IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION, and the NEVADA STATE BOARD OF EXAMINERS, and MICHELLE JACOBS, in her official capacity only,

Respondents.

Supreme Court No. 59752
DC Case No. 08A554970

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

RESPONDENTS' ANSWERING BRIEF

CATHERINE CORTEZ MASTO
Attorney General
DAVID J. POPE
Senior Deputy Attorney General
Nevada Bar No. 008617
BLAKE A. DOERR
Senior Deputy Attorney General
Nevada Bar. No. 009001
VIVIENNE RAKOWSKY
Deputy Attorney General
Nevada Bar No. 009160
555 East Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3426
Attorneys for Respondents

TABLE OF CONTENTS

Page

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

TABLE OF AUTHORITIES

CASES **Page(s)**

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

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

STATUTES AND REGULATIONS

OTHER

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

STATEMENT OF THE CASE

The original Appellants are eight gentlemen's clubs with locations in Las Vegas, Nevada. D.I. Food & Beverage of Las Vegas, LLC d/b/a Scores withdrew its appeal leaving the other seven gentlemen's clubs listed in the case caption as Appellants (hereinafter, the "Clubs").

The Clubs originally attempted to challenge the constitutionality of the Live Entertainment Tax (hereinafter referred to as "LET"), found in Chapter 368A of the Nevada Revised Statutes (hereinafter referred to as the "NRS"), by commencing an action in Federal District Court. The federal proceedings were dismissed based on application of the Tax Injunction Act, 28 U.S.C. §1341. (19 Appellants' App. 3700). The United States Court of Appeals for the Ninth Circuit agreed that the federal district court did not have jurisdiction because the Nevada court and administrative system provides an adequate remedy and affirmed the dismissal. (19 Appellants' App. 3700). Through the federal proceedings, the Clubs were made aware of NRS 368A.290, the relevant portions of Chapter 233B of the NRS and Nevada case law regarding tax matters.

Following dismissal of the federal case, the Clubs commenced Eighth Judicial District Case Number A553273 (hereinafter "Case 1") on December 19, 2006. This case was arguably filed as a facial challenge, or something meant to look like a facial challenge, as the Clubs later amended the Complaint to change the Introduction to say, "Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face *and as applied to Plaintiffs* . . .." (14 Appellants' App. 2674:12-13) (emphasis added). The Complaint originally read, "Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face . . .." (1 Appellants' App. 2:16). After commencing Case 1, the Clubs filed administrative refund claims, exhausted administrative remedies, and thereafter commenced Eighth Judicial District Court Case Number A554970 (hereinafter, "Case 2").

. . .

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

The two cases were never wholly consolidated. As evidenced by the Order dated April 5, 2011, the Eighth Judicial District Court consolidated only the declaratory relief actions. (14 Appellants' App. 2670-2671; 15 Appellants' App. 2750).[1] Prior thereto, the cases were merely coordinated, and the coordination didn't start until June 30, 2010. *See* Minute Order dated June 30, 2010 (9 Appellants' App. 1698).

Following the commencement of Case 1 and before the commencement of Case 2, all but two of the original Clubs submitted administrative claims for refunds commencing their administrative cases.[2] Thus, the Clubs were pursuing the facial challenge in District Court and the as applied challenge through the administrative process. For being confused, the Clubs were miraculously proceeding in accordance with Nevada law. *Malecon Tobacco, LLC v. Dep't of Taxation*, 118 Nev. 837, 840-841, 59 P.3d 474 (2002) (explaining that facial challenges can be an exception to the exhaustion requirement and that as applied challenges requiring factual determinations must be heard by the Department of Taxation). For some presumably strategic reason, the Clubs did not want to obtain declaratory relief on the facial challenge prior to pursuing the "as applied" challenge, abandoned the ability to factually develop the "as applied" challenge through the administrative proceedings and commenced Case 2 rather than filing a petition for judicial review (hereinafter "PJR").

Ultimately, the District Court consolidated the facial challenge declaratory relief claims into Case 1, ordered Case 1 to proceed only as a facial challenge, dismissed Case 2 and allowed the Clubs to pursue Case 2 as a petition for judicial

[1] The Clubs' statement that the cases were consolidated is not completely accurate. *See* Opening Br., p. 4, n. 1.

[2] The two Clubs that did not exhaust administrative remedies before commencing Case 2 were Déjà vu Showgirls of Las Vegas, L.L.C d/b/a Déjà vu Showgirls and Little Darlings of Las Vegas, L.L.C, d/b/a Little Darlings (hereinafter, "Déjà vu and Little Darlings"). Déjà vu and Little Darlings should not be parties to Case 2 because they did not exhaust administrative remedies before Case 2 was filed and are not part of the administrative record. NRS 233B.130. In fact Déjà vu and Little Darlings have removed themselves from the PJR. (Resp'ts' App. 179, ¶ 2).

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

review. (18 Appellants' App. 3541-3549). It is this Order that is the subject of this appeal (hereinafter "Order"). *Id*.[3] As will be shown, the appeal must be denied.

STATEMENT OF FACTS

Case 1 was originally commenced as a "facial" challenge. (1 Appellants' App. 2:16). It was later amended to include an "as applied" challenge. (14 Appellants' App. 2674:12-13).

Before the amended complaint was filed, the Department filed a motion to dismiss the Case 1 complaint for failure to exhaust administrative remedies. (2 Appellants' App. 317-328). The matter was heard on July 31, 2008 and the motion was denied in December of 2010. (11 Appellants' App. 1990-1991).

The Respondents, the Department of Taxation, the Nevada Tax Commission, the Board of Examiners and Michele Jacobs (hereinafter jointly referred to as "Department") filed their Motion for Partial Summary Judgment on Plaintiffs Claims for Refund and Motion to Dismiss the As Applied Challenge to the Live Entertainment Tax and Claims for Damages Pursuant to 42 U.S.C. 1983 (hereinafter "Motion") on January 25, 2011. (11 Appellants' App. 2057-2084). The Motion challenged the procedural posture of Case 1 and Case 2 and argued that Case 2 should be dismissed for not having been filed as a PJR. (11 Appellants' App. 2057-2084) (14 Appellants' App. 2506-2530). It is undisputed that the Clubs did not file a PJR.

At the hearing on March 15, 2011, the court granted the Motion in part and dismissed the 42 U.S.C. §1983 damages claims. (15 Appellants' App. 2750). The court also consolidated the facial challenges from both cases into Case 1. (15 Appellants' App. 2750:9-16) ("the dec relief claims are being consolidated so there won't be a duplication").[4] The remainder of the Motion was denied. (15

[3] Though the Clubs discuss the merits of their constitutional claims in their Opening Brief, they in essence state that the merits of such claims are irrelevant to this appeal. Because the merits of the constitutional claims are irrelevant for purposes of this appeal, the Department does not address the merits of such claims in this brief.

[4] This consolidation occurred before the dismissal of Case 2.

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

Appellants' App. 2750). Consequently, Case 2 was not dismissed and maintained its posture as a trial de novo.

The Clubs requested clarification of the order regarding the Motion. (14 Appellants' 2690-2713). While the argument was being briefed, and prior to the hearing, the decision in *Southern Cal. Edison v. First Judicial Dist. Ct.,* 127 Nev. ____, 255 P.3d 231 (Adv. Op. 22, May 26, 2011), was issued.[5] The Department submitted a copy of the *Edison* decision to the District Court via its Supplement to its Response to the Clubs Motion for Clarification of Order. (15 Appellants' App. 2758-2777).

In a Minute Order dated June 24, 2011, the district court requested the Department to re-notice its Motion. (15 Appellants' App. 2814; 18 Appellants' App. 3546:3-14). The Department re-noticed its Motion (hereinafter "Re-Noticed Motion") and the matter was heard on August 23, 2011 (15 Appellants' App. 2824-2916; 15 Appellants' App. 2736). The district court dismissed Case 2 and afforded the Clubs 30 days to file a PJR. (18 Appellants' App. 3519-3550). In addition, Case 1 was limited to a facial challenge. (18 Appellants' App. 3541:25 – 3542:3).

The Clubs assert that the Order (previously designated as the "Order") granting the Re-Noticed Motion is erroneous. (Appellants' Opening Br.).

The Clubs assert that the Department waived its right to challenge the procedural posture of the case on the basis that it didn't correctly plead an affirmative defense asserting that Case 2 should have been filed as a PJR. (Appellants' Opening Br., p. 22). Yet, in its original Answer, the Department's affirmative defenses included the failure to state a claim upon which relief may be granted. (2 Appellants' App. 290, 301). More importantly, in its Answer to the First Amended Complaint, the Department included the following affirmative defenses:

> 8. As and for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the Answering Defendants allege that the

[5] The opinion was issued May 26, 2011.

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

> Plaintiff [sic] has failed to comply with NRS 233B.130 which solely allows judicial review.
>
> 9. As [sic] for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, this court lacks subject matter jurisdiction as Plaintiffs failed to file a judicial review pursuant to NRS 233B.130 and NRS 368A.290 seeking review of the Nevada Tax Commission's final decision dated October 12, 2007.
>
> 10. As [sic] for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, Déjà vu and Little Darlings have not exhausted administrative remedies and are not parties of the administrative record as required by NRS 233B.130.
>
> 14. A [sic] for a separate, distinct affirmative defense to Plaintiffs' Amended Complaint, the "as applied" constitutional challenge is limited to judicial review of the Nevada Tax Commission's decision dated October 12, 2007 because "as applied" challenges require exhaustion of administrative remedies. In this case, the original six Plaintiffs pursued administrative remedies, obtained a final decision from the Nevada Tax Commission and failed to file a judicial review. Having failed to file a petition for judicial review, Plaintiffs "as applied" claim has been decided by the final decision of the Nevada Tax Commission dated October 12, 2007.

(14 Appellants' App. 2613).

The Clubs also assert that the Department should have been judicially estopped from challenging the procedural posture of the case. (Appellants' Opening Br., p. 34). The Clubs allege that the Department's arguments before the federal courts are a basis for judicial estoppel. *Id*. at 36-44. They also argue for relief on the basis that they relied on prior case law. *Id*. at 34-36.

With regard to the federal proceedings, the Department filed a motion to dismiss in the District Court for the District of Nevada. (16 Appellants' App. 3018-3029). The Department asserted that the Federal District Court lacked subject matter jurisdiction because of the Tax Injunction Act, 28 U.S.C. §1341. (16 Appellants' App. 3018-3029). The Department argued that Nevada's administrative and judicial processes constituted a "plain, speedy and efficient" remedy. (16 Appellants' App. 3018-3029). The motion was granted and the Ninth Circuit Court of Appeals affirmed. (13 Appellants' App. 2337-2346).

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

Consequently, arguments before the federal courts were focused on application of the Tax Injunction Act.

For judicial estoppel to apply, it must be shown, among other things, that the litigant took two contrary positions during proceedings before an administrative body or a court. *NOLM, LLC v. County of Clark,* 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Based thereon, the Clubs are alleging that the Department argued that the matter would proceed as a trial de novo and then later argued that the matter should be a PJR. (Appellants' Opening Br., p. 41). In its Reply Brief filed in Federal District Court, the Department spelled out the procedure for the Clubs to follow and stated:

> As discussed at length in the moving papers, the provisions of NRS 368A.250-.320 afford taxpayers the opportunity to raise the constitutionality of the live entertainment tax in the context of a request for a refund in an administrative proceeding. That procedure is subject to *judicial review*. NRS 368A.290. On judicial review, a district court may set aside the agency decision if it violates constitutional or statutory provisions. NRS 233B.135(3)(a). In the event of an adverse decision in district court, the taxpayer has a right to appeal to the Nevada Supreme Court. Nev. Const., art. 6, 4, and NRS 233B.150. At that level, a taxpayer will get a declaration by an appellate court with regard to the Constitutionality of the tax, one way or another.

(13 Appellants' App. 2423; 16 Appellants' App. 3033:19-27) (emphasis added). The Department was not stating what the appropriate remedy was in this particular case, it was arguing that the statutes and case law together provided a sufficient remedy. The Department never argued that Case 2 would proceed as a trial de novo; the Department argued that the remedy included judicial review with the exceptions stated in *State, Nev. Dep't of Taxation v. Scotsman Mfg. Co., Inc. (II), 109 Nev. 252, 255, 849 P.2d 317 (1993).*

. . .

. . .

. . .

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

The Clubs also assert that the Department should be judicially estopped because of its activity in the case and participation in discovery.[6] (Appellants' Opening Br., pp. 6-9, 36).

The Clubs pursued discovery in Case 1.[7] *See* Motion to Compel Discovery of Defendants (4 Appellants' App. 783); *See* Plaintiffs' Objection to the Discovery Commissioner's Report and Recommendation Regarding Plaintiff's Motion to Compel Discovery of Defendants (7 Appellants' App. 1248); *See* Plaintiff's First Set of Interrogatories to Defendants (4 Appellants' App. 808); *See* Plaintiffs' First Request for the Production of Documents and Things to Defendants (5 Appellants' App. p. 821); *See* Responses to Plaintiffs First Set of Interrogatories to Defendants (5 Appellants' App. p. 833); *See* Responses to Plaintiffs' First Request for Production of Documents and Things to Defendants (5 Appellants' App. 859).[8] Though a couple depositions were scheduled to occur in late August of 2011, the discovery that had been completed was related to the initial requests and responses which were pursued in Case 1.

The Department's discovery responses were served on the Clubs in August of 2009. (18 Appellants' App. 3549). The last information obtained by the Clubs pursuant to the discovery requests was obtained in March 2011. (15 Appellants' App. 2728:5, indicating the information would be provided in a week).

No discovery was actually propounded in Case 2 until after the Motion was denied. The factual issues should have all been determined by the administrative agency when the Clubs exhausted the administrative remedies and obtained a final decision from the NTC. *Malecon*, 118 Nev. at 839.

The Department did not propound any discovery requests until after the Motion was denied. The Department was simply forced to propound discovery

[6] The court wanted the parties to do discovery. (10 Appellants' App. 1709-1711).

[7] The Clubs admit, "The parties engaged in discovery in Case 1." Appellants' Opening Br., p. 6.

[8] All the case captions contain only District Court Case No. A533273, which is Case 1.

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

requests before running out of time. (18 Appellants' App. 3536:11-25; 17-18 Appellants' App. 3128-3156 and 3405-3476). The Departments' discovery requests were served in May and July of 2011 (17 Appellants' App. 3128-3156) (containing a sampling of the Department's discovery requests); (18 Appellants' App. 3405-3476).

Then, before the Re-Noticed Motion was heard on August 23, 2011, the Department had to file a motion to compel. (18 Appellants' App. 3363-3403). At this point, with trial set for December 2011, the Department had to pursue discovery in case the pending Re-Noticed Motion was not decided in the Department's favor.

Consequently, the Department never pursued a trial de novo and did not acquiesce to the treatment of Case 2 as an original de novo action; the Department adapted to the procedural posture of the cases.

Contrary to the Clubs' assertions, the Department never argued before a court or administrative body that the Clubs would get a trial de novo.

I. ARGUMENT

A. STANDARD OF REVIEW

The district court properly dismissed Case 2 because it did not have subject matter jurisdiction. NRCP 12(h); NRS 233B.130; *Edison,* 127 Nev. ___, 255 P.3d 231, 237 (Adv. Op. 22, May 26, 2011) ("[W]e conclude that NRS 372.680 now contemplates judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the Commssion . . .")[9]; *Morrison v. Beach City LLC*, 116 Nev. 34, 36-37, 991 P.2d 982 (2000) (stating the defense of lack of subject matter jurisdiction can be made by motion, citing NRCP 12(b)(1) and NRCP 12(h), and further stating that "the burden of proving the jurisdictional requirement is properly placed on the plaintiff"). This is a question of law subject to de novo review. *Campbell v. Nev.*

[9] The Court specifically noted that "the statutory intent was clearly expressed in the memorandum and testimony of Norm Azevedo, Senior Deputy Attorney General." *Edison,* 255 P.3d at 237.

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

Tax Comm'n, 109 Nev. 512, 515-516, 853 P.2d 717 (1993) ("Although a reviewing court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence." (citation omitted)).

Case 1 properly proceeded as a facial challenge. *Malecon*, 118 Nev. at 841 (stating that facial challenges can be exceptions to the exhaustion requirement); *Nat'l Private Truck v. Okla. Tax Comm'n, 515 U.S. 582 (1995)* (prohibiting all 42 U.S.C. §1983 relief in state tax cases, which means there is no applicable exemption from the exhaustion requirement). This is also a question of law subject to de novo review. *Campbell,* 109 Nev. at 515-516.

B. THE DISTRICT COURT ORDER IS NOT BASED ON LEGAL ERROR; THE DISTRICT COURT HAD TO DISMISS CASE 2.

The Remedy is a Judicial Review

The Clubs submitted refund requests. (2 Appellants' App. 273-274). The Department denied the refund requests. *Id*. The Clubs appealed the denial of the refunds to the NTC. *Id.* The NTC's final decision affirmed the denials. *Id.*

Pursuant to NRS 368A.290, the Clubs statutory remedy was to pursue a judicial review. NRS 368A.290 states:

> 1. Within 90 days after a *final decision* upon a claim filed pursuant to this chapter is rendered by:
> (a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.
> (b) The *Nevada Tax Commission*, the claimant may bring an action against the Department on the grounds set forth in the claim.
> 2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this 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.

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

(emphasis added). The plain language of the statute requires a final decision from the NTC before a taxpayer can proceed to district court. *Id*. (emphasis added).

In addition, in 1997, NRS 360.245 was amended to add language regarding judicial review. *Edison*, 255 P.3d at 235. As amended, Section 5 of the statute now reads as follows: "A decision of the Nevada Tax Commission is a *final decision for the purposes of judicial review*. The Executive Director or any other employee or representative of the Department shall not seek judicial review of such a decision." NRS 360.245(5) (emphasis added).

Chapter 233B of the NRS governs review of final decisions regarding contested cases before administrative agencies. In 1989, NRS 233B.130 was amended and Section 6 was added. Following the amendment, the statute states, "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." NRS 233B.130(6) (emphasis added). Consequently, the Clubs final decision from the NTC was subject to review by the District Court as a PJR and should not have been commenced as a trial de novo.

In *Edison*, this Court confirmed that this is an accurate harmonious reading of NRS 233B.130 and NRS 372.680, a statute containing the same language used in NRS 368A.290. *Edison*, 255 P.3d at 235-237. NRS 372.680 states:

> 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.

(emphasis added).

. . .

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

The language requiring a final decision from the NTC is the same in both statutes. *Id*.; NRS 368A.290. In addition, both statutes allow the claimant to "bring an action against the Department on the grounds set forth in the claim . . .." NRS 372.680; NRS 368A.290.

Having reviewed the history of legislative changes made to NRS 372.680, NRS 233B.130 and NRS 360.245, the *Edison* Court stated, "NRS 372.680 now contemplates judicial review . . .." 255 P.3d at 237. Because NRS 368A.290 uses the same language used in NRS 372.680, and because both statutes are tax refund statutes contained in Title 32 of the NRS, a harmonious reading of NRS 368A.290, NRS 233B.130 and NRS 360.245 has to also result in the intended remedy being a PJR. *Nat'l Mines Co. v. Sixth Judicial Dist. Ct.,* 34 Nev. 67, 78, 116 P. 996 (1911) (same or similar language will be given the same meaning unless there is a demonstration of clear intent by the Legislature for there to be a different meaning).

To interpret NRS 368A.290 to provide for a trial de novo and at the same time interpret NRS 372.680 to provide for a PJR leads to an absurd result. Statutes are to be read harmoniously to avoid absurd results. *Nev. Att'y for Injured Workers,* 126 Nev. ___, 225 P.3d 1265, 1271 (Adv. Op. 7, Feb. 25, 2010).

The Clubs simply should have commenced their case as a PJR. Had they done so, all of their issues, including the constitutional issues, would have received District Court review and Nevada Supreme Court review. NRS 233B.135 states:

> 1. Judicial review of a final decision of an agency must be:
> (a) Conducted by the court without a jury; and
> (b) Confined to the record.
> In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.
> 2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

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

> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRCP 12(h)(3) required dismissal

The District Court had to dismiss Case 2. NRCP 12(h)(3) states, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action." (emphasis added). "[S]ubject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review. . .." *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) ("A court's lack of subject matter jurisdiction can be raised for the first time on appeal."); *See City of Oakland v. Desert Outdoor Adver.*, 127 Nev ___, 267 P.3d 48, 51 (Adv. Op. 46, Aug. 4, 2011) (providing, "defenses such as . . . subject-matter jurisdiction . . . may be raised by a party seeking to reopen or vacate a foreign judgment."). Failure to properly seek judicial review of a final agency decision results in a lack of subject matter jurisdiction. *Kame v. Employment Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66 (1989) (stating, "the time period for filing a petition for judicial review of an administrative decision is mandatory and jurisdictional").

At the hearing regarding the Re-Noticed Motion, Judge Gonzales stated:

> The issue of the petition for judicial review was raised in this proceeding, and it was not appropriately acted upon, as the Supreme Court has now told us in Southern California Edison. And it doesn't matter to me if the person who raised it the first time in argument was the judge, if it was your side, or their side. And because the issue was raised and discussed and ruled upon by this Court, which is not consistent with the Southern California

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

> Edison, I'm not holding that against the State. Because it's not fair to you, I'm giving you a 30-day tolling period, which I don't have to do.

Having acknowledged the lack of subject matter jurisdiction, the court had to dismiss Case 2. NRCP 12(h)(3) (stating, "the court shall dismiss the action"); *Kame*, 105 Nev. at 25.

Consequently, the waiver argument addressed below is irrelevant because the court had to dismiss Case 2.

C. THE DEPARTMENT DID NOT WAIVE ITS RIGHT TO ARGUE THAT CASE 2 SHOULD HAVE BEEN FILED AS A PETITION FOR JUDICIAL REVIEW.

The Clubs argue that the Department waived its right to assert that Case 2 should have been filed as a PJR. (Appellants' Opening Br., p. 22). This is a non-issue for several additional reasons.

The Department did plead several relevant affirmative defenses

First and foremost, contrary to the Clubs assertions, the Department did plead several relevant affirmative defenses in its Answer to the First Amended Complaint. As set forth in the Statement of Facts, the Answer to the First Amended Complaint contained Affirmative Defenses 8, 9, 10 and 14. (14 Appellants' App. 2630). These affirmative defenses sufficiently assert the defense of lack of subject matter jurisdiction and failure to file a PJR. (14 Appellants' App. 2630). In addition, the Department's Answer to the First Amended Complaint relates back to its original Answer. NRCP15(c).

Consequently, the Department sufficiently pled affirmative defenses.

The defense could have been considered without an affirmative defense

Even if the Department were not given the opportunity to file an Answer to the First Amended Complaint, it's within a district court's discretion to allow a party to amend its answer to plead an affirmative defense where the facts pled by the plaintiff contain the facts needed for the defense. *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 295-296, 956 P.2d 93 (1998) (explaining that even though the

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

defense of accord and satisfaction must be set forth affirmatively pursuant to NRCP 8(c), where the facts necessary for the defense are within the scope of the complaint the court can allow the defense); *Elliot v. Resnick*, 114 Nev. 25, 30, 952 P.2d 961 (1998) (explaining that even though the defense of illegality must be set forth affirmatively, the district court properly considered the defense when it wasn't pled as an affirmative defense).

In this case, the facts needed for the defense of lack of subject matter jurisdiction were pled by the Clubs. The Clubs' original Complaint included the necessary facts regarding the final decision of the Nevada Tax Commission (hereinafter "NTC") issued on October 12, 2007 and a copy was attached. (1 Appellants' App. 135-136; 2 Appellants' App. 273-274). The fact that a complaint was filed meant that a petition for judicial review had not been filed. The Clubs should have asked the district court to review the final decision of the NTC as a PJR and it is undisputed that they did not. NRS 368A.290, NRS 233B.130; *Edison*, 255 P.3d at 237.

Consequently, even without the ability to assert the affirmative defenses in the Answer to the First Amended Complaint, the court would have allowed the Department to amend its answer by adding an affirmative defense if one was needed.

The issue of lack of subject matter jurisdiction was raised by the Department and the District Court

The Department raised this argument before the District Court by filing a motion to dismiss Case 1. (2 Appellants' App. 317-328). The motion was denied even though the claims arguably went beyond a facial challenge. *Id*. The hearing was held July 31, 2008 and the decision was rendered December 10, 2010) (11 Appellants' App. 1990-1991).

At the hearing on December 9, 2010, both the Department and Judge Togliatti arguably raised the issue and it was discussed. With regard to Case 2,

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

Judge Togliatti said she thought it "has some procedural issues." (10 Appellants' App. 1835:9-10). Judge Togliatti also said, "I have a note here that says before you ever said these words, my note is, did I forget a Petition for Judicial Review, question mark." (10 Appellants' App. 1814:6-8). Thereafter, Judge Togliatti said:

> I think that counsel's – I've been wondering all along how come there's no Petition for Judicial Review on that because that's - - normally the mechanism for any administrative ruling or administrative findings based upon a hearing and a ruling. You know, whether you could cure that or not, off the top of my head, without stipulation I do not know.

(10 Appellants' App. 1835:13-19). At this point, whether raised by the Department or sua sponte by Judge Togliatti, the issue was raised and Case 2 could have been dismissed. NRCP 12(h)(3); *Swan v. Swan*, 106 Nev. at 469.

The Department raised the issue again by filing the Motion on January 25, 2011 challenging the procedural posture of the cases and seeking dismissal of Case 2. (11 Appellants' App. 2057-2084). The issue was raised again in the Re-Noticed Motion which led to the Order that is being appealed. (15 Appellants' App. 2824-2856).

Thus, contrary to the Clubs assertions, the issue was raised and the Department has not taken two inconsistent positions.

<u>Lack of subject matter jurisdiction does not have to be affirmatively pled and can be raised in a NRCP 12(b)(5) motion</u>

Finally, the defense of lack of subject matter jurisdiction need not be affirmatively plead. "[S]ubject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review. . .." *Swan v. Swan*, 106 Nev. at 469 ("A court's lack of subject matter jurisdiction can be raised for the first time on appeal."). Lack of subject matter jurisdiction is properly brought in a motion to dismiss for failure to state a claim upon which relief can be granted. *Britz v. Consol. Casinos Corp.,* 87 Nev. 441, 447, 488 P.2d 911 (1971) (explaining, "[a] point not urged in the trial court" is waived "unless it goes to the jurisdiction of that

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

court"). In addition, "a defense under NRCP 12(b)(5) need not be pleaded affirmatively because it may be asserted at any time."[10] *Clark County School Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 395, 168 P.3d 87 (2007). Because subject matter jurisdiction can be raised at any time and can be asserted at any time as a NRCP 12(b)(5) defense, it was properly raised in this case.

In the original answer, the Department had affirmatively pled that the Clubs had failed to state a claim upon which relief could be granted. (2 Appellants' App. 301). A 12(b)(5) motion, the Motion, was later filed. (11 Appellants' App. 2057-2084). The defense of lack of subject matter jurisdiction is properly the subject of a NRCP 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted. *See* Orders Granting Petition for Writ of Mandamus issued in Nevada Supreme Court Case No. 56722 and 56740. (15 Appellants' App. 2908-2910; 2912-2915) (determining that the State District Courts had improperly denied the NRCP 12(b)(5) motions to dismiss). When the district court lacks subject matter jurisdiction, a complaint is properly dismissed. *Kame,* 105 Nev. at 25. The Motion should have been granted.

Consequently, the Department did not need to affirmatively plead the defense of lack of subject matter jurisdiction and had originally plead an affirmative defense of failure to state a claim upon which relief could be granted and a NRCP 12(b)(5) motion to dismiss was filed. (2 Appellants' App. 301; 11 Appellants' App. 2057-2084).[11]

Though not pled, an affirmative defense can also be heard when fairness requires it be considered

Though subject matter jurisdiction did not need to be pled as an affirmative defense in this case, there is yet another basis for the district court to have considered such a defense. "Even if not properly pleaded, an affirmative defense

[10] A motion for failure to state a claim upon which relief can be granted can be made at trial. NRCP 12(h)(2).

[11] This same course of action was taken in Case 1. (2 Appellants' App. 290; 317-328).

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

may be tried by consent or when fairness warrants consideration of the affirmative defense and the plaintiff will not be prejudiced by the district court's consideration of it." *Douglas Disposal, Inc. v. Wee Haul, LLC,* 123 Nev. 552, 558, 170 P.3d 508 (2007). In *Douglas Disposal,* this Court stated:

> [A]lthough Wee Haul and NJ Enterprises did not assert any affirmative defenses in their answers, they raised the constitutional issues in their opposition to Disposal's "Motion for Judgment on the Pleadings and/or for Partial Summary Judgment." Although Disposal objected that Wee Haul and NJ Enterprises had not raised the constitutional arguments in their answer, Disposal addressed the merits of the constitutional issues in its reply. We conclude that Disposal had notice of the constitutional arguments and was thereafter able to fully argue the merits of them.

Because the defense had been raised in an opposition and the opposing party had an opportunity to address the defense in its Reply, the Court determined that the district court "properly considered the constitutional arguments in rendering its decision." *Id.; see Idaho Res., Inc. v. Freeport-McMoran Gold Co.,* 110 Nev. 459, 461, 874 P.2d 742 (1994) (noting that the affirmative defense at issue was never raised "in any pleadings or any other papers filed with the court, including its answer, pretrial statement, or post-trial brief"); *City of Boulder City v. Boulder Excavating, Inc.,* 124 Nev. 749, 755, 191 P.3d 1175 (2008) ("Waiver occurs when a party fails to raise the affirmative defense in 'any pleadings or any other papers filed with the court, including its answer, pretrial statement, or post-trial brief. (citation omitted)"). Moreover, a district court is not precluded from resolving these issues *sua sponte*. *City of Boulder City*, 124 Nev. 749.

Because the Clubs now have the remedy that they should have pursued, it cannot be said that they have been prejudiced. Because the issue was raised by the Department and the court and the Clubs were able to respond to the motions, fairness requires that the defense be considered. *Douglas Disposal, Inc.,* 123 Nev. at 558.

. . .

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

The right to assert subject matter jurisdiction cannot be waived

The Department did not waive their right to argue that Case 2 should have been filed as a petition for judicial review because it is not something that can be waived. In *Hansen v. Eighth Judicial Dist. Ct.,* 116 Nev. 650, 656, 6 P.3d 982 (2000), the court stated, "Objections to personal jurisdiction, process, or service of process are waived, however, if not made in a timely motion or not included in a responsive pleading such as an answer[.]" This list does not include objections to subject matter jurisdiction. *Id*. To avoid waiver, the defense of lack of subject matter jurisdiction does not have to be raised in an answer or a pre-answer motion. *Id*.; NRCP 12(h)(2); NRCP 12(h)(3). Because it can be raised at any time, the defense cannot be waived. NRCP 12(h)(3).

D. THE COURT'S DECISION IN *EDISON* DID REQUIRE THE DISMISSAL OF CASE 2 AND THE AS APPLIED CHALLENGE IS NOW PROPERLY PROCEEDING AS A PETITION FOR JUDICIAL REVIEW.

In *Edison*, this Court stated that the sole means of review of a sales and use tax refund matter is by judicial review, not a trial de novo. Resolving the case by application of judicial estoppel, the *Edison* Court cited to a brief filed by the Department, with the NTC, in which it was argued that Edison would have the ability to conduct discovery in a trial de novo in district court. *Edison,* 255 P.3d at 237. Those same facts are not present in this case. As will be shown in Section IV, the Department has been referencing the judicial review process since the federal proceedings. This is simply a case where the Clubs strategically chose to pursue a trial de novo rather than a petition for judicial review.

The Clubs claim they relied on the decision in *Saveway Super Serv. Stations, Inc. v. Cafferata,* 104 Nev. 402, 760 P.2d 127 (1988)[12] which indicated that a tax refund matter would proceed by way of trial de novo. The same issue

[12] This case was decided in 1988, which is before the legislative changes to NRS 372.680 were completed in 1999.

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

was raised in *Edison,* but had no effect. Because the Legislature had changed the meaning of the statutory language years after the *Saveway* decision was issued, the court determined it could reconsider the nature of an action for refund claim regardless of the *Saveway* decision. *Edison*, 255 P.3d at 235.

Moreover, the Clubs cited to the *Malecon*[13] decision in their Opening Brief filed with the Ninth Circuit Court of Appeals (Resp'ts' App. 1-6) and *Malecon* explains that the as applied challenge was to be heard by the Department, then by the NTC. In fact, the Clubs cited to *Malecon* and stated the following in a parenthetical: "Exhaustion of administrative remedies is not required when the constitutionality of a tax statute is challenged on its face, as opposed to 'as applied.'" (Resp'ts' App. 6). Having obtained a decision from the NTC, the Clubs should have filed a petition for judicial review. NRS 368A.290; NRS 360.245(5); NRS 233B.130(6); *Campbell v. State, Dep't of Taxation,* 108 Nev. 215, 216, 827 P.2d 833 (1992) (prohibiting a de novo action, after administrative remedies had been exhausted, by application of administrative res judicata); *Malecon*, 118 Nev. at 839-841 (explaining that as applied constitutional challenges require exhaustion of administrative remedies whereas facial challenges do not).

Thus, the existing case law indicated that the PJR was the remedy.

<u>NRS 368A.290 cannot have a meaning different from NRS 372.680</u>

The Clubs again raise the issue that because NRS 368A.290 was adopted after the changes were made to NRS 372.680 it has a different meaning than that given to NRS 372.680. The Clubs assert that NRS 368A.290 provides for a trial de novo because the Legislature could have made the statute provide for a PJR by using the specific words and did not. In conjunction therewith, the Clubs argue that NRS 368A.290 is the specific statute and should be applied with a meaning . . .

[13] This case was decided in 2002, which is after the legislative changes to NRS 372.680 were completed.

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

contrary to NRS 372.680. The Clubs unsuccessfully made this specific versus general argument to the District Court.[14]

The argument is self-defeating. As explained in *Edison*, the Legislature made statutory changes to change the meaning of the language used in NRS 372.680 to make it provide for a PJR. The last legislative change was made in 1999. *Edison*, 255 P.3d at 236. From this point on, NRS 372.680 has meant that the exclusive remedy in sales and use tax refund matters is a petition for judicial review. *Id*. at p. 237 (concluding that, following the completion of the legislative changes, "NRS 372.680 now contemplates judicial review . . .").[15] Therefore, contrary to the Clubs assertions, the Legislature made the language of the statute provide for a PJR.

In *Edison,* this Court simply clarified the meaning of the statutory language following several legislative changes made for the purpose of changing the meaning of NRS 372.680. The Court found that it was sufficiently demonstrated that the Legislature intended for the statutory language to provide for a PJR. *Id*. Thus, the Legislature changed the meaning of the statutory language and this Court clarified the meaning.

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

---

[14] The Clubs cite to *Cauble v. Beener*, 64 Nev. 77, 100, 177 P.2d 677 (1947), *Quilic 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) to argue that, because Chapter 233B of the NRS existed when NRS 368A.290 was enacted, there is a presumption that Chapter 233B did not apply to refund matters brought pursuant to NRS 368A.290. This argument fails because the language used in NRS 368A.290 has a history and was given a prior meaning by the Legislature and was adopted from NRS 372.680 with that meaning when NRS 368A.290 was adopted and enacted. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Ct. ex rel. County of Clark,* 120 Nev. 575, 580-581, 97 P.3d 1132, 1135-1136 (2004). Moreover, the Department is not specifically excluded from the applicability of Chapter 233B. NRS 233B.039(5).

[15] Though the Clubs argue that NRS 368A.290 controls because it is the specific statute and that it has a meaning different from NRS 372.680 and NRS 233B.130(6), the Court clarified that "the APA and general tax statutes were subsequently amended in a manner demonstrating that judicial review under the APA is now the exclusive means of proceeding with a refund claim." *Edison*, 255 P.3d at 233. Consequently, when given its proper meaning, the meaning that came with the language when it was adopted from NRS 372.680, NRS 368A.290 is not in conflict with NRS 372.680 or NRS 233B.130. *Cf. Anderson Family Assocs. v. Ricci*, 124 Nev. 182, 187, 179 P.3d 1201 (2008). Rather, a harmonious reading of the statutes leads to the conclusion that NRS 368A.290 provides for a PJR. *Nev. Att'y for Injured Workers,* 126 Nev. __, 225 P.3d 1265, __ (Adv. Op. 7, Feb. 25, 2010) (statutes are to be read harmoniously).

NRS 372.680 and NRS 368A.290 contain the same language.[16] They both require a final decision from the NTC before seeking review from the district courts. As argued by the Clubs, the Legislature is presumed to have knowledge of existing statutes and what they mean. *Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. ____, 225 P.3d 1265, 1271 (Adv. Op. 7, Feb. 25, 2010) ("Whenever possible, we interpret 'statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.' (citation omitted). We presume that the Legislature enacted the statute 'with full knowledge of existing statutes relating to the same subject.'"). Moreover, when using language that has been given a particular meaning the language is adopted with the prior meaning. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Ct. ex rel. County of Clark*, 120 Nev. 575, 580-581, 97 P.3d 1132, 1135-1136 (2004) (stating, "[w]hen a legislature adopts language that has a particular [ ] meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language); *Nat'l Mines Co. v. Sixth Judicial Dist. Ct.,* 34 Nev. 67, 78, 116 P. 996 (1911) ("'Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was in the intention of the legislature to use it in different senses.' (36 Cyc. 1132, and authorities cited in notes.)").

When adopting NRS 368A.290 in 2003, the Legislature chose to use the same language they finally used in NRS 372.680. There was only one legislative session in between the final change to the meaning of the language used in NRS 372.680 and the adoption of NRS 368A.290. By using the same language in NRS 368A.290 as was used in NRS 372.680, the Legislature gave NRS 368A.290 the

[16] The Clubs admit that the statutes use the same or similar language. Opening Br., p. 30, n. 15.

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

same meaning that it had given to NRS 372.680. It simply cannot be said that the Legislature intended to use the same language but with a different meaning in NRS 368A.290.

To avoid an absurd result, NRS 368A.290 and NRS 372.680 must both provide for a PJR

In addition to being read as a whole and harmoniously, statutes are to be read to avoid absurd results. Chapter 372 (sales and use tax) of the NRS and Chapter 368A (LET) of the NRS are both in Title 32 of the NRS. Here, the Clubs argument would lead to the result that sales and use tax refunds must proceed as PJRs whereas LET refunds would proceed as trials de novo. This is an absurd result and statutes are to be read to avoid absurd results. *Speer v. State*, 116 Nev. 677, 679, 5 P.3d 1063 (2000).

None of the statutory language is rendered nugatory

Because NRS 368A.290 has the same meaning as NRS 372.680, none of the language is rendered nugatory.

For the first time, the Clubs raise the arguments regarding the use of the word "plaintiff" in NRS 368A.300(4-5). The Department objects because this argument is being made for the first time on appeal. Nonetheless, the Legislature had given this similar language in Chapter 372 the meaning that the remedy was a judicial review and then adopted this same language, with the same meaning, in Chapter 368A. Specifically, NRS 372.690 contains similar language and it did not prevent the *Edison* Court from clarifying that NRS 372.680 provides for a PJR. To avoid an absurd result, NRS 368A.290 and NRS 372.680 must both provide for a PJR. Thus, NRS 372.690 and NRS 368A.300(4-5), which use the word "Plaintiff", have to be read harmoniously with NRS 372.680 and NRS 368A.290 to mean "petitioner" or something consistent with a PJR. The Clubs are simply grasping at straws.

. . .

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

Further squelching the Clubs' arguments, a petition for judicial review is brought against the Department. The Department is the opposing party.

The Legislature did not render any statutory language nugatory by giving NRS 368A.290 the same meaning as NRS 372.680. To the contrary, it gave it the same meaning as NRS 372.680. The same is true for NRS 368A.300(4-5) and NRS 372.690. The Clubs are asking this Court to render NRS 233B.130(6) nugatory, which states, "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." In addition, NRS 368A.290 requires a final decision from the NTC and this statutory language, as well as any decision from the NTC, would also be rendered nugatory.

Thus, the Clubs' arguments must fail.

NRS 368A.290 is not of doubtful validity or effect

Because NRS 368A.290 was given the same meaning as NRS 372.680, it cannot be said that the statutory language is of doubtful validity or effect. Consequently, the Clubs argument that NRS 360.291(1)(o), *i.e*. the Taxpayer Bill of Rights, requires NRS 368A.290 to be interpreted in favor of the Clubs must fail.

Consequently, the Clubs specific versus general statute argument must fail. Chapter 368A is the specific chapter applicable to the LET. But, as established in the preceding paragraphs, the language used in NRS 368A.290 has the same meaning as the language used in NRS 372.680.[17]

. . .

. . .

[17] The Clubs cite to *Destefano v. Berkus*, 121 Nev. 627, 631, 119 P.3d 1238 (2005) and argue that NRS 368A.290 (the statute that the Clubs assert is the specific statute that has a meaning different from NRS 372.680) conflicts with NRS 372.680 and NRS 233B.130(6), the general statutes, and therefore provides an alternative remedy. Opening Br., pp. 29-30. The case actually says that the relevant statutes discussed therein provided for alternative methods because they did not supplant or conflict with each other. *Id*. In the case at hand, because NRS 368A.290 has the same meaning as NRS 372.680 it provides for the same remedy as NRS 372.680 and NRS 233B.130(6), not an alternative remedy.

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

The district court properly applied the *Edison* decision

Finally, the *Edison* decision was properly applied to this pending matter. The cases cited by the Clubs with respect to their retroactive application argument deal with situations in which the plaintiffs would have been deprived of a remedy.

In *Nevis v. Fidelity New York, F.A.*, 104 Nev. 576, 579, 763 P.2d 345 (1988), this Court stated, "we decline to give *Shields* retroactive effect to the extent of requiring compliance with the three month filing provision." Because the three months had already passed, this specific retroactive application would have deprived the creditor of the ability to be heard. In the case at hand, the Clubs were afforded the appropriate remedy, *i.e.* the right to file a PJR,[18] and will be heard.

Moreover, in *Nevis* this Court was considering the retroactive application of its decision in *Shields*. In *Shields*, this Court overruled prior decisions interpreting a statute that had not changed at, or prior to, the time the Court was deciding *First Interstate Bank of Nev. v. Shields,* 102 Nev. 616, 730 P.2d 429, 430-431 (1986).

Rather, this Court decided to change its interpretation of an unchanged statute. *Id.* All that changed is the Court's interpretation. *Id.* There is no mention of any prior legislative changes having caused the meaning of the statute to change thereby rendering the prior case opinions no longer applicable. *Id.; cf. Edison*, 255 P.3d at 234-237 (explaining how the Legislature changed the meaning of the statute).

In *Vogt v. Dennett,* 105 Nev. 303, 304-305, 774 .2d 1036 (1989), the Court reaffirmed its holding in *Nevis*. "[O]ur holding in *Nevis* did not give retroactive effect *only* to the three-month limitation for filing deficiency actions. . .." *Id*. (emphasis added). Again, retroactive application of the three-month limitation

[18] In Nevada Supreme Court Case No. 56722 this Court directed the Eighth Judicial District Court "to allow real party in interest to take any steps necessary to comply with the applicable provisions of NRS Chapter 233B and to thereafter proceed with its review of this matter under that chapter" and simultaneously decided that the 90 days in NRS 372.680 was the applicable time period for filing a PJR (15 Appellants' App. 2908-2910). In Nevada Supreme Court Case No. 56740, this Court similarly directed that the matter proceed as a Chapter 233B petition for judicial review.

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

would have resulted in the deprivation of the right to be heard. Consequently, *Shields*, *Nevis* and *Vogt* are distinguishable and not applicable to the case at hand as asserted by the Clubs.

In addition, the Clubs did not commence Case 2 prior to the effective date of NRS 368A.290, or the changes made to NRS 372.680 and NRS 233B.130, and the statutes are not being applied retroactively. Even if the statutes were being applied retroactively, it would be acceptable because NRS 368A.290 and NRS 233B.130 provide a remedy and the procedures for seeking a remedy. *See Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 956 P.2d 117 (1998) (stating that the presumption of prospective application of statutes does not apply when the statute addresses only remedies); *see also Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985) ("when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases"). In this regard, Nevada's approach mirrors the general rule, which is that statutes addressing remedies or procedures are applied to pending cases. *Madera*, 114 Nev. at 257-258 (determining that the statute at issue affected only remedies because it supplanted a common-law tort remedy with an administrative remedy).

In *Edison,* this Court stated it was taking "the opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action." *Edison*, 255 P.3d at 234. The Court simply clarified existing law, *i.e*. that final decisions of the NTC regarding tax refunds must proceed as petitions for *judicial review*. *Id*. at 237 ("It is clear from NRS 372.680, S.B. 362, and the larger statutory schemes that the intent of NRS 372.680, as amended, was to provide for *judicial review* of the Commission's final decisions") (emphasis added)). This is what the Legislature intended when it made the changes to NRS 372.680 and

. . .

. . .

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

NRS 233B.130 and therefore this is what the statutory language used in NRS 372.680 has meant since at least 1999. Therefore, this same language used in NRS 368A.290 has had the same meaning since its enactment in 2003.

Further, the case of *Campbell* was decided in 1992 and held that administrative res judicata will bar a second judicial evidentiary hearing/trial de novo in district court. *Campbell,* 108 Nev. at 219. Since the Nevada Supreme Court had stated that a taxpayer could not seek a trial de novo after exhausting administrative remedies, the law on this issue really hasn't changed since at least 1992 and these tax statutes now clearly express the meaning by requiring a final decision from the NTC. Having exhausted administrative remedies and obtained a final decision from the NTC, the Clubs' remedy was a PJR. *Id*. at 219-220 (stating this was the case even when there was an "alternate remedy"). Therefore, the *Edison* decision did not pronounce a new rule of law, it clarified what the statutory language means after the Legislature made the final changes to NRS 372.680 in 1999, as well as the changes to NRS 233B.130(6) and NRS 360.245.

The Order, which is the subject of this appeal, gave the Clubs 30 days to file a PJR and the Clubs filed a PJR. Pursuant to the Clubs' request, the PJR has now been remanded by the District Court to the NTC and from the NTC to the Administrative Law Judge to allow for review of the additional evidence obtained during discovery. (Resp'ts' App. 176-177; 178-183). The Clubs simply weren't sandbagged into believing that they were going to get a trial de novo and discovery. More importantly, they have been given the appropriate remedy.

Six years ago, the NTC gave the Clubs additional time to get everything together that they felt they needed to present their case. (Resp'ts' App. 41-42). The Clubs made a strategic decision at that point.

During the administrative proceedings, the Clubs could have requested subpoenas and caused depositions to be taken. For instance, NAC 360.135(1-2) allows a party to request that a subpoena be issued. In addition, NAC 360.145(6)

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

states, "any party to any proceeding may cause the depositions of witnesses to be taken in the manner prescribed by law and the rules of the court for depositions in civil actions." The Clubs did not request any subpoenas and failed to cause any depositions to be taken. Consequently, the Clubs waived the right to pursue this sort of discovery while, at the same time, they were exhausting administrative remedies and barring a trial de novo.

After receiving a final decision from the NTC, the Clubs strategically chose to file a complaint rather than a PJR. All along, Nevada law has stated, and the statutory language at issue has meant, that a district court does not have subject matter jurisdiction unless administrative remedies are exhausted and a petition for judicial review is filed. *State, Nev. Dep't of Taxation v. Scotsman Mfg. Co., Inc. (II),* 109 Nev. 252, 254, 849 P.2d 317 (1993); *Malecon*, 118 Nev. at 839; *Campbell*, 108 Nev. at 219; NRS 368A.290; NRS 233B.130(6); NRS 360.245.

The Clubs apparently educated themselves with regard to the exhaustion requirement – as they filed administrative refund claims and obtained a final decision from the NTC. (2 Appellants' App. 273-274). Yet, they ask this court to render the exhaustion requirement, including the hearing before the NTC and the final decision, nugatory by requesting a trial de novo. The Clubs' remedy was a PJR. They now have such a case pending. They can't point to anything in the record that indicates that they ever requested that the NTC allow them to conduct discovery or that they pursued their right set forth in NAC 360.145 to cause depositions to be taken. Similarly, the Department never argued that they shouldn't be allowed to conduct discovery during the administrative proceedings on the basis that they would be allowed to do so in in a trial de novo in district court and never prevailed on any such an argument. *Cf. Edison,* 255 P.3d 231, 233 (the Department had argued in a brief that a trial de novo would be available for Edison).

. . .

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

Rather, the Clubs strategically and aggressively did what they did for their own reasons. Had they followed the rule set forth in the *Malecon* case, they likely would have obtained a decision on the facial challenge years ago and pursued the administrative avenues for subpoenas and depositions in Case 2. From *Malecon*, the Clubs should have known that factual issues had to be presented to the Department and shouldn't have gambled on getting a trial de novo.[19]

Unless a district court chooses to grant one of the exceptions set forth in *Scotsman II* or *Malecon*, administrative remedies must be exhausted and thereafter the matter proceeds as a petition for judicial review. NRS 233B.130(6); *Malecon*, 118 Nev. at 839 (stating, "this court *has discretion not to require exhaustion* when the issues 'relate solely to the interpretation or constitutionality of a statute.'" (emphasis added). Further stating, "exhaustion *is not required* when a resort to administrative remedies would be futile." (emphasis added)).

In this case, the District Court properly applied the *Edison* decision to dismiss Case 2 and allow for the filing of a PJR.

E. JUDICIAL ESTOPPEL DOES NOT APPLY AND THE DEPARTMENT WAS NOT PROHIBITED FROM ASSERTING THAT THE CLUBS SHOULD HAVE FILED A PETITION FOR JUDICIAL REVIEW.

Judicial estoppel does not apply in this case. In *Edison,* the Department filed a brief in which it argued that Edison would be entitled to a trial de novo if they were not happy with the NTC decision. 255 P.3d at 233. No such facts exist in this case.

The Department did not, at any time, intentionally or with intent to gain an unfair advantage, mislead the Clubs by leading them to believe that their remedy is

[19] The *Malecon* case was decided by this Court in 2002, well before the Clubs commenced any of their cases, and it clearly states that as applied challenges requiring factual determinations are subject to the exhaustion requirement. 118 Nev. at 841 (stating, "The constitutionality of the statutes challenged here, as applied, involves a factual evaluation, and this evaluation is best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case."). The Clubs attempt to argue that no factual determinations are needed for this "as applied" challenge. Yet, they requested that the case be remanded so that the additional evidence obtained through discovery could be considered.

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

a trial de novo. As will be shown below, going back to 2006, the Department clearly spelled out the administrative process to be followed, which included judicial review, at the Federal District Court, Ninth Circuit Court of Appeals, as well as at the State District Court. Accordingly, the doctrine of Judicial Estoppel does not apply.

Judicial Estoppel is an equitable doctrine used by the court to safeguard the *judiciary's integrity* rather than the litigants. *New Hampshire v. Maine*, 532 U.S. 742, 742-743 (2001) (emphasis added). It is an extraordinary remedy which should only be used in certain specific circumstances. *Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004) (internal quotations omitted). The purpose of the doctrine is to prevent a party from *deliberately* changing positions according to the exigencies of the moment. *New Hampshire*, 532 U.S. at 743 (emphasis added). Thus, Judicial Estoppel should only be applied when an inconsistent position taken by the party arises from "intentional wrongdoing or in an attempt to obtain an unfair advantage." *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (citation omitted).

To determine whether judicial estoppel applies, Nevada uses a five part test: "1) the same party has taken two positions; 2) the positions were taken in a judicial or quasi-judicial administrative proceedings; 3) the party was successful in asserting the first position (i.e. the tribunal adopted the position or accepted it as true); 4) the two positions are totally inconsistent; and 5) the first position was not taken as a result of ignorance, fraud or mistake". *Marcuse v. Del Webb Cmtys., Inc.,* 123 Nev. 278, 287, 163 P.3d 462, 468-469 (2007).

For example, in *Nolm*, the Court refused to apply the doctrine of Judicial Estoppel because Clark County "never asserted a contrary position in a prior judicial or quasi-judicial proceeding. . ." *Nolm,* 120 Nev. 736. Similarly, in this case the Clubs have failed to show that the Department took an inconsistent position in a prior judicial or quasi-judicial proceeding. The Clubs take portions of briefs out of

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

context and argue that the Department has changed positions, but that is not the case. Noticeably missing from the Clubs' Opening Brief is any statement by the Department before a judicial or quasi-judicial forum that the Clubs would receive a trial de novo on the as applied refund claims. In fact, it is the opposite. Going back to 2006, the Department included judicial review as a remedy in both its Federal District Court and 9th Circuit papers.

For example, on page 42 of the Clubs' Opening Brief, the Clubs cite to a sentence from the Department's Opposition to Appellant's Motion for Leave to Supplement the Appellate Record and allege that the Department took a position that the Clubs were entitled to trial de novo under the *Scotsman* cases. (16 Appellants' App. 3804-3085). The Clubs are twisting the meaning of words. The *Scotsman* cases and *Malecon* allow for declaratory relief on facial constitutional challenges. With regard to a futility exception to the exhaustion requirement, no such exception was ever granted in the case at hand because the NTC had not spoken on the issue until it issued its decision in this case in October of 2007. Had there been a determination that exhaustion would be futile, arguably the case would have proceeded to State District Court without the administrative proceedings. Taken in context, the cited portion of the Department's argument explained that if the court were to determine that the administrative proceedings would be futile, then, pursuant to *Scotsman II,* the matter could proceed directly to State District Court. The argument simply clarified that exhaustion of administrative remedies followed by judicial review is the rule and that, with the two exceptions set forth in *Scottsman II* and *Malecon,* the statutory remedy is adequate. (16 Appellants' App. 3804-3085).

In *Scotsman II,* after the Court had determined the application of the tax to be unconstitutional and remanded the case to the district court in *Scotsman I*, exhausting administrative remedies was futile because this Court had already determined that the tax was unconstitutional. 109 Nev. at 255-256. In the case at

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

hand, exhaustion was not futile as the NTC had not previously spoken on the issue.

Nonetheless, the Clubs and the Department were both aware that the Clubs could raise their facial constitutional objections to the tax directly to the court, without exhausting the administrative remedies. (Resp'ts' App. 6) (quoting *Malecon,* the Clubs' brief states "Exhaustion of administrative remedies is not required when the constitutionality of a tax statute is challenged on its face, as opposed to "as applied"). The Clubs apparently were concerned that they might not be able to get a refund if they prevailed on the facial challenge alone. In its Reply Brief filed in Federal District Court, as clear as day, the Department spelled out the procedure for the Clubs to follow and stated:

> As discussed at length in the moving papers, the provisions of NRS 368A.250-.320 afford taxpayers the opportunity to raise the constitutionality of the live entertainment tax in the context of a request for a refund in an administrative proceeding. That procedure is subject to *judicial review*. NRS 368A.290. On *judicial review*, a district court may set aside the agency decision if it violates constitutional or statutory provisions. *NRS 233B.135(3)(a)*. In the event of an adverse decision in district court, the taxpayer has a right to appeal to the Nevada Supreme Court. Nev. Const., art. 6, 4, and *NRS 233B.150*. At that level, a taxpayer will get a declaration by an appellate court with regard to the Constitutionality of the tax, one way or another.

(13 Appellants' App. 2423; 16 Appellants' App. 3033:19-27) (emphasis added). Several pages later, the Department again stated "Plaintiffs could file requests for refunds for the periods going back over the entire span or time at issue herein, and if denied, could proceed to *judicial review* thereon." (13 Appellants' App. 2428:9-17) (emphasis added).

In addition, when the Federal District Court Judge dismissed the Complaint, he specifically stated in the Order "[f]irst, it should be noted that the foregoing [anti-injunction] statute [NRS 368A.280(1)] does not preclude a taxpayer from pursuing the established procedures for contesting a tax or seeking a refund." (19

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

Appellants' App. 3696:21-22). Thus, the Department never argued that the Clubs would receive a trial de novo but argued that declaratory relief is available in some situations and that the administrative procedures, judicial review and the exceptions to the exhaustion requirement together constitute an adequate remedy.

Moreover, the Clubs did not raise the opportunity to have a trial de novo in their moving papers before the 9th Circuit Court of Appeals. At issue was the applicability of the Tax Injunction Act, 28 U.S.C. §1341. In fact, the Clubs argued that "the Tax Injunction Act should not have precluded the district court below from adjudicating the Plaintiffs' constitutional challenges to the Nevada Live Entertainment Tax. Since the Plaintiffs do not have a plain speedy and efficient remedy in the courts of that state . . . the district court had subject matter jurisdiction . . .." (Resp'ts' App. 5) (internal quotations omitted).

It's important to note that what was being argued before the federal courts was whether the Nevada administrative and judicial process, as a whole, provide a "plain, speedy and efficiency remedy" for purposes of the Tax Injunction Act. (16 Appellants' App. 3022-3029). Citing to *Age Intern, Inc. v. Miller,* 830 F.Supp. 1484, 1492 (1993), the Department argued that "State remedies must afford an opportunity for a hearing and judicial determination at which Constitutional challenges to the tax may be raised, but may require exhaustion of administrative remedies." (16 Appellants' App. 3024). The *Age Intern* Court went on to state, "The district court should not analyze the substantive sufficiency of the state remedies, but should scrutinize the totality of state court remedies to determine whether Plaintiffs have *some opportunity* to raise their constitutional objections. *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1245 (11th Cir.1991)." 830 F.Supp. at 1492. The court further stated, "A state remedy may be plain, speedy, and efficient even though it requires exhaustion of an administrative remedy." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 507–08 (1981); *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 490 (10th Cir.1983)." *Id*. Therefore,

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

the Department was not stating whether the remedy was going to be a PJR or a trial de novo, the Department was showing that the statutes and case law together provided a sufficient remedy.

Because the issue was whether Nevada's remedy as a whole was adequate, the Department's arguments should be read in the context of the position it was defending, *i.e.* that the remedy is adequate whether a taxpayer must comply with the exhaustion requirement and pursue a PJR or can proceed directly to district court by establishing an exception to the exhaustion requirement.

It is misleading for the Clubs to state that the Department did not mention judicial review in their 9th Circuit Briefing. In fact, the Department stated that "[t]he various components of the sales tax in Nevada are governed by procedures set forth in NRS Chapters 372 and 374, which contained provisions with respect to *judicial review* that are almost identical to those in NRS Chapter 368A." (3 Appellants' App. 421) (emphasis added). The Department additionally states that "the Clubs could file requests for refunds for the periods going back over the entire span of time at issue herein, and if denied, could proceed to *judicial review* thereon.'' (3 Appellants' App. 423) (emphasis added).

Moreover, the Clubs mention judicial review as the remedy no less than three times in their Reply Brief filed with the 9th Circuit Court of Appeals:

> 1) "Further, any potential remedy is entirely speculative because full *judicial review* may only be had if an administrative agency, in its unbridled discretion decides to render a decision. (emphasis in original). (Resp'ts' App. 11).
>
> 2) "To then paraphrase Barringer: Unless a *decision* is required by either a statutory scheme or agency regulation, there is no right to judicial review—even if a *hearing* takes place. Both a hearing before and a decision by the NTC is required under NRS 368A.290-300 before the right to judicial review attaches. (emphasis in original). (Resp'ts' App. 20).
>
> 3) "Lack of procedural safeguards leave the prospect of *judicial review* at the discretion and leisure of the Nevada Tax Commission." (Resp'ts' App. 27)(emphasis added).

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

Thus, for some strategic reason, the Clubs decided to ignore the available PJR and chart their own course, and now disingenuously allege that they were lead down the trial de novo path by the Department.

In December 2006, the Clubs filed the Case 1 Complaint in State District Court. In 2008, the Department filed a Motion to Dismiss the Case 1 Complaint based on the Clubs' failure to exhaust their administrative remedies. (2 Appellants' App. 317-328). The Clubs argued that the exhaustion requirement was not applicable to their claims. (2 Appellants' App. 341-358; 3 Appellants' App. 459).

In November 2010, within the Department's Second Supplement to its Opposition to Plaintiffs' Motion for Preliminarily Injunction on the issue of Separation of Powers, the Department stated the following:

> NRS 368A.280 is a declaration of the principal of law that you do not get an injunction if there is an adequate remedy at law. The refund procedure and *judicial review* is an adequate remedy at law as indicated in the Ninth Circuit decision. As a result, this Court can either decide for itself that the statutory scheme provides for an adequate remedy at law; or apply res judicata. (emphasis added).

(Resp'ts' App. 84:23-27). The Motion for Preliminary Injunction was heard by the State District Court on December 9, 2010. During the oral arguments, judicial review was again brought up during the hearing.

> Remember the issue that he's speaking about, the issue of the refund, that's been adjudicated at the hearing officer and tax commission. He included it in his Complaint before Your Honor. We actually believe that should really be—that issue should be here on a *Petition for Judicial Review*, not a bring more facts to you about this, not a rehearing of that.

(10 Appellants' App. 1813:18-23) (emphasis added). Thereafter, Judge Togliatti said, "I have a note here that says before you ever said these words, my note is, did I forget a Petition for Judicial Review, question mark." (10 Appellants' App. 1814:6-8). Then again during the same hearing, the Department brought up Judicial Review again:

. . .

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

> Now again, your Honor, I would suggest that the whole issue, that this really should not be hear about the facts. This should—that issue about the refund should be here on a Petition for Judicial Review. And we've considered filing a motion to sever that part off and letting the Constitution – constitutional argument go forward here.

(10 Appellants' App. 1816:24-25; 1817:1-4) (emphasis added). The Judge finally responded as follows:

> I think that counsel's – I've been wondering all along how come there's no Petition for Judicial Review on that because that's - - that's normally the mechanism for any administrative ruling or administrative findings based upon a hearing and a ruling. You know, wether you could cure that or not, off the top of my head, without stipulation I do not know.

(10 Appellants' App. 1835:13-19).

Thus, since 2006 the Clubs knew that they had to follow the administrative process for all other claims except the facial constitutional claims, but chose to ignore the process by filing lawsuits in federal court and later in state court prior to filing for a refund with the Department. Finally, the Clubs began to file for refunds, and after denial of the refunds by the Department, the matter was heard by the NTC. Even after a full hearing before the NTC in August 2007, and after receiving a final written decision, the Clubs still failed to file a PJR.

On January 25, 2011, the Department filed their Motion. (11 Appellants' App. 2057-2084). The Department filed its Reply on March 7, 2011. (14 Appellants' App. 2506-2530). At the hearing, which was held March 15, 2011, the Department argued that "the case should have been filed as a judicial review." (15 Appellants' App. 2736:18-19). The Department continued the argument discussing the 1989 change to NRS Chapter 233B which removed the language that allowed final decisions of agencies to proceed to District Court as de novo actions and the 1999 change to NRS 372.680 requiring a final decision from the NTC before refund matters can proceed to district court. (15 Appellants' App. 2736-2737). The Department argued that these statutory changes made it clear that a PJR was

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

the sole remedy for refund claims and that NRS 368A.290 has the same meaning as NRS 372.680. (15 Appellants' App. 2737:10-20). It's important to note that, prior to the Motion being filed and heard, no discovery had occurred in Case 2, the Department had not propounded discovery, and the Department's motion to dismiss Case 1, which had been filed in April of 2008, had not been decided until December 10, 2010. In other words, the Department had asserted no contrary position in Case 2.

Finally, this Court issued the *Edison* decision in July of 2011. The Department submitted the *Edison* decision to the district court via a supplement to its opposition to the Clubs Motion for Clarification. (15 Appellants' App. 2758-2777). By the Minute Order dated June 24, 2011, the district court requested the Department to re-notice the Motion challenging the procedural posture of the case and, following briefing and oral argument, the district court found:

> The issue of the petition for judicial review was raised in this proceeding, and it was not appropriately acted upon, as the Supreme Court has now told us in Southern California Edison. And it doesn't matter to me if the person who raised it the first time in argument was the judge, or it was your side, or their side. The issue exists in this record from a long time ago. And because the issue was raised and discussed and ruled on by this Court, which is not consistent with the Southern California Edison, I'm not holding that against the State. Because it's not fair to you, I'm giving you a 30-day tolling period, which I don't have to do.

(15 Appellants' App. 2814; 18 Appellants' App. 3546:3-14).

It is apparent from the number of times that the Department raised the issue of judicial review, the Clubs knew the procedure, and knew that the remedy for any claim, other than the facial challenge to the constitutionality of the statute, was the administrative process followed by judicial review.

Furthermore, in 2010, when Judge Tagliotti raised the issue, stating that judicial review is the "normal mechanism," the Clubs did not take the hint. Finally . . .

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

in 2011, after this Court's decision in *Edison*, in the interest of fairness, Judge Gonzales gave the Clubs 30 days to file a PJR, even though the Clubs were years out of statute.

Thus, because the Department did not take two inconsistent positions at a judicial or quasi-judicial administrative proceeding with regards to the application of judicial review, the judiciary's integrity is not at stake and Judicial Estoppel does not apply.

F. THIS COURT'S DECISIONS IN THE *SCOTSMAN* CASES DID NOT PRECLUDE DISMISSAL OF THE ACTION BELOW

The Clubs are misinterpreting the *Scotsman* cases. Scotsman had "initiated a suit for declaratory relief . . .." *Scotsman Mfg. Co. v. State (Scotsman I)*, 107 Nev. 127, 129, 808 P.2d 517 (1991). "Ruling on cross-motions for summary judgment, the district court held, as a matter of law, that Scotsman was liable to collect and pay a state sales tax . . .." *Id*. The Court noted that the issue was "whether the district court was correct in ruling that there are no genuine issues of fact remaining in this action, and that as a matter of law, the collection of state sales taxes in this case is not proscribed by the Supremacy Clause of the United States Constitution." *Id*. at 129-130.

In *State, Nev. Dep't of Taxation v. Scotsman Mfg. Co., Inc., (Scotsman II)*, 109 Nev. 252, 255, 849 P.2d 317 (1993), the follow-up case, the Court, having already determined that the collection of the tax was unconstitutional, cited to *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 31 (1990) and said that the Department had to give meaningful backward-looking relief. Because the Department had required payment of a tax that this Court had determined was unconstitutional, it was determined that the only meaningful relief was a refund. *Scotsman II,* 109 Nev. at 255. Both *Scotsman* cases were decided prior to 1999, prior to the final legislative changes being made to require a final

. . .

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

decision on a tax refund matter to proceed as a petition for judicial review, and prior to this Court's decision in *Malecon.*

In *Malecon*, this court clarified that facial constitutional challenges are an exception to the exhaustion requirement. This Court also stated that as applied constitutional challenges requiring factual determinations must first be heard by the administrative body. 118 Nev. at 839-841. The *Malecon* decision was issued in 2002, which is after the final legislative changes were made affecting the judicial review of final decisions of the NTC regarding refund matters.

The *Scottsman* decisions do not preclude dismissal of Case 2 because they were decided prior to NRS 372.680 being given the meaning that it has had since the last legislative change was made in 1999. Therefore, the cases were decided before the statutory language from NRS 372.680, that was used in NRS 368A.290, was given its new meaning. In addition, arguably the district court had determined that there were no factual issues to be determined by the agency. *Scotsman I,* 107 Nev. at 129-130; *Malecon*, 118 Nev. 841 (stating that the question for the Supreme Court was whether the district court properly determined that there were no issues of fact). Reading the *Scotsman* cases and *Malecon* together, had the Clubs obtained favorable declaratory relief on the facial constitutional challenge in this case, the "meaningful backward-looking relief" would be a refund. *Scotsman,* 109 Nev. 252319-320. Such relief is not granted unless and until the statute is declared unconstitutional.

Consequently, the *Scotsman* decisions do not preclude dismissal of Case 2.

G. THE ACTION BELOW WAS IMPROPERLY COMMMENCED AS AN ORIGINAL DE NOVO ACTION AND WAS PROPERLY DISMISSED.

To make their argument in this regard, the Clubs have cited to only select portions of the *Malecon* decision. In *Malecon*, this Court also stated, "…as applied . . .

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

challenges requiring factual determinations must be decided by the administrative agency …". This Court could not have been more clear.

Case 2 was properly dismissed and the Clubs were given the opportunity to file a PJR. The Clubs had obtained a decision from the Department and appealed that decision to the NTC. Having obtained a final decision from the NTC, a PJR was the appropriate means of proceeding to State District Court. NRS 233B.130(6); NRS 368A.290.

The State District Court properly consolidated the declaratory relief actions, i.e. the facial challenge, and allowed them to proceed as Case 1. Because Case 1 was filed before any of the Clubs ever submitted an administrative claim for refund and before they exhausted administrative remedies, it should have been commenced solely as a facial challenge.[20] *Malecon*, 118 Nev. at 839-841.

The Clubs later amended the complaint to add an as applied challenge, or clarify that they were pursuing an as applied challenge. (10 Appellants' App. 1845:15-16). The court properly dismissed the as applied challenge in Case 1. *National Private Truck,* 515 U.S. 582, 588-592 (explaining that §1983 relief is not available in state tax cases); *Malecon*, 118 Nev. at 839-841 (facial challenge is exception to exhaustion requirement).

The District Court also properly dismissed Case 2. The Clubs had exhausted administrative remedies and obtained a final decision from the NTC. By pursuing issues of fact and litigating the application of the LET to themselves, the Clubs prevented the District Court from obtaining jurisdiction until a PJR was filed. *Malecon*, 118 Nev. at 839-841 (requiring exhaustion of administrative

[20] The Clubs appear to have abandoned their arguments regarding the 42 U.S.C. § 1983 claims. Contrary to the Clubs' assertions, Opening Br., n. 9, the Department requested dismissal of all §1983 claims and cited *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 588-592 (1995) which prohibits §1983 relief in state tax cases. See Department's Reply to Opposition to the Motion (14 Appellants' App. 2506, 2523-2526); See Response to Motion for Clarification (14 Appellants App. 2690-2713); See Department's Reply to Opposition to the Re-Noticed Motion. (Resp'ts' App. 146-151; 161-172). Though the Clubs argued to the district court that § 1983 claims are exempt from the exhaustion requirement, they cited to *Nat'l Private Truck* in their Ninth Circuit Brief which clearly states that no §1983 relief is available in state tax cases. (Resp'ts' App. 4).

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

remedies when factual issues are to be determined); *Campbell,* 108 Nev. at 216 (prohibiting a de novo action, after administrative remedies had been exhausted, by application of administrative res judicata).

Case 2, the as applied challenge is currently pending before the Department. The matter was heard by the NTC in 2008 and was previously pending before the State District Court as Case 2. When Case 2 was dismissed, the Clubs filed a PJR with permission of the State District Court.[21] The State District Court then granted the Clubs' motion to remand the matter to the NTC to allow the NTC to consider the additional evidence obtained through discovery. (Resp'ts' App. 176-177). The NTC then remanded the matter to an Administrative Law Judge to consider the additional evidence and amend the Findings of Fact, Conclusions of Law and Decision if any amendments are needed. (Resp'ts' App. 178-183).

Consequently, the State District Court properly dismissed Case 2 and allowed the Clubs to re-file it as a PJR. The Clubs have been given the appropriate remedy.

. . .

. . .

. . .

[21] Eighth Judicial District Court Case No. A-11-648894-J.

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

II. CONCLUSION

The Department respectfully requests that the appeal be denied and that the Order dismissing Case 2 and allowing 30 days for the filing of a PJR be affirmed in all respects.

Respectfully submitted this 4th day of March, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
555 East Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3426
Attorneys for Respondents

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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[ ] This brief has been prepared in a proportionally spaced typeface using [state name and version of word-processing program] in [state font size and name of type style]; or

[X] This brief has been prepared in a monospaced typeface using Microsoft Word 2010 with 12pt Arial.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[X] Monospaced, has 10.5 or fewer characters per inch, and contains 1,298 lines of text; or

[ ] Does not exceed 30 pages.

3. 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

. . .

. . .

. . .

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

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 Appellate Procedure.

DATED this 4th day of March, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ DAVID J. POPE
DAVID J. POPE
Senior Deputy Attorney General
BLAKE A. DOERR
Senior Deputy Attorney General
VIVIENNE RAKOWSKY
Deputy Attorney General
555 East Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3426
Attorneys for Respondents

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

CERTIFICATE OF SERVICE

I, hereby certify that on the 4th day of March, 2013, I served the **RESPONDENTS' ANSWERING BRIEF**, by causing to be delivered to the Department of General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

William H. Brown, Esq.
Law Offices of William H. Brown, Ltd.
6029 S. Ft. Apache Rd.
Las Vegas, NV 89148
Attorneys for Plaintiffs

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

Mark E. Ferrario, Esq.
Greenberg Traurig, LLP
3773 Howard Hughes Pkwy., Ste. 400 N.
Las Vegas, NV 89169
Attorneys for Shac LLC, dba Sapphire (only)

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

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