ADDENDUM J

West's Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 374. Local School Support Tax (Refs & Annos)
Overpayments and Refunds

N.R.S. 374.640

374.640. Limitations on claims for refund or credit

Currentness

Except as otherwise provided in NRS 360.235, 360.395 and 374.373:

1. No refund may be allowed unless a claim for it is filed with the Department within 3 years after the last day of the month following the close of the period for which the overpayment was made.

2. No credit may be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the Department within that period, or unless the credit relates to a period for which a waiver is given pursuant to NRS 360.355.

Credits
Added by Laws 1967, p. 916. Amended by Laws 1975, p. 1736; Laws 1981, p. 293; Laws 1983, p. 475; Laws 1991, p. 1408; Laws 1995, p. 1069; Laws 2003, c. 400, § 80.

Notes of Decisions (2)

N. R. S. 374.640, NV ST 374.640
Current through the 2011 76th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2011).

End of Document

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ADDENDUM I

West's Nevada Revised Statutes Annotated
Title 18. State Executive Department (Chapters 223-233J)
Chapter 233B. Nevada Administrative Procedure Act (Refs & Annos)
Adjudication of Contested Cases

N.R.S. 233B.150

233B.150. Appeal from final judgment of district court

Currentness

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the Supreme Court. The appeal shall be taken as in other civil cases.

Credits
Added by Laws 1967, p. 811.

Notes of Decisions (9)

N. R. S. 233B.150, NV ST 233B.150
Current through the 2011 76th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2011).

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ADDENDUM H

West's Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 360. General Provisions (Refs & Annos)
Rights and Responsibilities of Taxpayers

N.R.S. 360.291

360.291. Taxpayers' Bill of Rights

Effective: October 1, 2011
Currentness

<Section effective Nov. 27, 2012, if the proposed amendment is approved by the voters at the 2012 General Election and becomes law pursuant to Section 2 of Article 19 of the Nevada Constitution. See, also, section effective until Nov. 27, 2012, if the proposed amendment is approved by the voters at the 2012 General Election and becomes law pursuant to Section 2 of Article 19 of the Nevada Constitution.>

1. The Legislature hereby declares that each taxpayer has the right:

(a) To be treated by officers and employees of the Department with courtesy, fairness, uniformity, consistency and common sense.

(b) To a prompt response from the Department to each communication from the taxpayer.

(c) To provide the minimum documentation and other information as may reasonably be required by the Department to carry out its duties.

(d) To written explanations of common errors, oversights and violations that taxpayers experience and instructions on how to avoid such problems.

(e) To be notified, in writing, by the Department whenever its officer, employee or agent determines that the taxpayer is entitled to an exemption or has been taxed or assessed more than is required by law.

(f) To written instructions indicating how the taxpayer may petition for:

(1) An adjustment of an assessment;

(2) A refund or credit for overpayment of taxes, interest or penalties; or

(3) A reduction in or the release of a bond or other form of security required to be furnished pursuant to the provisions of this title that are administered by the Department.

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(g) Except as otherwise provided in NRS 360.236 and 361.485, to recover an overpayment of taxes promptly upon the final determination of such an overpayment.

(h) To obtain specific advice from the Department concerning taxes imposed by the State.

(i) In any meeting with the Department, including an audit, conference, interview or hearing:

(1) To an explanation by an officer, agent or employee of the Department that describes the procedures to be followed and the taxpayer's rights thereunder;

(2) To be represented by himself or herself or anyone who is otherwise authorized by law to represent the taxpayer before the Department;

(3) To make an audio recording using the taxpayer's own equipment and at the taxpayer's own expense; and

(4) To receive a copy of any document or audio recording made by or in the possession of the Department relating to the determination or collection of any tax for which the taxpayer is assessed, upon payment of the actual cost to the Department of making the copy.

(j) To a full explanation of the Department's authority to assess a tax or to collect delinquent taxes, including the procedures and notices for review and appeal that are required for the protection of the taxpayer. An explanation which meets the requirements of this section must also be included with each notice to a taxpayer that an audit will be conducted by the Department.

(k) To the immediate release of any lien which the Department has placed on real or personal property for the nonpayment of any tax when:

(1) The tax is paid;

(2) The period of limitation for collecting the tax expires;

(3) The lien is the result of an error by the Department;

(4) The Department determines that the taxes, interest and penalties are secured sufficiently by a lien on other property;

(5) The release or subordination of the lien will not jeopardize the collection of the taxes, interest and penalties;

(6) The release of the lien will facilitate the collection of the taxes, interest and penalties; or

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(7) The Department determines that the lien is creating an economic hardship.

(l) To the release or reduction of a bond or other form of security required to be furnished pursuant to the provisions of this title by the Department in accordance with applicable statutes and regulations.

(m) To be free from investigation and surveillance by an officer, agent or employee of the Department for any purpose that is not directly related to the administration of the taxes administered by the Department.

(n) To be free from harassment and intimidation by an officer, agent or employee of the Department for any reason.

(o) To have statutes imposing taxes and any regulations adopted pursuant thereto construed in favor of the taxpayer if those statutes or regulations are of doubtful validity or effect, unless there is a specific statutory provision that is applicable.

2. The sales and use tax administered throughout the counties of this State must be uniform and equal within each county so that all areas of each county, and all taxpayers within a county, are subject to an equal rate of sales and use tax.

3. The provisions of this title and title 57 of NRS and NRS 244A.820, 244A.870, 482.313 and 482.315 governing the administration and collection of taxes by the Department must not be construed in such a manner as to interfere or conflict with the provisions of this section or any applicable regulations.

4. The provisions of this section apply to any tax administered, regulated and collected by the Department pursuant to the provisions of this title and title 57 of NRS and NRS 244A.820, 244A.870, 482. 313 and 482.315 and any regulations adopted by the Department relating thereto.

Credits

Added by Laws 1991, p. 1579. Amended by Laws 1997, c. 547, § 6, eff. July 1, 1997; Laws 1997, c. 549, § 1, eff. July 1, 1997; Laws 1999, c. 105, § 73, eff. May 11, 1999; Laws 1999, c. 484, § 5, eff. July 1, 1999; Laws 2001, c. 331, § 2, eff. July 1, 2001; Laws 2005, c. 142, § 2; Laws 2005 (22nd ss), c. 9, § 8, eff. July 1, 2005; Laws 2009, c. 33, § 3, eff. July 1, 2009; Laws 2011, c. 207, § 2.

N. R. S. 360.291, NV ST 360.291

Current through the 2011 76th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2011).

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West's Nevada Revised Statutes Annotated
Title 18. State Executive Department (Chapters 223-233J)
Chapter 233B. Nevada Administrative Procedure Act (Refs & Annos)
Adjudication of Contested Cases

N.R.S. 233B.130

233B.130. Judicial review; requirements for petition; statement of intent to participate; petition for rehearing

Effective: May 29, 2007
Currentness

1. Any party who is:

(a) Identified as a party of record by an agency in an administrative proceeding; and

(b) Aggrieved by a final decision in a contested case,

is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.

2. Petitions for judicial review must:

(a) Name as respondents the agency and all parties of record to the administrative proceeding;

(b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and

(c) Be filed within 30 days after service of the final decision of the agency.

Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

3. The agency and any party desiring to participate in the judicial review must file a statement of intent to participate in the petition for judicial review and serve the statement upon the agency and every party within 20 days after service of the petition.

4. A petition for rehearing or reconsideration must be filed within 15 days after the date of service of the final decision. An order granting or denying the petition must be served on all parties at least 5 days before the expiration of the time for filing the petition for judicial review. If the petition is granted, the subsequent order shall be deemed the final order for the purpose of judicial review.

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5. The petition for judicial review and any cross-petitions for judicial review must be served upon the agency and every party within 45 days after the filing of the petition, unless, upon a showing of good cause, the district court extends the time for such service. If the proceeding involves a petition for judicial review or cross-petition for judicial review of a final decision of the State Contractors' Board, the district court may, on its own motion or the motion of a party, dismiss from the proceeding any agency or person who:

(a) Is named as a party in the petition for judicial review or cross-petition for judicial review; and

(b) Was not a party to the administrative proceeding for which the petition for judicial review or cross-petition for judicial review was filed.

6. The provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies.

Credits

Added by Laws 1965, p. 966. Amended by Laws 1969, p. 318; Laws 1975, p. 495; Laws 1977, p. 57; Laws 1981, p. 80; Laws 1989, p. 1651; Laws 1991, p. 465; Laws 2003, c. 337, § 17, eff. June 9, 2003; Laws 2005, c. 283, § 2; Laws 2007, c. 164, § 2, eff. May 29, 2007.

Notes of Decisions (34)

N. R. S. 233B.130, NV ST 233B.130

Current through the 2011 76th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2011).

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ADDENDUM F

West's Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 372. Sales and Use Taxes (Refs & Annos)
Overpayments and Refunds

N.R.S. 372.680

372.680. Action for refund: Time to sue; venue of action; waiver

Currentness

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.

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

Credits
Added by Laws 1979, p. 428. Amended by Laws 1999, c. 484, § 33, eff. July 1, 1999.

Notes of Decisions (5)

N. R. S. 372.680, NV ST 372.680
Current through the 2011 76th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2011).

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ADDENDUM E

West's Nevada Revised Statutes Annotated
Title 32. Revenue and Taxation (Chapters 360-377B)
Chapter 360. General Provisions (Refs & Annos)
Administration

N.R.S. 360.245

360.245. Decision of Department final unless appealed to Nevada Tax Commission; time for appeal; service of decision; review of certain decisions; judicial review; adoption of regulations by Nevada Tax Commission; transmission of notice of certain decisions on appeal

Currentness

1. Except as otherwise provided in this title:

(a) All decisions of the Executive Director or other officer of the Department made pursuant to this title are final unless appealed to the Nevada Tax Commission.

(b) Any natural person, partnership, corporation, association or other business or legal entity who is aggrieved by such a decision may appeal the decision by filing a notice of appeal with the Department within 30 days after service of the decision upon that person or business or legal entity.

2. Service of the decision must be made personally or by certified mail. If service is made by certified mail:

(a) The decision must be enclosed in an envelope which is addressed to the taxpayer at his or her address as it appears in the records of the Department.

(b) It is deemed to be complete at the time the appropriately addressed envelope containing the decision is deposited with the United States Postal Service.

3. The Nevada Tax Commission, as head of the Department, may review all decisions made by the Executive Director that are not otherwise appealed to the Commission pursuant to this section.

4. The Nevada Tax Commission may reverse, affirm or modify any decision of the Department that is:

(a) Appealed to the Commission by a taxpayer pursuant to this section; or

(b) Reviewed by the Commission pursuant to this section.

5. A decision of the Nevada Tax Commission is a final decision for the purposes of judicial review. The Executive Director or any other employee or representative of the Department shall not seek judicial review of such a decision.

6. The Nevada Tax Commission shall provide by regulation for:

(a) Notice to be given to each county of any decision upon an appeal to the Commission that the Commission determines is likely to affect the revenue of the county or other local government. The regulations must specify the form and contents of the notice and requirements for the number of days before a meeting of the Commission that the notice must be transmitted. If the parties to the appeal enter into a stipulation as to the issues that will be heard on appeal, the Commission shall transmit a copy of the notice to the district attorney of each county which the Commission determines is likely to be affected by the decision. Upon receipt of such a notice, the district attorney shall transmit a copy of the notice to each local government within the county which the Commission determines is likely to be affected by the decision. If there is no such stipulation, the Commission shall transmit a copy of the notice, accompanied by the names of the parties and the amount on appeal, if any, to the governing bodies of the counties and other local governments which the Commission determines are likely to be affected by the decision.

(b) The manner in which a county or other local government which is not a party to such an appeal may become a party, and the procedure for its participation in the appeal.

7. A county or other local government which is a party and is aggrieved by the decision of the Nevada Tax Commission is entitled to seek judicial review of the decision.

8. Upon application by a taxpayer, the Nevada Tax Commission shall review the denial of relief pursuant to NRS 361.4835 and may grant, deny or modify the relief sought.

Credits

Added by Laws 1975, p. 1647. Amended by Laws 1987, p. 1492; Laws 1997, c. 406, 3, eff. July 1, 1997; Laws 1997, c. 446, § 1, eff. July 1, 1997; Laws 1997, c. 547, § 4, eff. July 1, 1997; Laws 1999, c. 105, § 74, eff. May 11, 1999; Laws 1999, c. 484, § 4, eff. July 1, 1999.

Notes of Decisions (1)

N. R. S. 360.245, NV ST 360.245

Current through the 2011 76th Regular Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2011).

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ADDENDUM E

ADDENDUM D

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.

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(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

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"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.

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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

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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.

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[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.

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(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

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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

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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

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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,

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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

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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.

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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.

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ADDENDUM C

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1341

§ 1341. Taxes by States

Currentness

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Credits
(June 25, 1948, c. 646, 62 Stat. 932.)

Notes of Decisions (790)

28 U.S.C.A. § 1341, 28 USCA § 1341
Current through P.L. 112-207 (excluding P.L. 112-199 and 112-206) approved 12-7-12

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Westlaw.

NAC 368A.010

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.010
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NAC 368A.030

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

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Current through November 2007, Supplement 2007-3

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

"Commission" means the Nevada Tax Commission.

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

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

NV ADC 368A.030
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Westlaw.

NAC 368A.040

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

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Current through November 2007, Supplement 2007-3

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

"Department" means the Department of Taxation.

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

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

NV ADC 368A.040
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Westlaw.

NAC 368A.060

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.060
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Westlaw.

NAC 368A.070

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.070
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Westlaw.

NAC 368A.080

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.080
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Westlaw.

NAC 368A.090

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.090
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NAC 368A.100

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

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

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

NV ADC 368A.100
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NAC 368A.110

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

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

NV ADC 368A.110
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Westlaw.

NAC 368A.120

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

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

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

2. Live entertainment status ceases at the later of:

(a) The conclusion of the live entertainment; or

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

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

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

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

NV ADC 368A.120
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NAC 368A.130

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.130
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NAC 368A.140

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

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

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

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

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

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

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

NV ADC 368A.140
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NAC 368A.150

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

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

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

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

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

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

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

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

NV ADC 368A.150
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NAC 368A.160

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

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

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

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

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

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

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

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

NV ADC 368A.160
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NAC 368A.170

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

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Current through November 2007, Supplement 2007-3

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

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

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

3. A taxpayer shall:

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

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

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

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

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

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

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

ADDENDUM B

NAC 368A.170

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

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

NV ADC 368A.170
END OF DOCUMENT

Westlaw.

NAC 368A.300

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

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

Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.300
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.310

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

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

Current through November 2007, Supplement 2007-3

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

"Board" means the State Gaming Control Board.

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

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

NV ADC 368A.310
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.320

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

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

Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.320
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.330

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

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

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

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

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

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

NV ADC 368A.330
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.340

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

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

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

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

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

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

NV ADC 368A.340
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.350

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

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

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

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

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

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

NV ADC 368A.350
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.360

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

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

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

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

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

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

NV ADC 368A.360
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.370

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

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

Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.370
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.380

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

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

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

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

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

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

NV ADC 368A.380
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.390

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

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

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

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

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

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

NV ADC 368A.390
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.400

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

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

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

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

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

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

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

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

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

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

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

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

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

ADDENDUM B

NAC 368A.400

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

television.

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

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

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

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

NV ADC 368A.400
END OF DOCUMENT

Westlaw.

NV ADC 368A.410 Page 1

NAC 368A.410

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

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

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

1. Live entertainment status:

(a) Commences at the earlier of:

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

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

(b) Ceases at the later of:

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

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

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

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

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

NV ADC 368A.410
END OF DOCUMENT

ADDENDUM B

Westlaw.

NV ADC 368A.420

NAC 368A.420

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

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

Current through November 2007, Supplement 2007-3

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

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

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

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

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

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

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

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

(g) Applies, if an admission charge:

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NAC 368A.420

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

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

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

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

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

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

NV ADC 368A.420
END OF DOCUMENT

Westlaw.

NAC 368A.430

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

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

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

NV ADC 368A.430
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.440

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

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

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

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

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

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

NV ADC 368A.440
END OF DOCUMENT

ADDENDUM B

Westlaw.

NV ADC 368A.450 Page 1

NAC 368A.450

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

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

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

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

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

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

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

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

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

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

(a) Is not an affiliate of:

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

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

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

ADDENDUM B

NAC 368A.450

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

(b) Is an affiliate of:

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

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

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

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

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

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

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

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

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

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

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

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

NV ADC 368A.450
END OF DOCUMENT

Westlaw

NAC 368A.460

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

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Current through November 2007, Supplement 2007-3

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

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

1. Includes Entertainment Tax;

2. Inc. Ent. Tax;

3. Includes Live Ent. Tax; or

4. L.E.T. included.

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

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

NV ADC 368A.460
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.470

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

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

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

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

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

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

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

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

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

NV ADC 368A.470
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.480

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

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Current through November 2007, Supplement 2007-3

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

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

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

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

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

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

NV ADC 368A.480
END OF DOCUMENT

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Westlaw.

NV ADC 368A.490 Page 1

NAC 368A.490

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

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

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

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

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

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

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

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

4. Each person that holds:

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

ADDENDUM B

NAC 368A.490

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

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

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

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

NV ADC 368A.490
END OF DOCUMENT

Westlaw.

NAC 368A.500

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

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Current through November 2007, Supplement 2007-3

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

A taxpayer shall:

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

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

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

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

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

NV ADC 368A.500
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.510

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

NEVADA ADMINISTRATIVE CODE
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Current through November 2007, Supplement 2007-3

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

1. Each:

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

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

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

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

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

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

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

ADDENDUM B

NAC 368A.510

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

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

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

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

4. As used in this section:

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

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

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

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

NV ADC 368A.510
END OF DOCUMENT

Westlaw.

NAC 368A.520

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

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

Current through November 2007, Supplement 2007-3

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

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

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

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

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

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

NV ADC 368A.520
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.530

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

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

Current through November 2007, Supplement 2007-3

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

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

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

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

NV ADC 368A.530
END OF DOCUMENT

ADDENDUM B

Westlaw.

NAC 368A.540

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

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

Current through November 2007, Supplement 2007-3

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

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

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

NV ADC 368A.540
END OF DOCUMENT

ADDENDUM B

ADDENDUM A

West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation (Chapters 360-377B)
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.

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.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

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.

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 that person is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

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 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.

368A.070. "Game" defined

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

368A.080. "Licensed gaming establishment" defined

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

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, sportsmen or sportswomen;

(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 or her 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.

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.

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.

➡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.

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.

➡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.

➡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 or her 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.

➡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 the employee is absent from his or her regular place of employment to examine those documents.

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

1. Except as otherwise provided in this section and NRS 239.0115 and 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 or her 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 or her 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.

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 persons, 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 persons, 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 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) Beginning July 1, 2007, a baseball contest, event or exhibition conducted by professional minor league baseball players at a stadium in this State.

(q) 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 (q) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chair 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.

➡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 show-

ing 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.

➡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 0.75 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.

➡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 or her federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which the taxpayer is unable to collect,

the taxpayer 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 the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 2, the taxpayer 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.

(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.

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, after being credited against any amount then due from the person in accordance with NRS 360.236, be refunded to the person or his or her successors in interest.

➡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.

➡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 at the rate set forth in, and in accordance with the provisions of, NRS 360.2937.

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.

➡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.

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

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

➡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.

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

In any judgment, interest must be allowed at the rate of 3 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.

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.

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.

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.

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.

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 its gaming license by the Commission.

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.

END OF DOCUMENT

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.

Electronically Filed
Jan 04 2013 02:10 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court Case No.: 59752

District Court Case No.: A554970

APPELLANTS' OPENING BRIEF

NRAP 26.1 DISCLOSURE OF
DEJA VU SHOWGIRLS OF LAS VEGAS, LLC

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

Shafer & Associates, P.C.

Law Offices of William H. Brown, Esq., Ltd.

Greenberg Traurig, LLP

Dominic P. Gentile

Ghanem & Sullivan, LLP

Sullivan Brown, LLC

Turco & Draskovich

BY: */s/ Bradley J. Shafer*
BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.

NRAP 26.1 DISCLOSURE OF LITTLE DARLINGS OF LAS VEGAS, L.L.C.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

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Turco & Draskovich

BY: */s/ Bradley J. Shafer*

BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.

NRAP 26.1 DISCLOSURE OF K-KEL, INC.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

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BY: */s/ Bradley J. Shafer*

BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.

NRAP 26.1 DISCLOSURE OF OLYMPUS GARDEN, INC.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

Shafer & Associates, P.C.

Law Offices of William H. Brown, Esq., Ltd.

Greenberg Traurig, LLP

Dominic P. Gentile

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Turco & Draskovich

BY: */s/ Bradley J. Shafer*

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Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.

NRAP 26.1 DISCLOSURE OF SHAC, L.L.C.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

Shafer & Associates, P.C.

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BY: */s/ Mark E. Ferrario*

MARK E. FERRARIO
Nevada Bar No. 1625
BRANDON E. ROOS
Nevada Bar No 7888

NRAP 26.1 DISCLOSURE OF THE POWER COMPANY, INC.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

Shafer & Associates, P.C.

Law Offices of William H. Brown, Esq., Ltd.

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Turco & Draskovich

BY: */s/ Bradley J. Shafer*

BRADLEY J. SHAFER
Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.

NRAP 26.1 DISCLOSURE OF D. WESTWOOD, INC.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. Any publically held company that owns 10% or more of the party's stock:

None.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

Shafer & Associates, P.C.

Law Offices of William H. Brown, Esq., Ltd.

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Sullivan Brown, LLC

Turco & Draskovich

BY: */s/ Bradley J. Shafer*

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Michigan Bar No. P36604*
SHAFER & ASSOCIATES, P.C.

NRAP 26.1 DISCLOSURE OF D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, INC.

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

A. D.I. Food & Beverage has requested voluntary dismissal, negating the need for NRAP 26.1(a) disclosures.

B. All law firms whose partners or associates have appeared for the party or are expected to appear in this Court.

Shafer & Associates, P.C.

Law Offices of William H. Brown, Esq., Ltd.

Greenberg Traurig, LLP

Dominic P. Gentile

Ghanem & Sullivan, LLP

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INTRODUCTION

Plaintiffs, a number of live entertainment venues in Las Vegas, contend that a "Live Entertainment Tax" imposed upon them by the enactment of, and later amendment to, Title 37, Chapter 368A, of the Nevada Revised Statutes, is unconstitutional under both the Federal and State Constitutions. Following rejection by the Department of Taxation and the Nevada Tax Commission of administrative claims for refunds initiated by a number of the Plaintiffs predicated upon the unconstitutionality of the tax, those Plaintiffs timely filed suit in the Clark County District Court for their judicial claims for refund pursuant to NRS 368A.290 and NRS 368A.300, which are the specific judicial relief statutes found in Title 37, Chapter 368A.

For three and one half years, the State Defendants litigated that original action, including engaging in bi-lateral discovery. Then - - and even though they had never raised such a claim in their initial affirmative defenses - - the Defendants took the position that Plaintiffs had improperly brought the action below as an original proceeding, and that the proper remedy for the Plaintiffs was solely by way of a Petition for Judicial Review pursuant to NRS 233B.130 of the Administrative Procedures Act. Since the Plaintiffs had not filed such a petition, the Defendants claimed that the Plaintiffs' action below should be dismissed.

Shortly thereafter, this Court issued its decision in Southern California Edison v. First Judicial District, 125 Nev. Adv. Op. 22, 255 P.3d 231 (2011). Based thereon, the district court granted the Defendants' request for relief and dismissed the action below; permitting the Plaintiffs to then file a Petition for Judicial Review.

This appeal illustrates certain aspects of the confusion that has ensued in the district courts across the State following the ruling by this Court in Southern California Edison.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP § 3A(b)(1) and (3), and Nev. Const. Art. 6 § 4. This is an appeal from a final judgment entered on November 1, 2012, (amended December 19, 2011), with Notice of Entry filed November 2, 2011. The Notice of Appeal was filed on November 28, 2011.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN DISMISSING THE ACTION BELOW, WHICH WAS A PROPERLY FILED ORIGINAL ACTION FOR TAX REFUND TIMELY INITIATED PURSUANT TO NRS 368A.290 AND 268A.300, AND IN REQUIRING THE PLAINTIFFS TO, RATHER, PROCEED BY WAY OF A PETITION FOR JUDICIAL REVIEW.

II. THE DEFENDANTS WAIVED ANY RIGHT TO CHALLENGE THE ACTION BELOW AS A PROPERLY FILED ORIGINAL ACTION PURSUANT TO NRS 368A.290 AND 368A.300, AND SHOULD

HAVE BEEN ESTOPPED BY THE DISTRICT COURT BELOW FROM CLAIMING ANYTHING TO THE CONTRARY.

III. THIS COURT'S DECISION IN Southern California Edison v. First Judicial District, 127 Nev. Adv. Op. 22, 255 P.3d 231 (2011), CANNOT BE APPLIED RETROACTIVELY.

STATEMENT OF THE CASE

The Nevada legislature enacted amendments in 2005 to Title 37, Chapter 368A of the Nevada Revised Statutes ("Chapter 368A," or the "Statute," with the current codified version thereof appearing at Addendum "A," and with the initial regulations promulgated thereto appearing as Addendum B), which imposed an excise tax upon the admission to any facility that provides "live entertainment" (the "Live Entertainment Tax," or simply the "LET"). Thereafter, Plaintiffs (a number of establishments that provide such entertainment) filed -- in order to safeguard their constitutional rights -- suit on April 18, 2006, in the United States District Court for the District of Nevada, Case Number CV-S-06-00480-RLH-RJJ, seeking, among other things, 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.

The Defendants thereto (the same parties as the Appellees here, with the exception of Michelle Jacobs) filed a motion to dismiss the federal action claiming that the Tax Injunction Act, 28 U.S.C. § 1341 (Addendum C), precluded the

federal court from having jurisdiction over the claims because there existed a "plain, speedy, and efficient remedy" in state court. The federal District Court dismissed Plaintiffs' complaint on that basis (App.Apx., Vol. 19, p. 3692), 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. App.Apx., Vol. 19, p. 3699.

In order to prevent their constitutional rights from further violation, Plaintiffs filed an action in the Clark County District Court basically seeking the same remedies as they had requested in the federal courts (Case No. A533273, referred to herein as "Case 1") on December 19, 2006[1]. The parties to that action agreed, however, to extend the date for the Defendants to answer that complaint because, in an abundance of caution, a number the Plaintiffs below filed, at approximately the same time, administrative claims for refunds as permitted under the Statute.

Specifically, on February 27, 2007, within the three year statutory period under NRS 368A.260(1), Plaintiffs K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The Power Company, Inc., D.Westwood, Inc. and D.I. Food & Beverage of

[1] Because Case 1 was later coordinated and then consolidated with the matter below, and because those complaints are relevant to one of the issues discussed herein, the initial Complaint in Case 1 is found as App.Apx., Vol. 19, pp. 1, and the Amended Complaint thereto is found at App.Apx. Vol. 4, pp. 689.

Las Vegas, LLC (herein, the "K-Kel Plaintiffs") filed with the Nevada Department of Taxation ("Department") individual requests for refunds of the LET that they had paid during certain months.[2] *See* App.Apx., Vol. 19, p. 3701 (redacted copy of one of those refund requests, illustrating that the basis for the requests for refund was the asserted unconstitutionality, and therefore inapplicability to the Plaintiffs, of the LET).

The K-Kel Plaintiffs' requests for refunds were all summarily denied by the Department on April 3, 2007. App.Apx., Vol. 19, p. 3707. Those Plaintiffs all filed timely notices of administrative appeals, and the Nevada Tax Commission

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[2] 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, by reducing the seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See* NRS 368A.200(5)(d). Pursuant to NRS 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 then yet, submitted administrative claims for refund when the action below 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 with monthly notices of appeal to the Nevada Tax Commission. Subsequent to the filing of the action below, the Department responded to the monthly notices of appeal with identical acknowledgment letters stating that *each appeal was being held in abeyance during the pendency of the matter that constituted the action below.* App.Apx., Vol. 19, p. 3708. Consequently, the Commission would not hear, and to this date has not heard, the Deja Vu Plaintiffs' appeals. As a result and in an abundance of caution in order to preserve their rights, an amended complaint was filed in the action below to add the Deja Vu Plaintiffs as Plaintiffs to that suit. App.Apx., Vol. 10, p. 1844.

("Commission") held hearings regarding the first set of denials in July and August of 2007. After the submission of materials and oral argument, the Commission denied the K-Kel Plaintiffs' appeals in October of 2007. App.Apx., Vol. 19, p. 3709.

On January 9, 2008, in accordance with NRS 368A.290(1)(b) and 368A.300(3)(b), which govern adverse decisions by the Commission in regard to LET applications for refund, the K-Kel Plaintiffs timely filed a judicial complaint in the Clark County District Court for refund, declaratory relief, injunctive relief, and damages. That action was assigned Case No. A554970 (sometimes referred to herein as "Case 2," but move generally simply as the "action below").

On July 29, 2010, Case 1 and Case 2 were "coordinated" by the district court, and on April 5, 2011, they were consolidated. App.Apx., Vol.9, p. 1700 and App.Apx., Vol. 14, pp. 2639-40.

The parties engaged in discovery in Case 1, and that continued after the cases were coordinated and later consolidated; with discovery in the latter stages of the litigation applying to *both* cases.

For example, on August 2, 2011, Plaintiffs issued a series of subpoenas duces tecum for the taking of a number of depositions in both cases. App.Apx. Vol. 17, pp. 3328-48. The Defendants filed objections thereto App.Apx. Vol. 17, pp. 3199-3225. In no part of those objections did the Defendants ever assert that

discovery was improper in Case 2 because the Plaintiffs were limited therein to a Petition for Judicial Review ("PJR") proceeding.[3]

Rather, Defendants objected to the method of service of process; they claimed that they had already produced the documents; they asserted that the Plaintiffs failed to allow reasonable time for compliance; they argued that the subpoenas duces tecum required disclosure of privileged or other protected matter; they proclaimed that some of the requested witnesses were not in their custody and/or control; and they contended that the requests subjected the Defendants to undue burden. App.Apx. Vol. 17, p. 3208.

In addition, the Defendants propounded their own discovery in ***both cases***. On May 25, 2011[4], the Defendants issued a series of requests for production of documents to all of the Plaintiffs for use in Case 1 and Case 2. App.Apx. Vol. 18,

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[3] The Defendants cannot plausibly assert that they did not raise such objections because discovery would have been appropriate in Case 1 and that, as a consequence thereof, prevailing on objections with regard to the taking of *any* discovery in Case 2 would have simply been a pyrrhic victory. In their motion to dismiss and/or for summary judgment (pp. 25-26), the Defendants asserted that Case 1 was limited to a facial challenge only (App.Apx. Vol. 15, pp. 2848-49), where the district court would be limited to a review of the four corners of the statute *only* and where no discovery would then be necessary. In ruling on these motions, the district court agreed and limited Case 1 to a facial challenge. The court also stopped all further discovery. App.Apx. Vol. 20, pp. 3833 (Order of 11/1/2011, p. 4).

[4] This was actually one day before this Court issued its decision in Edison.

pp. 3405-76.[5] The Plaintiffs generally objected thereto, which lead the Defendants to file a motion to compel on August 16, 2011; almost three weeks *after* the decision of this Court in Southern California Edison v. First Judicial District, 127 Nev. Adv. Op. 22, 255 P.3d 231 (2011) ("Edison"). App.Apx. Vol. 18, pp. 3363-3403. In that pleading, the Defendants made clear that the requested discovery was necessary not only in Case 1, *but in Case 2 as well*.

In the Affidavit of Vivian Rakowsky in support of an order shortening time for that motion, she states: "This discovery is relevant to the Defense of the claims in the Plaintiffs' Amended Complaint**s**.[6]" App.Apx. Vol. 18, p. 3365 (¶ 9) (emphasis added).

In their actual motion to compel (p. 9), the Defendants acknowledged that they submitted the discovery prior to this Court's decision in Edison "in order to seek discovery with reference to the LET paid by each Plaintiff" (App.Apx. Vol. 18, p. 3371); claimed (p. 14) that "the Plaintiffs have made a number of claims in ***both*** of the Amended Complaints which necessitate the discovery requested in Ex. 'A'" (id. at 3376); provided an elaborate multi-page chart (pp. 18-26) setting forth why they contended that "the discovery is appropriately had" (id. at 3380-88);

[5] In addition, on July 26, 2011, the Defendants, ***in both cases***, propounded requests to produce, requests for admissions, and interrogatories to all of the Plaintiffs. *See, e.g.*, App.Apx., Vol. 17, pp. 3128-56.

[6] Thereby referring to the amended complaint**s** in *both* Case 1 and Case 2.

asserted that while the Plaintiffs alleged that the sole matter at issue was the "constitutionality of the tax," the Plaintiffs had brought their "as applied" and "***refund*** claims,"[7] which "significantly expand the scope of this matter beyond the constitutional challenge and necessitates the Defendants [sic] requests for discovery" (id. at 3388-89 (pp. 26-27)); argued that "Plaintiffs have also failed to show why the financial information requested ***is not relevant to the subject matter*** when it was the Plaintiffs, themselves who put this at issue with as applied ***and refund claims***" (id. at 3401 (p. 39)); contended - - quite astonishingly in light of their belated claim that Case 2 is limited to a PJR proceeding - - that "Plaintiffs do not feel that they have to comply with the Nevada Rules of Civil Procedure" (id.); and actually declared that "once this matter was expanded to include the as applied ***and refund claims***, *this discovery should have been automatically provided pursuant to NRCP 16.1"* (id. at 3402 (p.40)) (emphasis added)[8].

Consequently, both before and after the ruling in Edison, the Defendants willingly and *intentionally* engaged in elaborate discovery in Case 2, which would have been completely irrelevant, and indeed inappropriate, in a PJR proceeding.

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[7] The use of the phrase "'refund' claims" is a clear reference to the matters contained in Case 2.

[8] How the Defendants could contend that the mandatory discovery requirements under NRCP 16.1 were applicable *to a PJR proceeding* is simply beyond comprehension.

On January 25, 2011, the Defendants filed a motion for partial summary judgment on Plaintiffs' claims for refund, to dismiss Plaintiffs' "as applied" challenge to the LET and their claims for damages pursuant to 42 U.S.C. § 1983, and to dismiss Case 2 for the failure of the Plaintiffs to have filed a petition for judicial review. App.Apx., Vol. 11, pp. 2057-84. The Plaintiffs responded thereto. App.Apx., Vol. 12, pp. 2189-2249.

Initially, the District Court denied without prejudice the Defendants' motion regarding Plaintiffs' claims for refund and to dismiss Case 2. App.Apx., Vol. 14, p. 2640 (Order April 6, 2011). Plaintiffs, however, filed a motion for clarification of the order that had been entered.[9] App.Apx., Vol. 14, p. 2659-67. While that motion was pending, this Court issued its decision in Edison.

As a result, and on the same day, the Defendants filed a supplement to their response to the Plaintiffs' motion for clarification of order, which attached thereto a copy of Edison and which requested that the district court "order that the refund claims in this matter be dismissed because they should have proceeded as a petition for judicial review. . . ." App.Apx., Vol. 14 pp. 2758-60, 2761-2776.

[9] This was as a result of the district court having dismissed *all* of Plaintiffs' claims pursuant to 42 U.S.C. § 1983 - - including the requests for injunctive and declaratory relief - - instead of just the damages aspect of that claim as requested by the Defendants in their motion.

The district court acknowledged the decision in Edison, indicated that it was "inclined to reconsider the prior motion to dismiss related to the petition for judicial review issue based upon" the recent decision in Edison, and ordered the Defendants "to re-notice the motion so an appropriate record can be made." App.Apx., Vol. 15, p. 2814 (6/24/11 Minute Order). Defendants refiled their motion to dismiss (App.Apx., Vol. 15, pp. 2824-56), and the Plaintiffs appropriately responded (App.Apx., Vol. 16, pp. 2619-70).

At a hearing that occurred on August 23, 2011 regarding that refiled motion and other various motions, the district court, among other things, dismissed Case 2 based upon this Court's decision in Edison; ordered Plaintiffs to file a petition for judicial review in lieu of Case 2 within 30 days; stated that Case 1 would proceed as a facial challenge only; and precluded all further discovery in that action, including various depositions that the Plaintiffs intended upon taking later in that week (finding that "any further discovery would be inappropriate and is hereby ordered cancelled"). The court also orally instructed Plaintiffs to bring a motion for summary judgment based upon the facial unconstitutionality of Chapter 368A within 30 days. App.Apx., Vol. 18, pp. 3547-48 (Transcript of 8/23/2011, pp. 30-31); 3832 (Order of 11/1/2011, p.3); and 3955 (Amended Order of 12/19/2011).

Pursuant thereto, Plaintiffs filed such a petition for judicial review and initiated this appeal in regard to the dismissal of Case 2 as well.

STATEMENT OF FACTS

Plaintiffs operate commercial entertainment establishments in the City of Las Vegas that present live exotic performance dance entertainment to the consenting adult public. App.Apx., Vol. 1, pp. 132-34 (Complaint for Refund, Pursuant to N.R.S. 368A.290(1)(b) and N.R.S. 368A.300(3)(6), Declaratory Relief, Injunctive Relief and Damages, ("Comp.," at ¶¶ 23-28, 30). 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, as well as by Art. I, §§ 9 and 10 of the Nevada Constitution.[10] App.Apx., Vol. 1, p. 134 (Comp., ¶ 30).

[10] Exotic dancing, in the form of clothed, "topless," and even fully nude entertainment, falls within the scope of the liberties, including the right to free expressive association, afforded by the First Amendment. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 2460 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289 120 S.Ct. 1382, 1391 (2000) (same); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181 (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 from official regulation"); and Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, 274 F.3d 377, 396 (6th Cir. 2001), *cert denied*, 535 U.S. 1073 (2002), *citing* Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S.Ct. 3244, 3252 (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'"). Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see* S.O.C., Inc. v.

On or about July 22, 2003, the legislature enacted Chapter 368A, which modified the previous "Casino Entertainment Tax" and imposed, for the first time and subject to numerous and various exceptions, an excise tax on admission to any facility that provides defined "live entertainment." App.Apx., Vol. 1, p. 131 (Comp., ¶ 17). A copy of the version of Chapter 368A adopted in 2003 is found as Addendum D.

As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of NRS 368A.200(5)(d), to live entertainment that was not provided at a licensed gaming establishment if the facility had a maximum occupancy of less than 300 persons. 368A.200(5)(d). However, on June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554; found at App.Apx., Vol. 19, pp. 3628-46.

Among other things, Assembly Bill No. 554 reduced the exception as contained in NRS 368A.200(5)(d) from a maximum seating capacity of 300 to 200 persons. Id. at 3632. The purpose of this amendment was to specifically extend the tax obligation as contained in Chapter 368A to a number of the Plaintiffs' establishments that were not then subject to the LET. App.Apx., Vol. 1, p. 132 (Comp., ¶¶ 21-22). The LET was again modified in 2005, via Senate Bill 3

Mirage Casino-Hotel, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001)), this federal case law is applicable to Plaintiffs' state constitutional challenges as well.

(App.Apx., Vol. 19, p. 3663), to change the reference in NRS 368A.200 from "seating capacity" to "occupancy." Then in 2007, via Assembly Bill 487 (App.Apx., Vol. 19, p. 3669), the LET was modified to exempt "certain minor league baseball events . . . ."

The current codified version of Chapter 368A, incorporating the amendments as contained in Assembly Bills No. 554 and 487, as well as Senate Bill 3, is, as discussed above, found as Addendum A. The sections of Chapter 368A relevant to this appeal did not change through these statutory modifications, and the provisions referred to herein can be found in Addendum A.

The Defendants below comprised of the department, commission, board, and individual charged with enforcing Chapter 368A. They took the position that the Plaintiffs were all subject to the Statute, and the Defendants required the Plaintiffs to pay the LET as mandated therein. App.Apx., Vol. 1, pp. 130-135 (Comp., ¶¶ 13-15, 23-28, 32).

Contrarily, the Plaintiffs contend the tax imposed by Chapter 368A is both illegal and unconstitutional, 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. App.Apx., Vol. 1, pp. 135-137 (Comp., ¶¶ 33, 41). 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. App.Apx., Vol. 1, p. 135 (Comp., ¶ 33).

RELEVANT PROVISIONS OF CHAPTER 368A

Chapter 368A (Addendum A) states, at NRS 368A.200(1), that "[e]xcept 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 less than 7,500,[11] the rate of tax is 10% of the admission charge to the facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the facility. If the live entertainment is provided at a facility with a maximum occupancy of at least 7,500, the rate of the tax is 5% of the admission charged to the facility. Id.

> Chapter 368A defines an "[a]dmission charge" in NRS 368A.020 as:
>
> [T]he 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.

The term "facility" is defined in NRS 368A.060 as follows:

> (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:

[11] All the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons. App.Apx., Vol. 1, p. 134 (Comp., ¶ 29).

(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 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.

"[L]ive entertainment" is generally defined in NRS 368A.090 as:

> [A]ny 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.

This definition includes, *inter alia*, "[d]ancing performed by one or more professional or amateur dancers or performers." NRS 368A.090(2)(a)(2).

Pursuant to NRS 368A.200(5), however, the tax is not applicable to certain specifically identified entertainment, one of which is "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or the Nevada Constitution." NRS 368A.200(5)(a).

NRS 368A.260 states, in part:

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:

* * *

(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.

* * *

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 . . . Department shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

NRS 368A.290 states, in part:

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

* * *

(c) 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 . . . Department, for the recovery of the whole or

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

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

NRS 368A.300 states, in part:

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

* * *

(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 be first credited towards any tax due from the ***plaintiff***.

5. The balance of the judgment must be refunded to the ***Plaintiff*** (Emphasis added).

Other provisions of Chapter 368A are discussed below.

PLAINTIFFS' CONSTITUTIONAL ARGUMENTS

Although the merits of Plaintiffs' constitutional challenges to Chapter 368A are not before the Court in this appeal, they do inform the legal issues that this Court is being asked to address in this matter. Consequently, Plaintiffs will provide a very brief explanation as to the constitutional claims that were raised in the proceedings below.

There are three ways a tax may violate the First Amendment. First, a direct tax specifically on First Amendment freedoms is unconstitutional.

> ***Freedom of speech***, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way . . . . ***It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional***.

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 108, 111, 63 S. Ct. 870, 872, 874 (1943) (emphasis added).

Second, a tax that targets a narrowly defined group of speakers is unconstitutional. As set forth by the Supreme Court:

> A tax is also suspect if it targets a small group of speakers.
>
> * * *
>
> The danger from a scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from a content-based regulation: It will distort the market for ideas.

Leathers v. Medlock, 499 U.S. 439, 447-48, 111 S. Ct. 1438, 1443-44 (1991).

Third, a ***content-based tax*** is unconstitutional. Leathers, 499 U.S. at 447, 111 S. Ct. at 1444 ("Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech"). *See also* Seres v. Lerner, 120 Nev. 928, 936, 102 P.3d 91, 96 (2004).

Plaintiffs contend that the LET is unconstitutional for all three reasons. First, it is a direct tax on a mode of expression that undeniably receives protections under the First Amendment; *i.e.*, "live entertainment." Second, the numerous exceptions to and exemptions from the LET as found in NRS 368A.090(2)(b)(1) – (8) and NRS 368A.200(5)(a) – (p), together with the legislative history, clearly demonstrate that the Statute was legislatively gerrymandered in such a fashion that it was intended to, and in fact does, apply to exotic dance facilities and very little else. This demonstrates that the LET impermissibly "targets a small group of speakers." Third, the exemptions and exceptions, many of which permit businesses and individuals to escape paying the tax because of the *content* of the entertainment involved, establishes that the LET is an impermissible and unconstitutional content-based tax. *See* App.Apx., Vol. 1, pp. 135-141 (Comp., ¶¶ 33, 41, 53 and 54).

SUMMARY OF ARGUMENT

Plaintiffs properly and timely filed their refund action pursuant to NRS 368A.290 and 368A.300 in direct accordance with those statutory provisions. After litigating that original action for 3½ years, including engaging in bi-lateral discovery, the State asserted for the first time that the action had been improperly filed and should be dismissed since it was not in the form of a petition for judicial review.

The district court erred in dismissing the original action below and in requiring the Plaintiffs to proceed, rather, way of a petition for judicial review (and thereby robbing them of their broad discovery rights that would have been available in an original action) because: 1) this case is not governed by this Court's decision in Southern California Edison v. First Judicial District, 127 Nev. Adv. Op. 22, 255 P.3d 231 (2011), in that the judicial relief statutes at issue here - - NRS 368A.290 and NRS 368A.300 - - are *specific* statutes that were enacted *after* the changes to the *general* Administrative Procedures Act sections that served as the basis of this Court's ruling in Edison; 2) the Defendants waived their right to challenge Plaintiffs' original action by failing to raise such defenses in response to Plaintiffs' initial complaint and in willingly engaging in discovery that would have been improper in a PJR proceeding; 3) the actions of the Defendants, both in proceedings relating to these Plaintiffs and in regard to other taxpayers, estop the Defendants from denying these Plaintiffs an original de novo action for refund; 4) this Court's decision in Edison cannot be applied retroactively since it is a ruling involving construction of a procedural statute, which can only be applied prospectively; and 5) this Court's decision in Nevada Department of Taxation v. Scotsman Manufacturing Co., Inc., 109 Nev. 252, 255, 849 P.2d 317, 317-20 (1993), which provides for a direct refund action irrespective of other remedies that may be available, precluded the dismissal of Plaintiffs' suit.

ARGUMENT

I. STANDARD OF REVIEW.

All of the issues before this Court involve questions of law and constitutional concerns, which are subject to *de novo* review. *See* Busefink v. State, 128, Nev. Adv. Op. 49, 286 P.3d 599, 602 (Nev. 2012).

II. THE DEPARTMENT WAIVED ITS RIGHT TO RAISE THESE ARGUMENTS.

Plaintiffs filed the action below on January 9, 2008. App.Apx., Vol. 1, p. 127 (Compl). Pursuant to agreement among the parties, Defendants filed their Answer and Affirmative Defenses on March 3, 2008. App.Apx., Vol. 2, p. 293. ***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 filed a petition for judicial review instead. App.Apx., Vol. 2, pp. 301-302. Therefore, Defendants waived their right to raise such claims. *See* Pierce Lathing Co. v. ISEC, Inc., 114 Nev. 291, 295, 956 P.2d 93, 95 (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, 30, 952 P.2d 961, 964 (1998) (if affirmative defenses are not pleaded or tried by consent, they are waived).

Moreover, the Defendants litigated the action below for over three years as an original, *de novo*, action; they participated in discovery; and they did not, until

the absolute last minute, invoke the specter that the action was being improperly litigated and administered by the parties *and by the district court*. Such conduct of the Defendants further constitutes waiver on their behalf. *See* Valley Health System, LLC v. Eighth Judicial District Court, 127 Nev. Adv. Op. 15, 252 P.3d 676, 680 (May 6, 2011) (In holding that a party could not "advance additional" arguments to the district court after an adverse ruling by a discovery commissioner, and that parties should not be allowed to "change their strategy and present a different theory" to the district court, this Court held that "[a]ll arguments, issues, and evidence ***should be presented at the first opportunity and not held in reserve*** . . .") (emphasis added).

If the Defendants felt that a petition for judicial review - - which would not permit discovery - - was the appropriate procedure for the action below, they should have raised the issue at the first instance, and certainly before the Discovery Commissioner (at the latest), and not for the first time in the district court after protracted discovery battles. *See also* Garcia v. Scolari's Food & Drug,125, Nev. 48, 55, 200 P.3d 514, 519 (2009) (Court finding it is "generally inappropriate when a party . . . pursues one strategy at trial and then, after an adverse result, seeks to pursue another strategy with additional evidence").

III. THIS COURT'S DECISION IN *EDISON* DID NOT REQUIRE THE DISMISSAL OF THE ACTION BELOW.

For several reasons, Edison did not mandate the dismissal of the action below.

In Edison, this Court concluded that a petition for judicial review pursuant to NRS 233B.130 is the proper procedure to challenge the Commission's decisions related to certain sales and use tax statutes that existed ***prior to*** amendments to the Administrative Procedures Act ("APA") and to those tax statutes. This Court however, refused to require the taxpayer there to proceed with a PJR, and ordered the lower court to hear the matter as an independent action. 127 Nev. Adv. Op. 22, 255 P.3d at 233.

The reason for the Court granting review in Edison was as a result of the conflict in the district courts and the varying positions taken by the Department, in regard to different taxpayers, of the proper procedures to apply.[12] Those

[12] It is clear that the Department was telling different taxpayers that different judicial redress procedures applied in regard to decisions of the Commission, particularly as evidenced by an Administrative Law Judge's letter, referenced by this Court in Edison, which informed a taxpayer *other than Edison* that a trial *de novo* was judicially available. That letter (App.Apx., Vol. 16, pp. 3009-10) was issued on May 29, 2009, which was five weeks *after* the Department moved to dismiss the district court action in Edison. Plaintiffs note that co-counsel for the Defendants in *this* matter, Blake Doerr, was also sent the same letter and was, therefore, aware of the Department's position on this issue, although he still filed a motion for partial summary judgment (App.Apx., Vol. 11, pp. 2066-75), a supplement (App.Apx., Vol. 15, pp. 2758-60), and a renewed motion (App.Apx., Vol. 15, pp. 2833-46), insisting that *these* Plaintiffs were not entitled to de novo review. *See also* App.Apx., Vol. 17, pp. 3157-59, discussed, *infra* (letter issued to Edison's counsel).

inconsistent positions taken by the Department resulted in the final conclusion that Edison's suit would proceed forward as a de novo original action.

This Court stated:

> Edison argues that the nature of the judicial remedy available in a tax refund action is an important issue of law requiring clarification. Edison argues that the Department has taken inconsistent positions from one case to the next, and that this court should ensure that all taxpayers are treated with uniformity and consistency. According to Edison, there are multiple cases that are working their way through the administrative appeals process and that have been filed in district court that will require district courts throughout the state to determine the appropriate standards of review and procedural posture for refund cases. Edison argues that we should definitively clarify the law so that all of those cases are treated equally.
>
> It appears that the Department ***has adopted a new policy***[13] for refund cases. The Department and the Attorney General's office admitted at oral argument that, in the past, they had advised some taxpayers who contested the denial of a refund that trial de novo before the district court would be available. They also admitted that there was no consistent position taken regarding whether a taxpayer is entitled to trial de novo or a petition for judicial review. In one case, an administrative law judge stated in a letter that: "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." However, in its answer to the writ petition, the Department states that "going forward, [it] is challenging refund actions filed as civil actions in district court after an administrative proceeding."
>
> ***Given this change in the Department's approach to refund actions***, and the resulting confusion and potential disparate application of the

---

[13] Defendants' belated request below was apparently pursuant to that "***new policy***."

> law, we take this opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action [footnote omitted].

255 P.3d at 234 (emphasis added).

The omitted footnote further stated: "We note that during oral argument, the parties indicated that ***there seems to be confusion at the district court level as to whether NRS Chapter 233B applies, or whether NRS 372.680 applies***." Id. at 7 n.2, 255 P.3d at 234 n.2 (emphasis added).

Consequently, it is clear that this Court considered Edison merely to clarify the *procedures* that were to be used. Even though the Court was obviously very aware that many refund suits had been proceeding as original actions, it did not indicate, ***in the least***, that such matters would have to be dismissed and those Plaintiffs robbed of their ability to obtain full judicial redress (including discovery).

In addition, and more importantly, the circumstances here are markedly different from those in Edison because the statutory provisions under which the action below was filed (NRS 368A.290 and 368A.300) were enacted ***after*** the revisions to the APA that led this Court to conclude in Edison that the judicial challenge procedures of a ***previously-existing*** tax statute would then be interpreted as requiring the filing of a petition for judicial review in light of those amendments.

Chapter 368A imposes a specialized tax on live entertainment, and contains ***its own separate refund procedures*** distinct from NRS 360.245 of Chapter 360 (Addendum E) and NRS 372.680 (Addendum F). This Court in Edison discussed the amendments made to NRS 233B.130 (Addendum G; the PJR provisions of the APA), NRS 360.245, and NRS 372.680 in ***1989, 1997 and 1999*** (127 Nev. Adv. Op. 22, 255 P.3d at 234-37), and their effect on the general appellate procedures for sales and use tax claims. However, ***after*** those amendments were made, the Legislature then enacted Chapter 368A in 2003, which included ***specific*** provisions detailing actions for refund ***of that tax***. NRS 368A.290 (1) and (2), and 368A.300 (3)(b).

This Court has long held that if the legislature subsequently enacts a more specific law after a general law has been in effect, the more specific law controls:

> Where there is already a general act such as that of March 20, 1933, hereinbefore mentioned, it is sometimes argued that that fact alone shows that a general act would be applicable; but such is not the law. In Hess v. Pegg, [7 Nev. 23 (1871). . .], the court said the inference was the other way, and that the very passage of the law raises the presumption that the general act was not and could not be made applicable.

Cauble v. Beemer, 64 Nev. 77, 100, 177 P.2d 677–688 (1947) (clarification added). *See also* Quilici v. Strosnider, 34 Nev. 9,---, 115 P. 177, 179 (1911); and Washoe Co. Water Conservation Dist. v. Beemer, 56 Nev. 104,---, 45 P.2d 779, 784 (1935).

In fact, in one of the cases relied upon below by the Defendants, Nevada v. Eighth Judicial District, Case No. 56722 (App.Apx., Vol. 15, pp. 2907-10), this Court took the position asserted here by these Plaintiffs and held that a "specific statute that conflicts with a general statute will take precedence over the general statute. Andersen Family Assocs. v. State Engineer, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008)." App.Apx., Vol. 15, p. 2909. Because the LET contains a specific refund action statute, the judicial action procedures in Chapter 368A take precedence over the general tax review procedures at issue in Edison.[14]

It is, of course, also critical to note that NRS 368A.300 (4) and (5) refer to the aggrieved taxpayer as the "*plaintiff*," and not the "petitioner" as would be the case in a PJR proceeding under NRS 233B.130. Again, given the fact that this *specific* statute was enacted *after* the amendments to the APA and the general taxing statutes discussed in Edison, the provisions of Chapter 368A control. Plaintiffs were required to file (as, indeed, "*Plaintiffs*") an original action pursuant to NRS 368A.290 and NRS 368A.300, *and they did just that.*

Other differences between the refund action statutes in Chapter 368A and the PJR procedures as set forth in NRS 233B.130 further demonstrate this point.

[14] *See also* Nevada v. Eighth Judicial District, App.Apx., Vol. 15, p. 2909 (this Court noted that, subsequent to Edison, because NRS 372.680 provided a 90-day filing period, the 30-day deadline contained in NRS 233B.130(2)(c) "does not apply here").

First, there are the time differences for the filing of a request for judicial relief discussed in n. 14, *supra.* Second, NRS 368A.290(1)(b) and NRS 368A.300(3)(b) both state that the taxpayer is to bring "an action ***against the Department***" on the grounds set forth in the claim. (Emphasis added). NRS 233B.130(2)(a) requires that a PJR, on the other hand, must name "as respondents ***the agency*** [*i.e.*, the Commission] and all parties of record to the administrative proceeding . . . ." (Emphasis and clarification added).

Respectfully, imposing Edison in such circumstances presumes that unrepresented litigants, and even well-qualified attorneys, should intuitively know that they cannot take the specific language contained in NRS 368A.290 and NRS 368A.300 at face value, and that they must, rather, initiate a judicial review process in a form that is *inconsistent* with the specific requirements set forth in those two statutes.

In addition, courts are to "presume that the Legislature enacted the statute 'with full knowledge of existing statutes relating to the same subject.'" Nevada Attorney for Injured Workers v. Nevada Self Insurers Assn, 126 Nev. Adv. Op. 7, 225 P.3d 1265, 1271 (2010) (citations omitted). *See also* Destefano v. Berkus, 121 Nev. 627, 631, 119 P.3d 1238, 1241 (2005) (*accord,* with this Court noting that a subsequently enacted statute that did not "supplant or conflict" with the prior statute provided a "viable alternative method" of seeking relief).

Consequently, this Court should presume that the Legislature acted *intentionally* when it enacted the ***specific*** refund action process set forth in NRS 368A.290 and 368A.300, *knowing* that it conflicted with the other ***general*** statutes discussed in Edison. At best, this demonstrates that NRS 368A.290 and 368A.300 control. At worst, under Destefano, it means that NRS 368A.290 and 368A.300 provide a "viable alternative method" to seek judicial redress.

Clearly, if the Legislature had wanted the APA judicial review process to apply, ***it simply could have refrained from enacting the specific refund action statutes found at NRS 368A.290 and 368A.300***; thereby demonstrating that judicial review was to be made via the APA (*i.e.*, the *general* review statute). It did not. Rather, the Legislature adopted *specific* refund action statutes that undeniably *conflict* with the APA.[15] This Court should thus assume that action to have been *intentional*.

Likewise, when interpreting statutes, a court must read their provisions "in a way that would not render words or phrases superfluous ***or make a provision***

[15] Of course, there can be no question but that there is an inherent conflict between the refund action language contained in NRS 368A.290 and 368A.300 and the judicial review provisions found in NRS Chapter 233B. *See* discussion, *supra*. Review was granted in Edison, in fact, to resolve the conflict between the APA and NRS 372.680, which is, admittedly, similar to NRS 368A.290. And, were there to be no conflict, the Defendants would not have sought dismissal of the action below on the basis that Plaintiffs had not brought that suit under the rubric of a "petition for judicial review."

nugatory." Southern Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (emphasis added). Very respectfully, were this Court to side with the Defendants on this issue, it would, indeed, render the specific refund action statutes found in NRS 368A.290 and 368A.300 (enacted *after* the statutory revisions that served as the basis for the decision in Edison) to be "nugatory." In fact, the word "Plaintiff," used *three times* in NRS 368A.300, would not only be rendered "nugatory"; it would be *false and misleading* to potential litigants and attorneys. ***There is simply no doctrine of statutory construction that would permit such a result***.

Moreover, even if Edison could be considered to theoretically apply to the statutory provisions here (NRS 368A.290 and 368A.300), the ruling cannot be applied retroactively to the action below. While it may be that taxpayers who seek judicial redress from a decision by the Commission ***after*** Edison must repair through the process of a PJR under the APA (at least for sales and use taxes that are not subject to Chapter 368A), that does not mean that litigants who were "in the pipeline" when Edison was decided should be deprived of the full judicial redress for which they filed.

In Nevis v. Fidelity New York, 104 Nev. 576, 579, 763 P.2d 345, 347 (1988), this Court addressed the situation where, at the time a complaint was filed, existing law provided that guarantors of certain loans did not receive statutory

"protection afforded obligors pursuant to NRS 40.451 . . . ." (Citations omitted). Subsequently, in First Interstate Bank v. Shields, 102 Nev. 616, 618, 730 P.2d 429, 431 (1986), the Court overruled certain precedent, finding that the protections of NRS 40.451 *did* extend to guarantors. Nevis argued that since Fidelity failed to file their complaint within the time required pursuant to Shields, the Court should dismiss Fidelity's complaint. Nevis, 104 Nev. at 579, 763 P.2d at 347.

This Court refused, finding that "courts give ***prospective*** effect to the overruling of a judicial precedent involving construction of a procedural statute." Id. (*citing* 20 Am.Jur.2d Courts § 233 (1965); 21 C.J.S. Court § 194 (1940)) (emphasis added). "Therefore," this Court wrote, "we decline to give Shields retroactive effect to the extent of requiring compliance with the three month filing provision." Id.

The same issue was presented in Vogt v. Dennett, 105 Nev. 303, 774 P.2d 1036 (1989), where Shields had been handed down *after* the event triggering the filing deadline (a foreclosure sale) but *before* plaintiff filed its complaint. 105 Nev. at 304, 774 P.2d at 1037. This Court recognized that "Jenkins failed to initiate a deficiency action within three months as mandated by a retroactive application of Shields. However, we reaffirm our holding in Nevis. We will not give retroactive effect to our decision in Shields 'to the extent of requiring

compliance with the three month filing provision.'" 105 Nev. at 305, 774 P.2d at 1037.

Nevis and Vogt illustrate the extreme judicial reluctance of applying ***procedural*** rulings retroactively in a way that would have the consequent effect of barring or limiting a properly submitted request for judicial relief. Nothing is different here. As this Court recognized in Edison (127 Nev. Adv. Op. 22, 255 P.3d at 233), its prior decision in Saveway v. Cafferata, 104 Nev. 402, 760 P.2d 127 (1988), suggested that claimants could bring a de novo action pursuant to NRS 372.680,[16] which is admittedly similar to NRS 368A.290. And, here, NRS 368A.290 and 368A.300 were enacted *after* the legislative amendments relevant to the ruling in Edison.

Finally, our Taxpayers' Bill of Rights states that each taxpayer has the right "[t]o have statutes imposing taxes and any regulations adopted pursuant thereto

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[16] *See also* Sparks Nugget v. Department of Taxation, 124 Nev. 159, 162, 179 P.3d 570, 573 (Nev. 2008) ("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 use taxes . . .") (emphasis added). Hence, case law ***both before and after*** Plaintiffs filed their action below (and *subsequent* to the statutory amendments ultimately recognized to be controlling in Edison) provided for a direct suit in district court following a denial by the Commission. Consequently, even if this Court decides that Edison is applicable to the LET and to NRS 368A.290 and 368A.300, that decision should not be applied retroactively to procedurally bar the Case 2 Plaintiffs from having their suit heard as an original *de novo* action.

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) (Addendum H) (emphasis added).[17] Here, the Defendants assert that the provisions of NRS 368A.290 and 368A.300 are basically meaningless, and that Plaintiffs should have ***wholly ignored them***; filing, instead a petition for judicial review. Under the 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***.

IV. THE DEPARTMENT SHOULD HAVE BEEN ESTOPPED FROM ASSERTING THAT PLAINTIFFS COULD ONLY PROCEED BY WAY OF A PETITION FOR JUDICIAL REVIEW.

If this Court decides that the PJR procedures under NRS 233B.130 are applicable to Chapter 368A, then this Court's ultimate holding in Edison should be applied here as well. Even though the Court there held that the taxpayers' refund remedy was *otherwise* to be via a PJR, it nevertheless held that inconsistent actions by the Department resulted in it being judicially estopped from asserting that the

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[17] 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).

plaintiff's sole remedy there was pursuant to a petition for judicial review. 127 Nev. Adv. Op. 22, 255 P.3d at 237. The same result is warranted here.

As stated by this Court in Edison:

> Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by "intentional wrongdoing or an attempt to obtain unfair advantage."
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> * * *
>
> Judicial estoppel may apply when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."

Id. (Quoting NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)).

This Court in Edison began by noting that "[b]oth now and in the past, the Department has taken totally inconsistent positions in quasi-judicial administrative proceedings regarding the proper procedure for a taxpayer who wishes to challenge the Department's denial of a refund." Id. Moreover, the Department had even taken inconsistent positions with regard to Edison itself, and in a brief submitted to the Commission stated that Edison "may exercise its right to file a law suit against the Department under NRS 372.680" and that "Edison would have an opportunity before the district court to more fully develop the facts, if appropriate." Id.

In addition to the Department taking inconsistent positions in numerous *other* cases as discussed in Edison, its conduct in *this series of proceedings* aptly demonstrates that it is precluded from asserting that these Plaintiffs were limited to seeking redress from adverse rulings of the Commission only by way of a PJR.

As stated above, Case 1 was filed after the Plaintiffs' federal action was dismissed by application of the federal Tax Injunction Act ("TIA"), 28 U.S.C., § 1341. *See* Deja Vu Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation, 2006 WL 2161980 (D. Nev. July 28, 2006). App.Apx., Vol. 16, pp. 3014-17. Generally, the TIA divests the federal courts of jurisdiction over state tax matters when a "plain, speedy, and efficient remedy may be had in the courts of such State."

In the federal action, the Defendants thereto (in referencing here those litigants in that action, collectively just the "Department") filed a motion to dismiss pursuant to the TIA, arguing that a "plain, speedy, and efficient" remedy existed in the state courts because, if Plaintiffs sought an administrative refund:

> ***Within ninety days*** of denial by the NTC of a taxpayer's appeal of a claim for refund, the taxpayer may ***bring an action in court. NRS 368A.290***.[18] By default, jurisdiction for such actions lies in the

[18] Again, the Case 2 Plaintiffs brought their action in the District Court directly pursuant to, and within the time constraints as set forth in, this very statute (NRS 368A.290) ***cited by the State to the federal District Court as providing Plaintiffs their remedy for judicial redress.*** Judicial estoppel, as recognized in Edison, clearly then precludes Plaintiffs from being denied such judicial relief.

> District Court. Nev. Const. art 6, § 6, NRS 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Const., art. 6, § 4. *See also*, NRS 233B.150.[19]

App.Apx., Vol. 16, p. 3024 (Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006, p. 7) (emphasis added).

More succinctly, the Department further stated in that briefing that: "Plaintiffs have a clear opportunity to be heard at the administrative level and in court by ***making a claim for refund."*** Id. at 3025 (Motion to Dismiss, p. 8). Nowhere did the Department inform the federal court that the Plaintiffs' judicial remedy was limited to a PJR where the state courts would have very restricted review authority.

Then, in its reply memorandum in support of its motion to dismiss filed in the federal court, the Department noted that State v Scotsman Mfg. Co. Inc., 109

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[19] It should be noted that while the Department, in the federal District Court, cited to the portion of the APA that granted an aggrieved party an appeal to this Court from any final judgment of the district courts (NRS 233B.150; Addendum I), *nowhere* did the Department cite to NRS 233B.130 (Addendum G), which is the "judicial review" provision of the APA. In addition, the Department referenced NRS 233B.150 as a "*see also*," and thereby explained this provision as providing an *additional* basis for seeking review by this Court. Moreover, as pointed out below, in the federal court of appeals, the Department *deleted* this reference as being an additional avenue for relief.

Nev. 252, 849 P.2d 317 (1993)[20] "[w]ould support the proposition that ***declaratory relief is available*** notwithstanding NRS 368A.280(1).[21]" App.Apx., Vol. 16, p. 3032 (Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006, p. 3 n.2) (emphasis added). Declaratory relief would ***not*** be permissible, of course, in a petition for judicial review.

Nevertheless, the federal District Court ***agreed with the Department in this regard***, holding that NRS 368A.380(1) (the anti-injunction provision; *see* n. 21, *supra*):

> . . . does not prevent a ***judicial challenge*** either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a case involving a statute which precluded any suit whatsoever unless an administrative claim had been filed, held that ***notwithstanding the statute, the California corporation could bring the suit to challenge the tax.*** State v. Scotsman Mfg. Co. Inc., 109 Nev. 252, 849).2d [sic] 317 (1993). This decision strongly suggests that ***declaratory relief is available*** in State court notwithstanding NRS 368A.280(1).

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[20] Discussed in detail in Section V, *infra*.

[21] NRS 368A.280(1) is a provision that precludes any court from issuing an injunction, writ of mandate or other legal or equitable process 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." The unconstitutionality of this provision is addressed by these Plaintiffs in Appeal No. 60037.

Deja Vu Showgirls, 2006 WL 2161980, at *3 (App.Apx., Vol. 16, p. 3016,) (emphasis added).

The Department got its way on its arguments, and the federal District Court dismissed the Plaintiffs' action by concluding that, in light of the concessions made by the Department, a "plain, speedy and efficient" remedy existed in state court. Id.

The Department took a similar position on appeal, arguing:

> ***Within ninety days*** of denial by the [Nevada Tax Commission] of a taxpayer's appeal of a claim for refund, the taxpayer may bring ***an action in court***.[22] ***Nev. Rev. Stat. § 368A.290***. Jurisdiction for such action lies in the District Court. Nev. Const. art 6, § 6, [footnote omitted] Nev. Rev. Stat. § 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction. Nev. Cost. art. 6 § 4.[23]

App.Apx., Vol. 16, p. 3061 (Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, p.12) (emphasis added; footnote in original).

The omitted footnote to this comment stated: "This section of the Nevada Constitution provides in the pertinent part: 'The District Courts in the several Judicial Districts of the State have ***original jurisdiction*** in all cases excluded by law from the original jurisdiction of the justices' courts'") (emphasis added). Id.

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[22] The Department makes no reference whatsoever in this document to the filing of a petition for judicial review.

[23] It should be noted that in the Ninth Circuit, unlike in their comments to the federal District Court, the Department *omitted* any reference to NRS 233B.150 on appeal. Consequently, in the federal appellate court, the Department deleted ***any reference whatsoever to the APA*** providing an avenue (even alternatively) of judicial redress for the Plaintiffs.

Nowhere did the Department reference jurisdiction to hear a petition for judicial review.

In fact, ***no references to NRS 233B.130 (or any other part of the APA) are to be found <u>anywhere</u> in the Department's answering brief in the Ninth Circuit as providing the avenue (or even an alternative avenue) of judicial redress for the Plaintiffs.*** App.Apx., Vol. 16, pp. 3042-78. And, in support of its claim that a taxpayer aggrieved by a decision of the Commission has 90 days to file "an action on the claim in state court," the Department cited both NRS 368A.290 ***and NRS 368A.300***; the latter of which contains three references to the aggrieved taxpayer as being the "*plaintiff*."

Also on appeal the Department referenced the reasoning of the federal District Court (adopted at the urging of the Department itself), noting that this Court's decision in <u>Scotsman</u> (discussed more fully in Section V, *infra*) meant that the Plaintiffs could file their state court action ***without even exhausting administrative remedies***:

> The District Court further noted that the Nevada Supreme Court had specifically recognized a judicial remedy in the face of parallel language in Nev.Rev.Stat. Chapters 372 and 374. <u>State, Nevada Dept. of Taxation v. Scotsman Mfg. Co., Inc.</u>, 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.
>
> <u>Scotsman</u> involved an action for declaratory relief by a taxpayer challenging application of the sales tax to it. ***The various components of the sales tax in Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and 374, which contained provisions***

> ***substantially identical to those in Nev. Rev. Stat. Chapter 368A***. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. § 374.675, applicable to the sales taxes, ***and Nev. Rev. Stat. § 368A.280(1), applicable to the Live Entertainment tax***, are substantially identical:
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> * * *
>
> Applying the sales tax law to the matter before it, the Nevada Supreme Court in Scotsman found not only that the taxpayer was entitled to challenge the Constitutionality of the tax as applied to it, but, under the circumstances, ***it could do so without having exhausted administrative remedies.*** Id. at 255-6, 849 P.2d at 320-1.

App.Apx., Vol. 16, pp. 3063-64 (Appellees' Answering Brief, pp. 14-15) (emphasis added; footnote omitted).

Obviously, this could not have been a reference to the Plaintiffs being able to initiate a PJR because such a proceeding cannot be commenced *without a prior administrative determination*. Consequently, the Department specifically asserted, ***in court***, that ***these Plaintiffs*** would be able to challenge the imposed Live Entertainment Taxes by way of an original de novo action.

The Department expanded its position in this regard in briefing to the Ninth Circuit after the Plaintiffs moved to supplement the record on appeal with a number of the Department's statements made before the Commission during the administrative appeals. The Department then "clarified" that it was ***not*** taking the position "that the administrative refund remedy stands by itself as a plain, speedy and efficient remedy." App.Apx., Vol. 16, p. 3084 (Appellees' Opposition to

Motion for Leave to Supplement the Appellate Record, 9th Cir., Case No. 06-16634, filed April 24, 2008, p. 6).

Rather, it asserted that even "[i]f Appellants are right in their contention that the administrative remedy is somehow futile, that would provide an additional basis for proceeding by ***direct refund action*** in Nevada courts under Scotsman, *supra*, at 225, 849 P.2d at 319." App.Apx., Vol. 16, p. 3085, (id. at p. 7) (emphasis added). In addition, to make it clear to the Ninth Circuit that there existed a "plain, speedy, and efficient" remedy in the state courts, the Department made sure to point out that the Plaintiffs "have brought two actions in the Eighth Judicial District Court for the State of Nevada to challenge the Constitutionality [sic] of the live entertainment tax. *See* Exhibits A and B (complaints in actions A533273 and A554970 …)." App.Apx., Vol. 16, p. 3081 (id. at p. 3).

Of course, the latter was the very action below that the Defendants sought (ultimately successfully) to dismiss as having been improperly filed. Nowhere did the Department ever inform the federal courts that it felt that the Plaintiffs' Case 2 action had been improperly filed or was, indeed, basically meaningless. And, certainly, Plaintiffs were never afforded the Scotsman remedy so well pushed by the Department in the federal courts.

The forgoing makes clear that the Department, in this group of cases alone, never took the position that a PJR was either the correct remedy or the *sole remedy*

available to Plaintiffs for obtaining judicial redress. Instead, the Department painted the broadest possible picture of the remedies available in state court in order to secure dismissal of the federal action.

After the Department's victory in federal court and following rejection by the Commission of the K-Kel Plaintiffs' claims, those aggrieved taxpayers initiated judicial relief according to the ***very provisions*** (NRS 368A.290 and 368A.300) ***the Department cited to the federal courts as providing a remedy in the state courts***. Thus, like in Edison, "it would be highly inequitable to now allow the Department to change its position with respect to this taxpayer." 127 Nev. Adv. Op. 22, 255 P.3d at 237.

Moreover, "[t]here is nothing in the record to suggest that the Department's original position was due to ignorance, fraud, or mistake." Id. Rather, the prior position was calculated to obtain an order from the federal court dismissing the clubs' suit, and that is exactly what the Department achieved. Defendants should have been judicially estopped from claiming that Plaintiffs must have proceeded, or must now proceed, pursuant to a petition for judicial review.

Finally, whether subject to judicial or equitable estoppel, it must, of course, be pointed out that the Defendants never raised the claim in their affirmative defenses to the initial complaint filed below that Plaintiffs' action had been improperly filed and that the proper course of proceedings was through a PJR.

Had they timely done so, Plaintiffs could then have used the same as an argument as to why the federal District Court should not have dismissed Plaintiffs' action there.

For all of these reasons, the Defendants were estopped from contesting the propriety of Plaintiffs' action below, and the district court's decision should then, respectfully, be reversed.

V. THIS COURT'S DECISION IN *SCOTSMAN* PRECLUDED DISMISSAL OF THE ACTION BELOW.

Pursuant to the decision of this Court in Nevada Department of Taxation v. Scotsman Manufacturing Company, Inc., 109 Nev. 252, 849 P.2d 317 (1993), even if a plaintiff has missed the statutory deadline for the filing of a refund action to obtain reimbursement of unlawfully collected taxes, the taxpayer can still seek judicial redress to 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.

109 Nev. at 255, 849 P.2d at 320 (*citing* McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39, 110 S.Ct. 2238, 2251 (1990)).

In Scotsman, 109 Nev. at 255-56, 849 P.2d 319-20, the Court found that the plaintiffs were entitled to a refund despite the State's assertion that the claimants' failure to abide by the refund provisions of NRS 374.640(1) (Addendum J) (similar

to LET provisions) was a bar to subject matter jurisdiction. Not only had the plaintiff not filed claims for refund, but that litigant was actually past the limitations period for doing so. Scotsman, 109 Nev. at 254, 849 P.2d at 318. Still, the Court recognized its obligation to provide relief, and did so. 109 Nev. at 255-56, 849 P.2d at 320. *See also* Campbell v. State, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992) (district court, in equity, may order refund of taxes paid under protest despite claimants' failure to comply with statutory refund provisions).

As discussed above, the federal District Court dismissed Plaintiffs' action there by finding, in part, that the potential for a direct refund action under Scotsman – without even the necessity of administrative exhaustion of remedies -- provided a "plain, speedy and efficient" remedy in the state courts. And, the Defendants rode Scotsman all through the federal appellate proceedings. In light of this clear precedent from this Court and the fact that the Department relied upon Scotsman to negate the federal proceedings, it would be inequitable and unconscionable to permit the dismissal of the action below and to then deprive the Plaintiffs of their right to seek full judicial redress on their refund claims predicated upon unconstitutionally collected taxes.

VI. THE ACTION BELOW SHOULD HAVE REMAINED AS AN ORIGINAL DE NOVO ACTION.

In addition to all of the other matters set forth above describing why Plaintiffs should have been permitted to proceed with their original action, the

nature of the constitutional challenges at issue here further weigh against converting Plaintiffs' challenges to Chapter 368A into a PJR proceeding. Particularly telling in this regard is the Department's own position taken in the early stages of the Edison administrative process.

In a letter dated November 17, 2003, the Department assured Edison's counsel that a trial de novo was not only an option, but was the *best forum* for claims of a constitutional nature (which are certainly involved in Case 2[24]).

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

App.Apx., Vol. 17, p. 3158 n.1 (emphasis added).

This is, of course, consistent with the precedence of both this Court and the United States Supreme Court, holding that constitutional claims are to be appropriately litigated in courts of law, and not in administrative tribunals. In Malecon Tobacco, LLC v. Department of Taxation, 118 Nev. 837, 840-41, 59 P.3d 474, 476 (2002), this Court noted that the "United States Supreme Court has

[24] *See* App.Apx., Vol. 19, pp. 3701-06 (redacted refund requests illustrating that the basis thereof was the asserted unconstitutionality of the LET); App.Apx., Vol. 1, pp. 135-141 (Comp., ¶¶ 33, 41, 53, and 54); and Plaintiffs' Constitutional Arguments, *supra.*

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.'" (Citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215, 114 S. Ct. 771, 780 (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, 986 (1977).

Because the claims at issue involve constitutional matters, and in particular those involving First Amendment liberties, Plaintiffs' judicial redress from the decisions of the Department and the rulings of the Commission should be by way of an original de novo proceeding, and not by way of the very limited judicial review provided for under the APA, and in particular by NRS 233B.130.

For all of these reasons, not only should the district court have denied the Defendants' motion to dismiss Case 2, but it should have declined - - as this Court did in Edison - - to convert Case 2 into a judicial review proceeding.

CONCLUSION

For the reasons as set forth above, Plaintiffs/Appellants respectfully request that this Honorable Court reverse the decision of the district court below, and permit Plaintiffs' claims for refund to proceed as an original action under NRS

368A.290 and 368A.300, consistent with all civil rules (including discovery).

Dated this 4th day of January, 2013

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Appellants' Opening Brief** was filed with the Clerk of the Court for the Supreme Court for the State of Nevada on January 4, 2013. I certify that the following are registered with the Electronic Filing System through the Supreme Court for the State of Nevada and that service will be accomplished through the Electronic Filing System:

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of the NRAP 32(a)(4), the typeface requirements of the NRAP 32(a)(5) and the type style requirements of the NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14.

I further certify that this brief complies with the page – or type-volume imitations of NRAP 21(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of size 14 or more, and contains 11,822 words, as counted by MS Word.

Finally, I hereby certify that I have read this appellate 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 this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the 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 accompanying brief is not in conformity with the requirements of the Nevada Rules of the Appellate Procedure.

Dated this 4th day of January, 2013

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