of a tax statute, the administrative proceedings will certainly then be futile. **Id.** (the taxpayer's compliance with the administrative remedies would have been futile in "view of the State's position concerning the constitutional validity of the tax"). Because the Department here has not given any indication to this Court that it will now change its position and concede that the LET is unconstitutional, it is presumed that it (and the Commission in regard to the Deja Vu Plaintiffs) will take the position that Chapter 368A is, in fact, fully valid. Since the filing of the initial Complaint here, Defendants have done just that. Hence, any further administrative proceedings are futile pursuant to **Scotsman**.[21]

But there is an even more compelling basis to establish that any administrative remedy

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[21] Indeed, because the Department asserted in the Commission proceedings that the LET was fully constitutional and because the Commission reached just that conclusion (Ex. 11), any further administrative proceedings in either the Department or the Commission would also be futile. For example, once the Deja Vu Plaintiffs began to file their administrative refund requests under Chapter 368A, the Department has continued to deny their requests each and every month. Further, those Plaintiffs would have no chance of prevailing on their constitutional challenges because the Commission has already rejected such arguments (even if the Commission were to take up the appeals of those denials, which it is not doing, purportedly due to the pendency of Case 2). Ex. 10. There is no reason to believe, and certainly the Department has posited no argument in this motion supporting any such belief, that the Commission would rule on ***the Deja Vu Plaintiffs'*** constitutional claims ***any different*** than it decided the similar challenges raised by the K-Kel Plaintiffs. And, of course, there is no reason to believe that further administrative appeals by the K-Kel Plaintiffs would have outcomes any different than the prior rulings by the Commission.

The final, but possibly most important, reason that the administrative proceedings would be futile is the simple fact that the resolution of constitutional issues - - which is certainly critical here for the reasons discussed above - - are unsuited to administrative proceedings. **Malecon Tobacco**, 118 Nev. at 840-841. Our State Supreme Court has further noted that the "United States Supreme Court has recognized that under federal administrative procedures, the 'adjudication of the constitutionality of congressional enactments has generally been thought to be beyond the jurisdiction of administrative agencies.'" **Id.** at 840 (*citing* **Thunder Basin Coal Co. v. Reich**, 510 U.S. 200, 215, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (other citations omitted)). Indeed, the Supreme Court has observed that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." **Califano v. Sanders**, 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The same circumstances apply here.

would be futile. That is because the Defendants have ***themselves*** argued to the Nevada Tax Commission the futility of the Plaintiffs' administrative remedies. During the first hearing that occurred before the Commission on July 9, 2007, the Department, through legal counsel (who is the ***same attorney*** that filed the motion to for partial summary judgment and to dismiss at bar), stated that it was:

> ". . . important to mention N.A.C. 368A.170 which requires that if it is determined that a refund is appropriate in this case, that the taxpayer would first have to establish that any amounts of refund could be or have been actually refunded to the patrons of the taxpayer, and there has been no indication in this case that there is any ability of the taxpayer to refund that money to the patrons."

Transcript (Ex. 19), page 30, lines 8-14.

N.A.C. § 368A.170 (Ex. 20) regulates the "over-collection" of the subject taxes, which is defined in part as "any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of N.R.S. 368A.200[22]." N.A.C. § 368A.170(1). The regulation states that any over-collection "must, if possible, be refunded by the taxpayer to the patron from whom it was collected." N.A.C. § 368A.170(2). The taxpayer is required to "use all practical methods to determine any amount to be refunded pursuant to subsection 2 and the ***name and address*** of the person to whom the refund is to be made." N.A.C. § 368A.170(3)(a) (emphasis added). *If the taxpayer cannot do this, the refund goes to the Department!* N.A.C. § 368A.170(4).

This was the first occasion that any of the Defendants raised the applicability of N.A.C.

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[22] Subsection 5 of N.R.S. § 368A.200 states that the LET does not apply to, among other things, "[l]ive entertainment that this state is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution." N.R.S. § 368A.200(5)(a). Consequently, if Plaintiffs' arguments are correct that the LET violates both the federal and state Constitutions, the exemption under N.R.S. § 368A.200(5)(a) applies and there has then been an "over-collection" of the tax.

§ 368A.170. When the hearing continued before the Commission on August 6, 2007, Bradley Shafer, counsel for the taxpayers and one of the attorneys for the Plaintiffs here, addressed N.A.C. § 368A.170 and the Department's insistence that in order to obtain a refund a taxpayer has to identify each patron who paid an admission charge, or for food, drink or merchandise, and also has to demonstrate that the taxpayer knows where the patron lives or works in order to "reimburse" the refund to that individual. He explained:

> [W]hat the Department would say is that if a customer buys Coca-Cola, for us to get a refund of this tax, we have to get the name and address of every person buying a Coca-Cola or a beer coming in the facility and I don't think any of you in your real life experiences have ever had any time where you went to buy food and drink and had to give your name and address, and that doesn't happen here.

Transcript (Ex. 21), page 10, lines 14-21.

In addition to the arguments regarding the taxpayers' inability to locate each patron who paid an admission or who purchased food, drink or merchandise, the K-Kel Plaintiffs further informed the Commission that the tax was paid not by the patrons but, rather, by the clubs themselves. The K-Kel Plaintiffs introduced affidavits from four of the Plaintiffs which established that "none of the facilities have raised their admission fees in order to recoup the tax, the tax merely is deducted out of the general receipts of the business and it's the businesses' money that we're trying to get back." Transcript (Ex. 21), page 10-11, lines 22-25 and 1. The four affidavits submitted are attached hereto as Ex. 22.

Irrespective of these arguments of the K-Kel Plaintiffs, Senior Deputy Attorney General David Pope, ***one the defense attorneys who has filed motions for summary judgment and to dismiss in both Cases 1 and 2***, replied as follows:

> To the extent that the tax is applicable ***it's to be collected from the patrons of the gentlemen's clubs***, and in fact, there is to be an accounting or should have been an accounting by the gentlemen's club six days after they indicated that they were entitled to a refund.

> I think that they may have some approach to that and it may lead to further argument, so I think it's still an issue that is applicable and we'll have to address.

Transcript (Ex. 21), page 9, lines 5-13 (emphasis added).

Although the argument of the applicability of N.A.C. § 368A.170 was thereafter reserved by the Commission for argument at a later time (if the Plaintiffs were found to be entitled to a refund in the first place), Mr. Pope subsequently stated in the hearing:

> I know we've reserved time to argue this, but ***the law does require that that admission charge be collected from the patrons*** and I believe it also requires that if it's included in the ticket or included in the admission charge, then there has to be some notification of that.
>
> To the extent that it's not included as was stated here today, that it's just being paid on behalf of the patrons, then I think ***it's difficult to say that the patrons aren't paying it even though they don't know that they are not. The law requires that it's being collected from the patrons*** and the appellants are paying it ***on behalf of the patrons***.

Transcript (Ex. 21), pages 74-75, lines 19-25, 1-6 (emphasis added).

Commissioner Turner then verified this position:

> Counsel for the taxpayers, Mr. Shafer, argued that this is really a tax that's being absorbed by the businesses he represents.
>
> ***It is a pass-through tax***, and the businesses if the tax did not exist could reduce what they're charging to their customers by the amount of the tax and have the same bottom line today.

Transcript (Ex. 21), pages 92-93, lines 21-25, 1-2 (emphasis added).[23]

Counsel for the Defendants expressed this same position before this very Court.

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[23] In later commenting upon the bases for the ruling denying the claims for refunds, Commissioner Turner, in adhering to his "pass-through" conceptualization of the tax, stated that he would "find in addition that a refund to the taxpayers being the clients of Mr. Shafer at this point in time would constitute ***an unjust enrichment*** at the same time." Transcript (Ex. 21), page 93, lines 6-8 (emphasis added). That unjust enrichment claim was obviously predicated upon his belief that these Plaintiffs did not *pay* the tax and could not, then, equitably recoup it.

During the hearing held just on December 9, 2010, all three of the attorneys for the Defendants articulated three different positions regarding the applicability of N.A.C. § 368A.170 to Plaintiffs' ability to even recover a refund of the LET unconstitutionally paid to the state. Transcript of Hearing on December 9, 2010, Ex. 23, pp. 30-46.

First, Vivienne Rakowsky, who was not involved in either the federal cases or the state administrative proceedings, explained her interpretation of the ability of Plaintiffs to recover any refund based upon N.A.C. § 368A.170:

> So in other words, they have to pay that tax on the admission. They can collect it separately from their patrons, or they can include it in the ticket price and then make out the check. It says any ticket for live entertainment must stay with the tax imposed by this sections [sic], including the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.
>
> [Mr. Shafer] says his - - his people have not been collecting the tax they've been paying it. So if he can verify the fact that the LET tax has come out of the pockets of his clients, he's entitled to - - he - - he will be entitled to refund if he wins this case, with interest.

Transcript, Ex. 23, p. 34 (clarification added).

Next, Mr. Pope, who admitted that he was the only attorney of the trio present on behalf of the State on December 9, 2010, who was also involved in both the federal court and state administrative proceedings, made an argument disavowing his position in front of the Commission, as set forth, *supra*:

> MR. POPE: I think one of the things that plaintiffs are going to have to show is how they did handle that - - that issue. Did they include the tax and did they have a sign on the wall or did they not?
>
> And - - and, you know, we haven't gotten to that point yet.
>
> THE COURT: And because, if they did not, then the State's position would be what?

MR. POPE: ***Well, I'm not sure***, and I don't know that we're here to say that today. But it depends on what they did and what evidence they have to show what they did.

THE COURT: Well, let me ask you this. ***If you took a position before in an administrative proceeding***, is it your - - is it your - -

MR. POPE: ***I'm not sure if we took it in administrative proceeding or, I mean, took a position, or if what Mr. Shafer just said, a commissioner recited a regulation. I don't recall, Your Honor.*** I'm not - - I'm not sure.

Transcript, Ex. 23, pp. 35-36 (emphasis added).

Then, it was Mr. Doerr's turn to give this Court *his* interpretation of N.A.C § 368A.170:

THE COURT: . . . You haven't taken a position on that one way or another you're saying to me?

MR. DOERR: I'm not saying that. I'm saying that, in fact, I believe in our first argument, I argued that ***I don't think it could ever be construed to have been <u>not</u> paid by their customer.*** It's the customer who bears the burden of the tax, the retailer under sales and use tax, the club in this case, is the collection agent. ***They're not the payer, they're the remitter.*** They remit the tax. They don't pay the tax, they get it from their client - -

Transcript, Ex. 23, p. 38 (emphasis added).

Finally, all three of the State's attorneys again gave their varying constructions of the ability of Plaintiffs to obtain a refund *at all* if Chapter 368A is found to be unconstitutional:

MR. DOERR: And I think the commission said, we don't think this is unconstitutional, you don't get a refund. So that issue - - you know, again, I think that that question should be here on Judicial review.

MR. POPE: What the - - what the statute says, Your Honor, is a business entity that collects any amount that is taxable, pursuant to the LET, is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount.

MS. RAKOWSKY: So they're paying - - it's a pay first. They're paying it. They're entitled to collect it if they want, but if they don't want it, they still have to pay it.

MR. SHAFER: Your Honor - -

MR. DOERR: ***It comes from the customer.***

MR. SHAFER: Your Honor - -

MR. DOERR: ***The receipts, it comes from the customer.***

Transcript, Ex. 23, p. 42 (emphasis added).

Despite their arguments to the contrary, Mr. Pope then tried to argue that Plaintiffs have not established irreparable harm: "You have to pay first, and sue later. It's not an irreparable harm. As long as you get your money back with interest you have not been harmed." Transcript, Ex. 23, p. 44.[24]

It is therefore clear that pursuant to the very arguments made by these Defendants before the Commission and this Court that it is their position that Plaintiffs can only obtain a refund of an unconstitutional tax if they are able to obtain and retain the name and address of every patron who pays an admissions fee to enters their facility or who purchases any form of food, beverage, or merchandise. No entertainment venue could be expected to collect and maintain such records, particularly in light of the fact that the Constitution recognizes the right to view, hear, and engage in protected expression *anonymously.*[25] These privacy interests are particularly relevant here where the Plaintiffs are exotic dance facilities and where patrons may

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[24] Of course, Defendants *also* now argue that the refund actions are null and void, that any further administrative actions by the K-Kel Plaintiffs would be barred, and that those Plaintiffs can ***never***, therefore, seek reimbursement of any unconstitutionally collected taxes.

[25] *See, e.g.,* **Talley v. California**, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); **Hynes v. Mayor and Council of Borough of Oradell**, 425 U.S. 610, 628, 96 S.Ct. 1755, 1764, 48 L.Ed.2d 243 (1976); **McIntyre v. Ohio Elections Comm.**, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); **Connection Distribution Co. v. Reno**, 154 F.3d 281, 293 (6th Cir. 1998); and **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 394-395 (6th Cir. 2001).

then have a specific interest in maintaining their anonymity. Particularly, then, in light of the applicability of N.A.C. § 368A.170, which the Defendants apparently ***insist*** applies in the circumstances at issue here, any administrative remedies would be futile since the Plaintiffs would ***never*** be entitled to obtain a refund even if the LET was declared unconstitutional. Administrative redress is then futile to adjudicating Plaintiffs' constitutional claims.

Moreover, the question must be asked as to just what is to be accomplished by requiring the Plaintiffs to exhaust their administrative remedies. How would that assist this Court in ultimately ruling on Plaintiffs' constitutional claims? As noted above (n. 21, *supra*), administrative bodies are not the appropriate fora for resolving constitutional issues. In the same regard, the Department points out in its motion (at pages 24-26) that Nevada courts distinguish between fact-intensive "as applied" constitutional challenges and facial challenges, holding only that "as applied" challenges must first be heard by the relevant agency.[26] **Malecon Tobacco**, 118 Nev. at 841. Specifically, the Nevada Supreme Court has recognized that it has found no state that does "not adhere to the principle that an exception to the exhaustion doctrine may exist when a determination of the constitutional issue does not depend upon factual findings by the agency." **Id.** at 841 n.13. In fact, Plaintiffs' "as applied" challenge does not require any factual findings from the Commission.[27]

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[26] This is ***not true***, of course, for the constitutional exception under 42 U.S.C. § 1983.

[27] A facial challenge (which Plaintiffs have certainly raised here) is, of course, adjudicated by mere reference to the challenged law. But Plaintiffs have also relied upon evidence of the "targeting," or "gerrymandering," of the LET so that it applies to, almost exclusively, the Gentlemen's clubs of Nevada. This evidence includes the legislative record relied upon in the briefing to this Honorable Court, and the "charts" and supporting documentation that the parties are currently fighting about in the discovery disputes pending before Your Honor. Although Plaintiffs put excerpts of the legislative record before the Commission (See Ex. 24, Reply Brief to Commission, pp. 15-17), the Commission made no "factual findings" regarding this aspect of the Appellants' (these Plaintiffs') arguments. Ex. 11, Ruling. Moreover, because

In fact, the Department has failed to identify any "factual findings" that the Commission would have to make in order for this Court to be able to adjudicate the Plaintiffs' as applied constitutional challenges. And, indeed, the Department has failed to discuss any such requisite findings even having now had the benefit of the Commission proceedings and the resulting ruling therefrom.

For all of these reasons, Plaintiffs are not required to exhaust any further administrative remedies as a prerequisite to bringing their claims before this Honorable Court.

A. NEITHER THE K-KEL PLAINTIFFS NOR THE DEJA VU PLAINTIFFS HAD TO SUBMIT ADMINISTRATIVE CLAIMS FOR REFUNDSPRIOR TO FILING THE COMPLAINT IN CASE 1.

Despite the fact that they filed their administrative requests for refunds in a timely manner, Plaintiffs Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC, did not need to have already filed a claim for refund in order to be entitled to maintain the action that is Case 1. As is discussed in excruciating detail in the Section above, exhaustion of administrative remedies is simply not required in a § 1983 action. The same applies for the K-Kel Plaintiffs, who have filed *and lost* administrative appeals. Because Plaintiffs are not required to exhaust administrative remedies, it makes absolutely no difference whether they submit administrative claims for refund before filing in this Court, after filing in this Court, or not at all. Exhaustion simply isn't necessary here, as Defendants ***admitted*** in federal court.

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of the evidence of legislative "targeting" and "gerrymandering," the Defendants are simply in error when they content that no "as applied" challenge can be brought as a result of their arguments concerning the invalidity of Case 2. The fact remains that the State of Nevada has, indeed, ***applied*** what the Plaintiffs contend is an unconstitutional tax ***against them***. No one here disputes that, for years now, the Plaintiffs have had to pay the LET. Consequently, Plaintiffs' "as applied" claims are ripe for adjudication, and there is no reason or basis, *whatsoever*, to dismiss them.

Moreover, the Nevada Supreme Court in **Scotsman** outright rejected the very argument the Department again asserts here. In **Scotsman**, 109 Nev. at 255-256, the court found that the claimants were entitled to a refund despite the State's assertion that the claimants' failure to abide by the following provisions was a bar to subject matter jurisdiction:

> "NRS 374.640(1) provides that:
>
> No refund may be allowed unless a claim for it is filed with the department within 3 years after the last day of the month following the close of the period for which the overpayment was made or. . . .
>
> NRS 374.680 provides that:
>
> No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegal determined or collected unless a claim for refund or credit has been duly filed."

Id. at 254.

Those administrative requirements of a different tax statute are virtually ***identical*** to the exhaustion provisions of the LET. The **Scotsman** claimants had not filed any claim for refund, **id**. at 254, yet the court rejected the argument that failure to abide by the administrative refund provisions was a jurisdiction bar to judicial relief. **Id**. at 255-56. In doing so, the court recognized:

> "If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post payment refund action in which he can challenge the tax's legality, ***the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify an unconstitutional deprivation***."

Id. at 255, *citing* **McKesson Corp. v. Division of Alcoholic Beverages and Tobacco**, 496 U.S. 18, 31, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) (emphasis added).

Plaintiffs assert that the "backwards-looking relief" provided by the State of Nevada here is, in fact, the statutory "action against the Department on the grounds set forth in the

claim" as spelled out in NRS 368A.290. But if that affords a meaningless remedy as argued by the Defendants in light of the "pay back to the customers" requirement of N.A.C. § 368A.170 (Transcript (Ex. 21), page 93, lines 6-8), the Department must then answer to this Court as to just what "backwards-looking relief" the State provides here, particularly if it also claims that damages are unavailable under § 1983. In the 4-plus years that Case 1 has languished, the Defendants have failed to provide such an answer to this Court. Perhaps in their reply they will enlighten both this Honorable Body and the Plaintiffs. Nevertheless, for the exhaustive reasons laid out above, this Court ***clearly*** has jurisdiction to resolve both Plaintiffs' facial and "as applied" constitutional challenges.

Lastly, Plaintiffs must note that not only had the **Scotsman** plaintiff not filed claims for refund, but that litigant was actually were past the limitations period for doing so. **Scotsman**, 109 Nev. at 254. Still, the court recognized its obligation to provide relief and did so. **Id.** at 255-256. *See also* **Campbell v. State**, 108 Nev. 215, 219, 827 P.2d 833 (1992) (district court, in equity, may order refund of taxes paid under protest despite claimants' failure to comply with statutory refund provisions).

The Department's contention that the Deja Vu Plaintiffs must have filed for refunds and have otherwise exhausted administrative remedies is no more than an assemblage of the arguments rejected in **Scotsman**. Those spurious claims should, once again, be rejected. This Court has full subject matter jurisdiction to hear ***all*** of Plaintiffs' constitutional claims.

Neither the Department's argument regarding judicial review nor its claim regarding exhaustion of administrative remedies are applicable to these two lawsuits. Therefore, the Department's contention that only the "facial challenge" to the constitutionality of the LET remains, should be rejected.

VIII. PLAINTIFFS SHOULD BE ENTITLED TO AMEND THEIR COMPLAINTS

Should Plaintiffs' Complaints in Case 1 or 2 be found by the Court to be deficient in any regard, the Court should grant Plaintiffs leave to amend. "[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy. Leave to amend should be freely given when justice requires . . . ." **Cohen v. Mirage Resorts, Inc.**, 119 Nev. 1, 22, 62 P.3d 720, 734 (Nev. 2003). Justice would certainly so require here. Thus, Plaintiffs respectfully request this Honorable Court grant Plaintiffs leave to amend their complaints should any deficiency be identified.

IX. CONCLUSION.

For the reasons set forth above, Plaintiffs respectfully request that this Honorable Court deny the 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. In the alternative, Plaintiffs request leave to amend their pleadings should any deficiencies be found.

DATED this 22nd day of February, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2011, the foregoing **PLAINTIFFS' OPPOSITION TO 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 ENTARTINMENT TAX AND THE CLAIMS FOR DAMAGES PURSUANT TO 42 U.S.C. 1983** was served on the party(ies) by faxing a copy and mailing of same in the United States mail, postage prepaid thereon, addressed as follows:

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EXHIBIT 1

WEST'S NEVADA REVISED STATUTES ANNOTATED
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.110, 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.

[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.060. "Facility" defined

"Facility" means:

1. 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:

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

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

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

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

➡368A.070. "Game" defined

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

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

➡368A.080. "Licensed gaming establishment" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.
➡368A.090. "Live entertainment" defined

"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.

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

➡368A.100. "Slot machine" defined

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

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

➡368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

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

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

➡368A.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. Adoption by Department of regulations for determining whether activity is taxable

The Department shall provide by regulation for a more detailed definition of "live entertainment" consistent with the general definition set forth in NRS 368A.090 for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.

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

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

1. The Board shall:

(a) Collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments; and

(b) Adopt such regulations as are necessary to carry out the provisions of paragraph (a). The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

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

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

3. For the purposes of:

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

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

4. To ensure that the tax imposed by NRS 368A.200 is collected fairly and equitably, the 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 agency 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 Board and the Department may by regulation specify the types of records which must be kept to determine the amount of the liability of a taxpayer from whom they are required to collect the tax imposed by this chapter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IMPOSITION AND COLLECTION

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

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in

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

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

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

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

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

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

(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 seating capacity of less than 300.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six 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 seating capacity of less than 300.

(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.

6. As used in this section, "maximum seating capacity" 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. Taxpayer to hold taxes in separate account

A taxpayer shall hold the amount of all taxes for which he is liable pursuant to this chapter in a separate account in trust for the State.

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

➡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. The report must be in a form

prescribed by the Board.

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

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

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

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

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

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

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

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

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

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable receipts reported for a previous reporting period; and

(b) Has taken a deduction on his federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to collect,

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be

used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

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

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

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

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

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

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

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

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

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

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

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

OVERPAYMENTS AND REFUNDS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Except as otherwise provided in this section and NRS 360.320, interest must be paid upon any overpayment of

any amount of the tax imposed by this chapter in accordance with the provisions of NRS 368A.140.

2. If the overpayment is paid to the Department, the interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the Department that a claim may be filed or the date upon which the claim is certified to the State Board of Examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

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

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

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

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

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

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

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

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

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

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

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City,

the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

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

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

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Nevada Gaming 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 Nevada Gaming Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

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

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

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

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

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

In any judgment, interest must be allowed at the rate of 6 percent per annum upon the amount found to have been

illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment, or to a date preceding the date of the refund warrant by not more than 30 days. The date must be determined by the Board or the Department.

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

→368A.320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

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

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

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

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

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

→368A.340. Cancellation of illegal determination

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

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

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

MISCELLANEOUS PROVISIONS

➡**368A.350. Prohibited acts; penalty**

1. A person shall not:

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

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

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

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

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

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

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

EXHIBIT 2

NEVADA 2005 SESSION LAWS
REGULAR SESSION OF THE 73RD LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~. Changes in tables are made but not highlighted.

Ch. 484

A.B. No. 554

REVENUE AND TAXATION--ADMINISTRATION--BUSINESS, PROPERTY, AND ENTERTAINMENT

AN ACT relating to taxation; clarifying the definition of "employer" for the purpose of the tax on business; revising the provisions governing the applicability and administration of the tax on live entertainment; clarifying the provisions governing the administration of the use taxes on certain personal property acquired free of charge at public events; expanding the exemptions from the taxes on the transfer of real property; revising the provisions governing the application of sales and use taxes to retail sales of vehicles for which used vehicles are taken in trade; revising the provisions governing the application of sales and use taxes to retail sales of farm machinery and equipment; providing for the submission to the voters of the question whether the Sales and Use Tax Act of 1955 should be amended to provide an exemption from the tax for sales of vehicles for which used vehicles are taken in trade and for farm machinery and equipment; providing exemptions from certain analogous taxes; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 363B.030 is hereby amended to read as follows:

<< NV ST 363B.030 >>

"Employer" means any employer who is required to pay a contribution pursuant to NRS 612.535 for any calendar quarter, except a financial institution, an Indian tribe, a nonprofit organization , ~~or~~ a political subdivision ~~.~~ **or any person who does not supply a product or service, but who only consumes a service.** For the purposes of this section:

1. "Financial institution" has the meaning ascribed to it in NRS 363A.050.

2. "Indian tribe" includes any entity described in subsection 10 of NRS 612.055.

3. "Nonprofit organization" means a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c).

4. "Political subdivision" means any entity described in subsection 9 of NRS 612.055.

Sec. 2. Chapter 368A of NRS is hereby amended by adding thereto the provisions set forth as sections 3, 4 and 5 of this act.

Sec. 3.

"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.

Sec. 4.

"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.

Sec. 5.

"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.

Sec. 6. NRS 368A.010 is hereby amended to read as follows:

<< NV ST 368A.010 >>

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.110, inclusive, **and sections 3, 4 and 5 of this act** have the meanings ascribed to them in those sections.

Sec. 7. NRS 368A.020 is hereby amended to read as follows:

<< NV ST 368A.020 >>

"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.**

Sec. 8. NRS 368A.060 is hereby amended to read as follows:

<< NV ST 368A.060 >>

1. "Facility" means:

~~1.~~ **(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:

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

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

~~2.~~ **(b)** Any area or premises where live entertainment is pr ovided 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.

Sec. 9. NRS 368A.090 is hereby amended to read as follows:

<< NV ST 368A.090 >>

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

2. The term:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

Sec. 10. NRS 368A.200 is hereby amended to read as follows:

<< NV ST 368A.200 >>

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

3. A business entity that collects any amount that is taxable pursuant to subsection 1 is liable for the tax imposed,

but is entitled to collect reimbursement from any person paying that amount.

4. Any ticket for live entertainment must state whether the tax imposed by this section is included in the price of the ticket. If the ticket does not include such a statement, the taxpayer shall pay the tax based on the face amount of the ticket.

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

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

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

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

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum seating capacity of less than ~~300.~~ **200.**

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than six 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 seating capacity of less than ~~300.~~ **200.**

(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) 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.

(l) 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.

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

(n) 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.

(o) 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 Nevada Gaming 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 (o) 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 Nevada Gaming Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

7. As used in this section, "maximum seating capacity" 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.

Sec. 11. NRS 368A.220 is hereby amended to read as follows:.

<< NV ST 368A.220 >>

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.

Sec. 12. Chapter 372 of NRS is hereby amended by adding thereto a new section to read as follows:

In its administration of the use tax imposed by NRS 372.185, the Department shall not consider the storage, use or other consumption in this State of tangible personal property which is:

1. Worth $100 or less; and

2. Acquired free of charge at a convention, trade show or other public event.

Sec. 13. NRS 372.7263 is hereby amended to read as follows:

<< NV ST 372.7263 >>

1. In administering the provisions of NRS 372.335, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

(a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

(b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

(c) The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

~~(a) "Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 14. NRS 372.7263 is hereby amended to read as follows:

<< NV ST 372.7263 >>

~~1.~~ In administering the provisions of NRS 372.335, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

~~(a)~~ **1.** The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

~~(b)~~ **2.** The sale of farm machinery and equipment **, as defined in section 30 of this act,** to a nonresident who sub-

mits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

~~(c)~~ **3.** The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will he delivered out of State not later than 15 days after the sale.

~~2. As used in this section:~~

~~(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~

~~(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or~~

~~(2) Machinery or equipment only incidentally employed for agricultural purposes.~~

~~(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.~~

~~(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.~~

Sec. 15. Chapter 374 of NRS is hereby amended by adding thereto the provisions set forth as sections 16 and 17 of this act.

Sec. 16.

In its administration of the use tax imposed by NRS 374.190, the Department shall not consider the storage, use or other consumption in a county of tangible personal property which is:

1. Worth $100 or less; and

2. Acquired free of charge at a convention, trade show or other public event.

Sec. 17.

1. There are exempted from the taxes imposed by this chapter the gross receipts from the sale, storage, use or other consumption in a county of farm machinery and equipment.

2. As used in this section:

(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for agricultural purposes.

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 18. NRS 374.030 is hereby amended to read as follows:

<< NV ST 374.030 >>

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

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

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

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

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

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

~~(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.~~

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

Sec. 19. NRS 374.070 is hereby amended to read as follows:

<< NV ST 374.070 >>

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:.

(a) The cost of the property sold.

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

(c) The cost of transportation of the property before its purchase.

2. The total amount for which property is sold includes all of the following:

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

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

(b) The amount charged for property returned by customers when the entire amount charged therefor is refunded in cash or credit, except that this exclusion does not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned.

(c) The amount charged for labor or services rendered in installing or applying the property sold.

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

(e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.

(f) The amount of any allowance against the selling price given by a retailer for the value of a used ~~vehicle or~~ vessel which is taken in trade on the purchase of another ~~vehicle or~~ vessel.

Sec. 20. NRS 375.090 is hereby amended to read as follows:

<< NV ST 375.090 >>

The taxes imposed by NRS 375.020, 375.023 and 375.026 do not apply to:

1. A mere change in identity, form or place of organization, such as a transfer between a corporation and its parent corporation, a subsidiary or an affiliated corporation if the affiliated corporation has identical common ownership.

2. A transfer of title to the United States, any territory or state or any agency, department, instrumentality or political subdivision thereof.

3. A transfer of title recognizing the true status of ownership of the real property.

4. A transfer of title without consideration from one joint tenant or tenant in common to one or more remaining joint

tenants or tenants in common.

5. A transfer of title between spouses, including gifts, or to effect a property settlement agreement or between former spouses in compliance with a decree of divorce.

6. A transfer of title to or from a trust without consideration if a certificate of trust is presented at the time of transfer.

7. Transfers, assignments or conveyances of unpatented mines or mining claims.

8. A transfer, assignment or other conveyance of real property to a corporation or other business organization if the person conveying the property owns 100 percent of the corporation or organization to which the conveyance is made.

9. A transfer, assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of **lineal** consanguinity or affinity.

10. A conveyance of real property by deed which becomes effective upon the death of the grantor pursuant to NRS 111.109.

11. The making, delivery or filing of conveyances of real property to make effective any plan of reorganization or adjustment:

(a) Confirmed under the Bankruptcy Act, as amended, 11 U.S.C. §§ 101 et seq.;

(b) Approved in an equity receivership proceeding involving a railroad, as defined in the Bankruptcy Act; or

(c) Approved in an equity receivership proceeding involving a corporation, as defined in the Bankruptcy Act,

if the making, delivery or filing of instruments of transfer or conveyance occurs within 5 years after the date of the confirmation, approval or change.

12. The making or delivery of conveyances of real property to make effective any order of the Securities and Exchange Commission if:

(a) The order of the Securities and Exchange Commission in obedience to which the transfer or conveyance is made recites that the transfer or conveyance is necessary or appropriate to effectuate the provisions of section 11 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k;

(b) The order specifies and itemizes the property which is ordered to be transferred or conveyed; and

(c) The transfer or conveyance is made in obedience to the order.

13. A transfer to an educational foundation. As used in this subsection, "educational foundation" has the meaning ascribed to it in subsection 3 of NRS 388.750.

14. A transfer to a university foundation. As used in this subsection, "university foundation" has the meaning ascribed to it in subsection 3 of NRS 396.405.

Sec. 21. NRS 374.265 is hereby amended to read as follows:

<< NV ST 374.265 >>

"Exempted from the taxes imposed by this chapter," as used in NRS 374.265 to 374.355, inclusive, **and section 17 of this act** means exempted from the computation of the amount of taxes imposed.

Sec. 22. NRS 374.286 is hereby amended to read as follows:

<< NV ST 374.286 >>

1. There are exempted from the taxes imposed by this chapter the gross receipts from the sale , ~~of, and the~~ storage, use or other consumption in a county of ~~,~~ farm machinery and equipment . ~~employed for the agricultural use of real property.~~

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ (c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 23. NRS 374.7273 is hereby amended to read as follows:

1. In administering the provisions of NRS 374.340, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

(a) The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

(b) The sale of farm machinery and equipment to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

(c) The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

2. As used in this section:

(a) ~~"Agricultural use" has the meaning ascribed to it in NRS 361A.030.~~

~~(b)~~ "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for ~~the agricultural use of real property.~~

~~(c)~~ **agricultural purposes.**

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

~~(d)~~ **(c)** "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 24. NRS 374.7273 is hereby amended to read as follows:

<< NV ST 374.7273 >>

~~1.~~ In administering the provisions of NRS 374.340, the Department shall apply the exemption for the sale of tangible personal property delivered by the vendor to a forwarding agent for shipment out of State to include:

~~(a)~~ **1.** The sale of a vehicle to a nonresident to whom a special movement permit has been issued by the Department of Motor Vehicles pursuant to subsection 1 of NRS 482.3955;

~~(b)~~ **2.** The sale of farm machinery and equipment **, as defined in section 30 of this act,** to a nonresident who submits proof to the vendor that the farm machinery and equipment will be delivered out of State not later than 15 days after the sale; and

~~(c)~~ **3.** The sale of a vessel to a nonresident who submits proof to the vendor that the vessel will be delivered out of State not later than 15 days after the sale.

~~2. As used in this section:~~

~~(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:~~

~~(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or~~

~~(2) Machinery or equipment only incidentally employed for agricultural purposes.~~

~~(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.~~

~~(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.~~

Sec. 25. Section 64 of Chapter 400, Statutes of Nevada 2003, at page 2374, is hereby amended to read as follows:

Sec. 64. NRS 374.070 is hereby amended to read as follows:

1. "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

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

(c) The cost of transportation of the property before its purchase.

2. The total amount for which property is sold includes all of the following:

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

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

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

(c) The amount charged for labor or services rendered in installing or applying the property sold.

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

(e) The amount of any tax imposed by the State of Nevada upon or with respect to the storage, use or other consumption of tangible personal property purchased from any retailer.

(f) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

~~4. For the purpose of a sale of a vehicle by a seller who is not required to be registered with the Department of Taxation, the sales price is the value established in the manner set forth in NRS 374.112.~~

Sec. 26. Section 138 of Chapter 400, Statutes of Nevada 2003, at page 2409, is hereby amended to read as follows:

Sec. 138. NRS ~~374.107,~~ 374.112, 374.113, 374.286, 374.291, 374.2911, 374.322 and 374.323 are hereby repealed.

Sec. 27. Section 139 of Chapter 400, Statutes of Nevada 2003, at page 2409, is hereby amended to read as follows:

Sec. 139. 1. This section and section 102 of this act become effective upon passage and approval.

2. Sections 103 to 135, inclusive, of this act become effective on July 1, 2003.

3. Sections 1 to 29, inclusive, 32 to 38, inclusive, 40 to 50, inclusive, 52 to 57, inclusive, 66, 67, 69 to 72, inclusive, 74 to 80, inclusive, 83, 84, 85, 87 to 92, inclusive, 94 to 101, inclusive, 136 and 137 of this act become effective:

(a) Upon passage and approval for the purposes of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) On January 1, 2006, for all other purposes.

4. Sections 30 and 39 of this act become effective on January 1, 2006, only if the proposal submitted pursuant to

sections 103 to 107, inclusive, of this act is approved by the voters at the General Election on November 2, 2004.

5. Sections 31, 51, ~~58~~ **60** to 65, inclusive, 68, 73, 81, 82, 86, 93 and 138 of this act become effective on January 1, 2006, only if the proposal submitted pursuant to sections 103 to 107, inclusive, of this act is not approved by the voters at the General Election on November 2, 2004.

Sec. 28.

At the General Election on November 7, 2006, a proposal must be submitted to the registered voters of this State to amend the Sales and Use Tax Act, which was enacted by the 47th session of the Legislature of the State of Nevada and approved by the Governor in 1955, and subsequently approved by the people of this State at the General Election held on November 6, 1956.

Sec. 29.

At the time and in the manner provided by law, the Secretary of State shall transmit the proposed Act to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

Sec. 30.

The proclamation and notice to the voters given by the county clerks pursuant to law must be in substantially the following form:

Notice is hereby given that at the General Election on November 7, 2006, a question will appear on the ballot for the adoption or rejection by the registered voters of the State of the following proposed Act:

AN ACT to amend an Act entitled "An Act to provide revenue for the State of Nevada; providing for sales and use taxes; providing for the manner of collection; defining certain terms; providing penalties for violation, and other matters properly relating thereto." approved March 29, 1955, as amended.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. The above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 762, is hereby amended by adding thereto a new section to be designated as section 18.2, immediately following section 18.1, to read as follows:

Sec. 18.2. **"Vehicle" has the meaning ascribed to it in NRS 482.135.**

Sec. 2. The above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 762, is hereby amended by adding thereto a new section to be designated section 55.5, immediately following section 55 to read as follows:

Sec. 55.5. **1. There are exempted from the taxes imposed by this Act the gross receipts from the sale, storage, use or other consumption in a county of farm machinery and equipment.**

2. As used in this section:

(a) "Farm machinery and equipment" means a farm tractor, implement of husbandry, piece of equipment used for irrigation, or a part used in the repair or maintenance of farm machinery and equipment. The term does not include:

(1) A vehicle required to be registered pursuant to the provisions of chapter 482 or 706 of NRS; or

(2) Machinery or equipment only incidentally employed for agricultural purposes.

(b) "Farm tractor" means a motor vehicle designed and used primarily for drawing an implement of husbandry.

(c) "Implement of husbandry" means a vehicle that is designed, adapted or used for agricultural purposes, including, without limitation, a plow, machine for mowing, hay baler, combine, piece of equipment used to stack hay, till, harvest, handle agricultural commodities or apply fertilizers, or other heavy, movable equipment designed, adapted or used for agricultural purposes.

Sec. 3. Section 11 of the above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 764, is hereby amended to read as follows:

Sec. 11. **1.** "Sales price" means the total amount for which tangible property is sold, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(a) The cost of the property sold.

(b) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

(c) The cost of transportation of the property ~~prior to~~ **before** itspurchase.

2. The total amount for which property is sold includes all of the following:

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

(b) Any amount for which credit is given to the purchaser by the seller.

3. "Sales price" does not include any of the following:

(a) Cash discounts allowed and taken on sales.

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

(c) The amount charged for labor or services rendered in installing or applying the property sold.

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

(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

Sec. 4. Section 12 of the above-entitled Act, being Chapter 397, Statutes of Nevada 1955, at page 764, is hereby amended to read as follows:

Sec. 12. **1.** "Gross receipts" means the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

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

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

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

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

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

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

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

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

(a) Cash discounts allowed and taken on sales.

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

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

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

(e) The amount of any allowance against the selling price given by a retailer for the value of a used vehicle which is taken in trade on the purchase of another vehicle.

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

Sec. 5. This Act becomes effective on January 1, 2007.

Sec. 31.

The ballot page assemblies and the paper ballots to be used in voting on the question must present the question in substantially the following form:

Shall the Sales and Use Tax Act of 1955 be amended to exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of any used vehicle taken in trade on the purchase of another vehicle and to exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of farm machinery and equipment?

Yes (BOX) No (BOX)

Sec. 32.

The explanation of the question which must appear on each paper ballot and sample ballot and in every publication and posting of notice of the question must be in substantially the following form:

(Explanation of Question)

The proposed amendment to the Sales and Use Tax Act of 1955 would exempt from the taxes imposed by this Act on the gross receipts from the sale and the storage, use or other consumption of tangible personal property, the value of any used vehicle taken in trade on the purchase of another vehicle and the value of farm machinery and equipment. The Legislature has amended the Local School Support Tax Law and the City-County Relief Tax Law to provide the same exemption for farm machinery and equipment if this proposal is adopted.

Sec. 33.

If a majority of the votes cast on the question submitted to the voters is yes, the amendment to the Sales and Use Tax Act of 1955 becomes effective on January 1, 2007. If less than a majority of votes cast on the question submitted to the voters is yes, the question fails and the amendment to the Sales and Use Tax Act of 1955 does not become effective.

Sec. 34.

All general election laws not inconsistent with this act are applicable.

Sec. 35.

Any informalities, omissions or defects in the content or making of the publications, proclamations or notices provided for in this act and by the general election laws under which this election is held must be so construed as not to invalidate the adoption of the act by a majority of the registered voters voting on the question if it can be ascertained with reasonable certainty from the official returns transmitted to the Office of the Secretary of State whether the proposed amendment was adopted by a majority of those registered voters.

<< Repealed: NV ST 368A.130, 368A.210, 374.107 >>

Sec. 36.

1. NRS 368A.130 and 368A.210 are hereby repealed.

2. NRS 374.107 is hereby repealed.

3. Sections 58 and 59 of Chapter 400, Statutes of Nevada 2003, at page 2371, are hereby repealed.

Sec. 37. 1. This section becomes effective upon passage and approval.

2. Section 22 of this act:

(a) Becomes effective upon passage and approval for the purpose of adopting regulations and on July 1, 2005, for all other purposes; and

(b) Expires by limitation on December 21, 2005.

3. Sections 1 to 12, inclusive, 15, 16, 20 and subsection 1 of section 36 of this act become effective on July 1, 2005.

4. Sections 25 to 35, inclusive, and subsection 3 of section 36 of this act become effective on October 1, 2005.

5. Sections 13 and 23 of this act become effective on January 1, 2006.

6. Sections 14, 17, 21 and 24 of this act become effective on January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is approved by the voters at the General Election on November 7, 2006.

7. Sections 18, 19 and subsection 2 of section 36 of this act become effective on January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is not approved by the voters at the General Election on November 7, 2006.

Approved by the Governor June 17, 2005.

NV LEGIS 484 (2005)

END OF DOCUMENT

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

368A.010. Definitions

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

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

368A.020. "Admission charge" defined

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

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

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

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

368A.040. "Business" defined

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

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

368A.050. "Business entity" defined

1. "Business entity" includes:

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

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

2. The term does not include a governmental entity.

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

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

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

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

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

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

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

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

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

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

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

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

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

368A.070. "Game" defined

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

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

368A.080. "Licensed gaming establishment" defined

"Licensed gaming establishment" has the meaning ascribed to it in NRS 463.0162.

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

368A.090. "Live entertainment" defined

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

2. The term:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) Does not constitute a performance;

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

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

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

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

368A.097. "Shopping mall" defined

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

368A.100. "Slot machine" defined

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

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

368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

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

who collects the taxable receipts.

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

368A.115. "Trade show" defined

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

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

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

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

Administration

368A.130. Repealed

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

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

2. The Department shall:

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

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

3. For the purposes of:

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

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

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

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

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

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

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

1. If:

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

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

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

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

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

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

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

(b) Preserve those records for:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Imposition and Collection

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

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

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

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

2. Amounts paid for:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

368A.210. Repealed

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

1. Except as otherwise provided in this section:

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

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

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

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

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

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

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

Upon written application made before the date on which payment must be made, the Board or the Department may, for good cause, extend by 30 days the time within which a taxpayer is required to pay the tax imposed by this chapter. If the tax is paid during the period of extension, no penalty or late charge may be imposed for failure to pay at the time required, but the taxpayer shall pay interest at the rate of 1 percent per month from the date on which the amount would have been due without the extension until the date of payment, unless otherwise provided in NRS 360.232 or 360.320.

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

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

1. If a taxpayer:

(a) Is unable to collect all or part of an admission charge or charges for food, refreshments and merchandise which were included in the taxable receipts reported for a previous reporting period; and

(b) Has taken a deduction on his federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to collect,

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

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

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

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

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

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

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

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

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

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

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

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

Overpayments and Refunds

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. If the overpayment is paid to the Department, the interest must be paid:

(a) In the case of a refund, to the last day of the calendar month following the date upon which the person making the overpayment, if he has not already filed a claim, is notified by the Department that a claim may be filed or the date upon which the claim is certified to the State Board of Examiners, whichever is earlier.

(b) In the case of a credit, to the same date as that to which interest is computed on the tax or amount against which the credit is applied.

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

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

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

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

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

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

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

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

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

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

2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

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

alleged overpayments.

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

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

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

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

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

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

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

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

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

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

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

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

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

368A.320. Standing to recover

A judgment may not be rendered in favor of the plaintiff in any action brought against the Board or the Department to recover any amount paid when the action is brought by or in the name of an assignee of the person paying the amount or by any person other than the person who paid the amount.

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

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

1. The Board or the Department may recover a refund or any part thereof which is erroneously made and any credit or part thereof which is erroneously allowed in an action brought in a court of competent jurisdiction in Carson City or Clark County in the name of the State of Nevada.

2. The action must be tried in Carson City or Clark County unless the court, with the consent of the Attorney General, orders a change of place of trial.

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

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

368A.340. Cancellation of illegal determination

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

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

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

Miscellaneous Provisions

368A.350. Prohibited acts; penalty

1. A person shall not:

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

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

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

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

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

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

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

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

368A.370. Remedies of State are cumulative

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

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

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