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**SUPREME COURT
OF THE STATE OF NEVADA**

K-KEL, INC., d/b/a Spearmint
Rhino Gentlemen's Club, et al.,

Appellants,

vs.

**NEVADA DEPARTMENT OF
TAXATION**, et al.,

Respondents.

Supreme Court Docket: 69886

District Court Case: A-11-648894-J
Consolidated with A-14-697515-J

Appellants' Appendix

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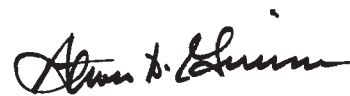
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CLERK OF THE COURT

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16 **Pending Admission Pro Hac Vice*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

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

21 Petitioners,

22 vs.

23 NEVADA DEPARTMENT OF TAXATION,
24 and NEVADA TAX COMMISSION,

25 Respondents.

Case No. A-11-648894
Dept. No. XXX

**APPLICATION FOR LEAVE TO
PRESENT ADDITIONAL EVIDENCE
TO THE NEVADA TAX
COMMISSION**

Date of Hearing: n/a
Time of Hearing: n/a

1 COME NOW the Petitioners, K-KEL, INC., d/b/a *Spearmint Rhino Gentlemen's Club*,
2 OLYMPUS GARDEN, INC., d/b/a *Olympic Garden*, SHAC, L.L.C. d/b/a *Sapphire*, THE
3 POWER COMPANY, INC., d/b/a *Crazy Horse Too Gentlemen's Club*, D. WESTWOOD, INC.,
4 d/b/a *Treasures*, D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, d/b/a *Scores*, DEJA VU
5 SHOWGIRLS OF LAS VEGAS, LLC, d/b/a/ *Déjà Vu*, and LITTLE DARLINGS OF LAS
6 VEGAS, LLC, d/b/a *Little Darlings*, by and through their attorneys, WILLIAM H. BROWN,
7 ESQ. of TURCO & DRASKOVICH, and hereby submit, pursuant to NRS 233B.131(2), this
8 Application for Leave to Present Additional Evidence to the NEVADA TAX COMMISSION,
9 and in support thereof state the following:
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- 12 1. Petitioners operate commercial entertainment establishments in the City of Las Vegas,
13 which present on their business premises live performance dance entertainment to the
14 consenting adult public. This entertainment constitutes speech and expression, as well as
15 a form of assembly, protected by the First and Fourteenth Amendments to the United
16 States Constitution, and by Art. I, §§ 9 and 10, of the Nevada Constitution.
17
- 18 2. The Nevada Department of Taxation and the Nevada Tax Commission have taken the
19 position that the entertainment provided by the Petitioners subjects their businesses to a
20 new (in 2003) the Live Entertainment Tax ("LET") enacted by the Nevada Legislature as
21 NRS Chapter 368A (sometimes "Chapter 368A").
22
- 23 3. Petitioners believe that the LET is unconstitutional under the First and Fourteenth
24 Amendments to the United States Constitution, as well as Art. I, §§ 9 and 10, of the
25 Nevada Constitution, and initiated legal challenges thereto as early as 2005, shortly after
26 the Legislature enacted a series of amendments to the breadth and scope of the LET.
27 First, Petitioners filed suit in federal district court seeking, among other things, to declare
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1 the LET unconstitutional and to enjoin its enforcement. That action was dismissed,
2 pursuant to motion filed by the Respondents here, on the basis that under the federal Tax
3 Injunction Act (28 U.S.C. § 1341), a “plain, speedy, and efficient remedy” could be had
4 in the courts of this state. Petitioners then filed suit in this Court basically seeking the
5 same relief. That case was docketed as Case No. 06A533273, was originally assigned to
6 Judge Togliatti, is now assigned to Judge Gonzalez, *and is still pending in Department*
7 *XI* (referred to hereinafter as “Case 1”). Pursuant to order of Judge Gonzalez, Petitioners
8
9 have filed (as Plaintiffs), contemporaneously with this submission, a motion for summary
10 judgment in Case 1 limited to a “facial” constitutional challenge to the LET. In addition,
11 after the denial by the Nevada Department of Taxation (“Department”) of administrative
12 refund claims filed by Petitioners K-Kel, Inc., Olympus Garden, Inc., SHAC, LLC, The
13 Power Company, Inc., D.Westwood, Inc., and D.I. Food & Beverage of Las Vegas, LLC
14 (the “K-Kel Petitioners”), predicated upon the unconstitutionality of Chapter 368A, and
15 shortly after the filing of Case 1, the Nevada Tax Commission (“Commission”) heard
16 appeals on those administrative denials but ultimately upheld them. Specifically, an
17 order was issued by the Commission on October 12, 2007, upholding the Department’s
18 denial of the refunds of the LET paid by the K-Kel Petitioners for the January through
19 April 2004 tax periods.¹

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23 4. In the Commission, the K-Kel Petitioners did not undertake any discovery, and only
24 placed a limited constitutional challenge to Chapter 368A before the Commission,
25 because: 1) precedent establishes that administrative agencies are not the appropriate
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28 ¹ Appeals from all other tax periods are being held in abeyance pending the resolution of Case 1
and this Petition.

1 forum in which to litigate constitutional challenges; 2) precedent at the time established
2 that the K-Kel Petitioners would be afforded de novo judicial review where discovery
3 would be permitted (and, in fact, established that the filing of a limited petition for
4 judicial review was procedurally improper and would be subject to dismissal); 3) the
5 judicial redress statute contained in Chapter 368A (that being NRS 368A.290) appeared
6 to provide for the filing of an original action for refund following the denial by the
7 Commission of appeals regarding administrative claims for refund, where de novo review
8 would be provided and where discovery could be conducted; and 4) the conduct and
9 representations of the Respondents in the federal proceedings led Petitioners to believe,
10 that following an adverse ruling by the Commission, they could, in fact, initiate judicial
11 redress by filing an original action for refund where de novo review would be provided
12 and where discovery could be conducted.

- 13
14
15 5. On January 9, 2008, in full accordance with NRS 368A.290(1)(b) and 368A.300(3)(b),
16 which govern adverse decisions by the Commission in the circumstances here, the
17 Petitioners timely filed a judicial complaint for refund, which was assigned Case No.
18 A554970 in Division XI of this District Court (Case 2).²
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21
22 ² Petitioners filed an Amended Complaint in Case 2 on or about December 19, 2010, which
23 added Deja Vu Showgirls of Las Vegas, LLC, and Little Darlings of Las Vegas, LLC (the “Deja
24 Vu Petitioners”) to the action for refund, as they were then required to file administrative claims
25 for refunds as a result of statutory amendments to Chapter 368A. The Deja Vu Petitioners did not
26 become subject to the LET until Chapter 368A was amended in June of 2005, to reduce the
27 seating capacity required for a facility to be subject to the LET from 300 to 200 persons. *See*
28 NRS § 368A.200(5)(d). Pursuant to NRS § 368A.260(1), the statutory three year period for
those two Petitioners to file their administrative requests for refunds did not then expire until mid
2008, and the Deja Vu Petitioners were not required to have filed, and had not yet submitted,
administrative claims for refund when Case 2 was filed. However, starting in August, 2008 (for
the July 2005 tax period), the Deja Vu Petitioners began filing administrative claims for refund,
and responded to the inevitable denials from the Department with monthly notices of appeal to

1 6. After litigating Case 2 for three years and Case 1 for more than that, including the
2 providing of substantial discovery and engaging in extended and acrimonious discovery
3 disputes, the Respondents then took the position that Case 2 should have been filed as a
4 limited petition for judicial review, and moved to then dismiss that action. Before
5 Department XI entered a formal ruling on that motion, the Nevada Supreme Court issued
6 its ruling in Southern California Edison v. First Judicial District, 127 Nev.Adv.Op.
7 22 (May 26, 2011), where it held that in light of a number of statutory amendments, prior
8 precedent was no longer operative and that a petition for judicial review was the proper
9 procedure to appeal a determination from the Commission. The Respondents then filed a
10 motion for reconsideration of the decision on their motion to dismiss Case 2, and Judge
11 Gonzalez then orally dismissed that suit and stated (no final written order has yet been
12 entered) that the Petitioners would be given 30 days to file a petition for judicial review.
13 Contemporaneously with the filing of this application, Petitioners have done just that.

14 7. Following the acrimonious discovery disputes and the obtaining by the Petitioners of
15 extensive written discovery in Cases 1 and 2, Petitioners were about to take depositions
16 of a number of representatives of the Respondents. In fact, those depositions were
17 scheduled to commence just 3 days after Department XI orally ruled that Case 2 would
18 be dismissed (with the consequent filing of the Petition at bar here) and that Case 1 would
19 proceed limited to a “facial” constitutional challenge. As a result, all of the depositions
20 were cancelled.

21 8. Nevertheless, discovery undertaken in both Cases 1 and 2 has uncovered extensive

22 the Commission. Their appeals, however, are also being held in abeyance pending the resolution
23 of Case 1 and this Petition.

1 documentation that is directly relevant and material to the constitutional challenges that
2 will be decided by this Honorable Court. Those materials were not presented to the
3 Commission below, however, for the reasons set forth in paragraph 4 above. As
4 Petitioners were justifiably under the impression that they would be afforded de novo
5 review in this Court from the decision of the Commission, where discovery could be
6 taken and where all relevant evidence could be presented to this Honorable Court, “good
7 reasons” exist to grant this petition and to permit the Petitioners to present additional
8 evidence to the Commission before this Court engages in a review of the decision of that
9 administrative Tribunal.³ Further, the Deja Vu Petitioners never had a hearing before the
10 Commission, as the deadline for their refund requests had not yet arrived when the K-Kel
11 Petitioners appealed the Department’s denial of their refund requests. Therefore, there is
12 no record at all before the Commission on the Deja Vu Petitioners’ refund requests. And,
13 the type of depositions that were to be taken in Cases 1 and 2 should be permitted to
14 proceed below in order to afford the Petitioners an opportunity to submit a full and
15 complete record on their constitutional challenges to the Commission before judicial
16 review by this Court commences.

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20 9. Consequently, Petitioners respectfully assert that in order to ensure that they are all
21 afforded a fair decision by this Court, based upon a complete record below, this Court
22 should grant this Application and permit the Petitioners to complete discovery before the
23 Commission and to present such additional evidence thereto as the Petitioners deem

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25
26 ³ Moreover, in light of the fact that the discovery received in Cases 1 and 2 by the Petitioners to
27 date was only obtained after numerous hearings before the Discovery Commissioner and before
28 two different judges (comprising of no fewer than 5 separate hearings), it would be disingenuous
to believe that Petitioners would have been able to obtain such materials in the Commission had
they requested discovery there.

1 appropriate. This will permit the Commission to base its ruling(s) on a full and complete
2 record and provide it the chance to modify its findings and decisions pursuant to NRS
3 233B.131(3) before further review is undertaken by this Court.

4
5 10. Respondents will not be prejudiced by the relief requested in this application, and there
6 will be no unnecessary delay in the resolution of the constitutional matters at issue since
7 Judge Gonzalez has ordered the filing of the Plaintiffs' (these Petitioners') "facial"
8 constitutional challenges in Case 1, which has been submitted to Department XI
9 contemporaneously with this submission (Judge Gonzalez considering this Petition to
10 encompass the Petitioners' "as applied" constitutional challenges).

11
12 11. Petitioners request that this Court grant oral argument on this application due to the
13 complex procedural history of the various previous proceedings, and the sensitive
14 constitutional issues at bar.

15
16 12. This Application is supported by the accompanying memorandum of points and
17 authorities.

1 WHEREFORE, Petitioners respectfully request that this Honorable Court grant
2 Petitioners leave to present additional evidence to the Nevada Tax Commission (including that
3 already obtained in Cases 1 and 2 and that which may be uncovered in further discovery at the
4 Commission level, including through the conducting of depositions), before the Commission
5 transmits its record to this Court.

6 DATED this 26nd day of September, 2011.

7 Respectfully submitted,

8
9 BY: /s/ William H. Brown

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24 **Pending Admission Pro Hac Vice*

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES⁴**

3 **I. INTRODUCTION AND SUMMARY**

4 Chapter 368A imposes a separate and unique sales tax on “live entertainment.” Live
5 entertainment constitutes speech and expression protected by the United States Constitution,
6 and, therefore, the Constitution of the State of Nevada as well. *See, e.g.,* **Schad v. Borough of**
7 **Mout Ephraim**, 452 U.S. 61, 66 (1981); **Winters v. New York**, 333 U.S. 507, 510 (1947); and
8 **Zacchini v. Scripts-Howard Broadcasting Co.**, 433 U.S. 562, 578 (1977). Petitioners contend
9 that the LET violates, both “facially” and “as-applied” to these Petitioners, those constitutional
10 protections.
11

12 Petitioners have been litigating those constitutional claims in Department XI for nearly
13 five years, and voluminous discovery has been produced as a result of elongated and
14 acrimonious proceedings by the Petitioners to compel that production.
15

16 The K-Kel Petitioners have received rulings from the Commission denying their
17 administrative claims for refund. However, for the reasons as set forth in the application above
18 and more fully below, they did not undertake discovery in the Commission proceedings, and
19 placed only a limited constitutional challenge before that administrative Tribunal. Prior to a
20 recent Nevada Supreme Court pronouncement, Petitioners were entitled to de novo review of
21 the Commission’s ruling in the District Court, where discovery could be conducted and where a
22 full independent record could be submitted for judicial consideration.
23

24 However, on May 22, 2011, the Nevada Supreme Court issued its ruling in **Southern**
25 **California Edison v. First Judicial District**, 127 Nev.Adv.Op 22 (May 26, 2011), which held
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1 that in light of a number of statutory amendments, its prior precedent was no longer applicable
2 and judicial redress from a decision of the Commission would have to proceed by way of a
3 limited petition for judicial review.⁵ Department XI concluded, therefore, that Case 2 should be
4 dismissed, that the plaintiffs there (these Petitioners) should be afforded 30 days to file a
5 petition for judicial review, and that Case 1 should proceed as only a “facial” constitutional
6 challenge.
7

8 In light of the limited scope of review here, and the fact that Petitioners justifiably
9 believed that they would be able to develop a full record in the District Court in order to
10 adjudicate their constitutional claims, Petitioners respectfully request, due to the unique
11 procedural developments of these various proceedings (with the Edison decision “changing the
12 game”), that this Court remand this matter back to the Commission in order to allow the
13 Petitioners to complete their discovery and to present additional evidence to the administrative
14 Tribunal before review by this Court.
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18 **II. ARGUMENT**

19 **A. Constitutional Constraints Applicable to Chapter 368A.**

20 As discussed above, the subject matter of Chapter 368A (that being “live
21 entertainment”) receives constitutional protections under both the federal and state constitutions.
22 In fact, the particular form of expression engaged in by these Petitioners (topless and nude
23 performance dance entertainment) is similarly imbued with free speech protections. *See, e.g.,*
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25
26

27 ⁴ In order to reduce duplication of briefing, the Application above is incorporated herein by
28 reference, and the definitions and short-form designations set forth therein are utilized here as
well.

1 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991); City of Erie v. Pap's A.M., 529 U.S.
2 277, 289 (2000).

3 In order for the Court to be able to appropriately consider the relief requested by way of
4 this application, and to understand why the additional evidence requested by the Petitioners is
5 necessary for full and adequate judicial review of the Commission's decision, Petitioners set
6 forth below a very brief summary of the constitutional constraints regarding tax laws that
7 impact upon the freedoms of speech, the press, and expression.
8

9 It is unconstitutional to *directly* tax the engagement of First Amendment protected
10 activities. The Supreme Court has noted:

11
12 It is one thing to impose a tax on the income or property of a
13 preacher, it is quite another thing to exact a tax from him for the
14 privilege of delivering a sermon. The tax imposed [here] is a flat
15 license tax, the payment of which is a condition of the exercise of
these constitutional privileges. *The power to tax the exercise of a
privilege is the power to control or suppress its enjoyment.*

16 Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 112 (1943) (emphasis and
17 clarification added).

18 Stated somewhat differently:

19
20 A power to tax differentially, as opposed to a power to tax generally,
21 gives a government a powerful weapon against the taxpayer selected.
22 *When the State imposes a generally applicable tax, there is little
cause for concern. We need not fear that a government will
destroy a selected group of taxpayers by burdensome taxation if it
must impose the same burden on the rest of its constituency.*
23

24 * * *

25 Further, *differential treatment*, unless justified by some special
26 characteristic of the press, suggests that the goal of the regulation is

27
28 ⁵ Interestingly, the Court in Edison ruled that Edison's judicial redress could continue as an
original action subject to de novo review in light of the principle of judicial estoppel in light of a
variety of representations made by the Department and the Commission.

1 not unrelated to suppression of expression, and such a goal is
2 presumptively unconstitutional.

3 Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575,
4 585 (1983) (emphasis added).

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

7
8 *Freedom of speech*, freedom of the press, freedom of religion are
9 available to all, not merely to those who can pay their own way
10 [I]t could hardly be denied that a tax laid specifically on the
11 exercise of those freedoms would be unconstitutional.

12 Murdock, 319 U.S. at 108, 111 (emphasis added).

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

15 A tax is also suspect if it targets a small group of speakers.

16 * * *

17 The danger from a scheme that targets a small number of speakers is
18 the danger of censorship; a tax on a small number of speakers runs
19 the risk of affecting only a limited range of views. The risk is
20 similar to that from a content-based regulation: It will distort the
21 market for ideas.

22 Leathers v. Medlock, 499 U.S. 439, 447-448 (1991).

23 Third, a *content-based tax* is unconstitutional. Leathers, 499 U.S. at 447 (“Finally, for
24 reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it
25 discriminates on the basis of the content of taxpayer speech”).

26 Petitioners contend that the LET violates *all three of these constitutional principles*.
27 However, the additional evidence that the Petitioners desire to present to the Commission relate
28 to the second and third constitutional components; that being that Chapter 368A “targets a
narrowly defined group of speakers” (generally referred to by the courts as “gerrymandering”)

1 and that it imposes a *content-based* tax.

2 **B. The Standards for this Application.**

3 NRS 233B.131(1) of the Administrative Procedures Act requires that “within 30 days
4 after the service of the petition for judicial review or such time as is allowed by the court,” the
5 agency that rendered the decision at issue shall transmit the record to the reviewing Court.
6 However, before submission of the record by the agency, a party may apply to the Court for
7 leave to present additional evidence to the agency below.
8

9 Specifically, NRS 233B.131(2) states:

10
11 If, before submission to the court, an application is made to the court for leave to
12 present additional evidence, and it is shown to the satisfaction of the court that the
13 additional evidence is material and that there were good reasons for failure to
14 present it in the proceeding before the agency, the court may order that the
15 additional evidence and any rebuttal evidence be taken before the agency upon
16 such conditions as the court determines.

17 Consequently, in order for this Honorable Court to grant this application, it must find
18 “materiality” with regard to the evidence that the Petitioners desire to present to the
19 Commission, as well as “good reasons” as to why such evidence was not originally submitted
20 below. These Petitioners easily satisfy both standards.

21 **C. Materiality of the Proposed Evidence.**

22 Following extensive proceedings to compel before the Discovery Commissioner, before
23 Judge Togliotti, and before Judge Gonzalez, Petitioners obtained voluminous written
24 documentation in Cases 1 and 2, much of which serves to establish Petitioners’ claims that the
25 LET is gerrymandered to apply to this group of business owners and to few else (and was
26 legislatively *intended* to do so), and that it is a content-based tax. While Petitioners will not go
27 over each and every such document that serves to prove these points, some examples are in
28

1 order.

- 2 • Charts by the Department showing LET Collections by Taxpayer Group illustrating that
3 the gentlemen's clubs pay the vast majority of the 10% portion (the more oppressive
4 portion) of the tax. DV 1193-1195⁶ and un-numbered documents produced in
5 supplements (Ex. 1 hereto).
- 6 • A March 14, 2005, Department memo discussing the specific inclusion of gentlemen's
7 clubs in the proposed amended version of Chapter 368A. DV 2-3 (Ex. 2 hereto).
- 8 • An October 9, 2003, email to former Department Director Dino DiCianno from an
9 attorney on behalf of the Bellagio hotel and casino discussion the constitutionality of the
10 proposed amendments. DV 577-578 (Ex. 3 hereto).
- 11 • An October 21, 2003, email to DiCianno with a transcript of the Nevada Gaming
12 Commission discussing the importance of subjecting the gentlemen's clubs to the LET.
13 DV 614 (Ex. 4 hereto).
- 14 • The First Reprint of Senate Bill 247 which contains a counsel digest specifically
15 referencing adult entertainment and what would happen if that proposed portion of the
16 Bill were held unconstitutional. DV 1031. This version actually defines live adult
17 entertainment. DV 1033 (Ex. 5 hereto).
- 18 • Minutes of the May 16, 2005, meeting of the Assembly Committee on Commerce and
19 Labor which discusses what happens if the proposed live "adult" entertainment
20 provisions are held unconstitutional. DV1071 (Ex. 6 hereto).
- 21 • Minutes of the May 26, 2005, meeting of the Assembly Committee on Ways and Means,
22 which specifically references the Department's position on there being two distinct
23 categories: live entertainment and live adult entertainment. DV 1081. Exhibit E to the
24 minutes is an email from DiCianno setting forth this distinction. DV 1087 (Ex. 7 hereto).

25
26
27 More specifically, for example, on March 14, 2005, a Memorandum from Department
28 was issued "to analyze the fiscal impact of making changes to the Live Entertainment Tax
(LET)." Department of Taxation Memorandum, March 14, 2005, Ex. 2. This analysis

⁶ The page references preceded by "DV" indicate the bates-stamped numbers given to the documents by the State when they were produced to Petitioners.

1 recognized that eliminating the 300 person seating requirement⁷ would raise an additional
2 \$4,197,900 from gentlemen's clubs, and \$1,614,600 from other bars and nightclubs. *See also*
3 *Untitled Revenue Analysis, Ex. 8* (analyzing the impact of the 300-seat requirement separately
4 for "men's clubs" from other businesses and specifically analyzing revenue to be generated from
5 200-seat men's clubs; no other specific category of businesses being mentioned or identified).

7 Another Memorandum on November 4, 2004, to Chuck Chinnock, then-Executive
8 Director of the Nevada Department of Taxation, specifically identifies those gentlemen's clubs
9 statewide that have seating capacities of less than 300. Memorandum of November 9, 2004, Ex.
10 9. And, in an April 24, 2005 email, Dino DiCianno, then-Executive Director of the Department
11 of Taxation, explained:
12

13 Chris Janzen asked me [sic] take a look at the fiscal impact of Senator
14 Titus's new version of SB 247. *There is no question that the focus of the*
15 *bill is to tax for LET all adult entertainment, except for brothels.*
16 *Currently the vast majority of the revenue that we collect comes from the*
17 *gentlemen's clubs that have a seating capacity greater than 300.* For
18 example, 1.2 million from nightclubs, 1.4 million from raceways, 1.0
19 million from performing arts, 5.2 million from gentlemen's clubs; for a
20 total collected of about 9.0 million. The remaining venues are minor (i.e.
21 sporting events, etc.). *By removing the seating capacity and eliminating*
the other venues you would ten capture all of the remaining gentlemen
[sic] clubs that are currently not paying. There is no question that they
are a cash cow for LET. My best guess is that the fiscal impact of the
revised SB 247 would be either a wash with a distinct possibility of a
potential LET revenue gain.

22 DiCianno Email of April 24, 2004, Ex. 10 (emphasis added).

23 The documents preceding the 2003 tax are no different. In a 2003 email from Barbara
24 Smith Campbell to Bill Bible, it was explained that:
25

26
27 ⁷ The 2005 amendments to Chapter 368A reduced the seating capacity threshold (in order to
28 subject a business to the LET), in order to capture a number of gentlemen's clubs that had
escaped taxation through the initial iteration of the LET in 2003.

1 The DAG has concerns about your recommended language in Ambient
2 Entertainment #3. In summary, he feels the language *may lead to the*
3 *exemption of “entertainers” at the Gentlemen [sic] clubs. Therefore, we*
4 *did not incorporate it in our draft.*

5 Memorandum, November 18, 2003, Ex. 11 (emphasis added).

6 Even additional legislative minutes produced in discovery (that the Petitioners were not
7 able to obtain before the Commission proceedings⁸) further demonstrate the unconstitutional
8 gerrymandering of Chapter 368A. For example, in discovery Petitioners obtained additional
9 legislative minutes that state as follows:

10 **Senator Coffin:**

11 *Where are the topless clubs in this bill?*

12 **George W. Treat Flint (Nevada Brother Owners Association):**

13 I have an intimate relationship with this bill and its verbiage since the last
14 Session. On page 6 of A.B. 554, the topless clubs would be covered under
15 lines 1 through 3, unless they have an occupancy capacity of less than 300.
16 The major men’s cabarets are covered under that section. I have been told
17 by the Department of Taxation that the major places create approximately
18 \$7 million a year. *Most of the smaller clubs could probably be brought*
19 *into A.B. 554 if you amend the section to read a total occupancy of 200*
20 *rather than 300.* To protect my client, I do not want you to bring the
21 occupancy number down too much lower than 200 *or you will have my*
22 *clients back in this tax law.*

23 **Senator Coffin:**

24 It is my understanding that some of the topless clubs get out of being taxed
25 by removing a few seats. We should consider the possibility of reducing
26 the seating capacity so these highly profitable, legitimate businesses could
27 help pay their share of the budget. Has there been any discussion about
28 that?

26 ⁸ Through the standard public document process, Petitioners obtained what they thought was the
27 complete legislative history of the 2003 version of Chapter 368A and the 2005 amendments
28 thereto (those modifications significantly contributing to the legislative gerrymandering of this
content-based tax). However, Petitioners submitted formal discovery requests in Cases 1 and 2
for the complete legislative records, and thereby obtained additional materials that had not been
previously disclosed by the State.

1
2 * * *

3 **Senator Coffin:**

4 I would like to ask Charles Chinnock from the Tax Department a few
5 questions on this legislation. Mr. Chinnock, what happened after the last
6 Session *with regard to the men's cabarets*?

7 **Charles Chinnock (Executive Director, Department of Taxation):**

8 Many jurisdictions, whether fire marshals or the building code
9 departments that oversee *these facilities*, found increased safety concerns
10 with the 300-seating capacity. From the building and safety officials'
11 standpoint, they would much rather see less occupancy than greater
12 occupancy. If you had 300 or greater seating capacity, they were willing
13 to adjust that seating capacity from the standpoint it was a safer venue to
14 reduce that capacity. It became an easy issue for *them* to reduce the
15 seating capacity.

16 **Senator Coffin:**

17 Are you saying *they* reduced the seating number to avoid the tax in the
18 interest of safety?

19 **Mr. Chinnock:**

20 Yes, it was in the interest of safety.

21 **Senator Coffin:**

22 If we changed the language to lower the amount, *would we*
23 *unintentionally include entities we do not want to tax*?

24 **Mr. Chinnock:**

25 I do not know how to answer that. We did not do a study of a breaking
26 point below the 300-seating capacity. The other bills were all or nothing
27 *with respect to adult entertainment*.

28 **Senator Coffin:**

If we are going to take action on A.B. 554 on the Senate Floor, would it be
possible to amend it at that time to lower the 300-seat capacity to 200?

William Bible (Nevada Resort Association):

1 I really cannot assist you with this issue because the taxes would apply to
2 venues associated with gaming. The seating capacity in A.B. 554 is for
3 areas not on gaming premises.

4 **Senator Townsend:**

5 With regard to the 300 seating and the budget, the lower we make it, the
6 more revenue we would generate as opposed to having an effect on *them*.
7 There should be no fiscal note. My limited knowledge of this corresponds
8 with Senator Coffin. This puts our Department of Taxation and the
9 auditors in a tough situation. We have to remember, at the end of the day.
10 We have those individuals who will be responsible for implementing this
11 law. *Senator Coffin's proposal meets the original intent of what this*
12 *Committee and the Assembly debated.* Obviously, we do not want to
13 create a problem for Mr. Flint's clients. That was never the issue.

14 **Mr. Flint:**

15 This is not official, but *I spoke with someone in the Department of*
16 *Taxation*, and I do not have Mr. Chinnock's permission to say this on the
17 record. *I was told if you brought this number down to 200, you may pick*
18 *up those who are avoiding or evading this at the moment.* I have been in
19 enough of *these places* to know there are very few with less than 200
20 seats. There is a wide area you would pick up at 200, and you will still
21 keep me harmless at this number.

22 SENATE COMMITTEE ON TAXATION, June 5, 2005, pp. 4, 6-7, Ex. 12 (emphasis added).

23 All of these materials are obviously critically relevant to the constitutional issues that
24 will have to be decided by this Honorable Court, but they were not available at the time of the
25 Commission proceedings (and were only obtained after extensive motion practice). In addition,
26 Petitioners should be afforded the opportunity to depose representatives of the State in regard to
27 these documents before either the Commission or this Court make final determinations on the
28 Petitioners' constitutional claims. Materiality has clearly been established.

29 **D. The "Good Reasons" Why Such Materials Were Not Submitted to the**
30 **Commission in the First Instance.**

31 As discussed above, some of the documents that turn out to be extremely relevant to the

1 constitutional claims being made here were only obtained after extensive judicial proceedings
2 before the Discovery Commissioner, before Judge Togliotti, and before Judge Gonzalez. It
3 would be disingenuous to presume in these circumstances that even had the Petitioners
4 requested written discovery in the Commission proceedings, they would have been able to
5 unearth the proverbial “smoking guns” that the extensive judicial proceedings unveiled. In fact,
6 when the Petitioners first received responses to written discovery in Cases 1 and 2, the full-page
7 blackened redactions appeared to be a response to compel the production of the plans for the
8 next generation stealth fighter.
9

10
11 Regardless, there are numerous “good reasons” why these materials were not presented
12 to the Commission irrespective of the fact that, in reality, the Petitioners would not have been
13 able to obtain such documentation in the administrative proceedings below in the first place.

14 **1. Precedent Establishes that Administrative Tribunals are Not the**
15 **Appropriate Forum to Litigate Sensitive Constitutional Claims.**

16 In Malecon Tobacco, LLC, 118 Nev. 837, 840-841, 59 P.3d 474, 467-77 (2002), our
17 State Supreme Court noted that the “United States Supreme Court has recognized that under
18 federal administrative procedures, the ‘adjudication of the constitutionality of congressional
19 enactments has generally been thought to be beyond the jurisdiction of administrative agencies.’”
20 Id. at 840 (*citing* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (other citations
21 omitted)). Indeed, the Supreme Court has observed that “[c]onstitutional questions obviously
22 are unsuited to resolution in administrative hearing procedures and, therefore, access to the
23 courts is essential to the decision of such questions.” Califano v. Sanders, 430 U.S. 99, 109
24 (1977).
25
26

27 Due to this precedent, Petitioners were under the belief that the real determination of the
28 constitutionality of the LET would occur at the District Court level, where they would entitled to

1 de novo review of the Commission's decision and to discovery. Under this precedent, there was
2 no reason for the Petitioners to fight tooth-and-nail in the administrative proceedings below in
3 order to obtain the discovery that has now been unearthed, in order to place a full and complete
4 record with regard to the constitutional claims before the Commission.

5
6 **2. Precedent at the Time of the Commission Proceedings Clearly**
7 **Established that Judicial Redress From a Ruling of that Tribunal was to**
8 **be by Way of an Original Action, Where De Novo Review Would Apply**
9 **and Where Discovery Could be Obtained.**

10 Edison modifies prior precedent of the Nevada Supreme Court with regard to the avenue
11 of judicial redress from a decision of the Commission. Prior to Edison, the standards were
12 articulated in Saveway Super Serv. Stations, Inc. v. Cafferata, 104 Nev. 402, 404 (1988).
13 There, the taxpayer paid fuel excise taxes and penalties assessed by the Department, pursuant to
14 NRS Chapter 365, and filed an appeal with the Commission. After receiving an adverse decision
15 from the Commission, Saveway filed *a petition for judicial review* of the Commission's
16 decision. The district court *dismissed* the petition as being improperly filed, and the Supreme
17 Court *affirmed*. The Nevada Supreme Court later observed:

18
19 This matter was last before us in February 1985. At that time, Saveway was
20 appealing from a judgment entered in the Eighth Judicial District Court
21 dismissing Saveway's complaint for *lack of subject matter jurisdiction*. Under
22 the provisions of the *Administrative Procedure Act (NRS 233B.130)*, Saveway
23 has sought judicial review of the Nevada Tax Commission's order requiring
24 Saveway to pay \$23,709.14 for loss of discount and interest. In our order
25 *dismissing Saveway's previous appeal, we stated that NRS 233B.130 is*
26 *specifically limited to NRS 365.460, and under NRS 365.460 Saveway's remedy*
27 *was to pay the excise tax under protest and bring an action against the state*
28 *treasurer in the district court* in Carson City to recover the amount paid under
protest. Saveway has since taken that course of action.

26 Id. at 403-04 (emphasis added).

27 NRS 365.460 uses the same "may bring an action" language as is found in NRS 372.680

1 (at issue in Edison), and in NRS 368A.290 (at issue here).⁹ *Consequently, had these Petitioners*
2 *filed a petition for judicial review, the Department would have moved to dismiss that action as*
3 *being improperly filed under Saveway.*

4 But Saveway was not the only precedent establishing entitlement to original judicial
5 redress from a Commission ruling prior to the Commission proceedings below. *See also*
6 Sparks Nugget, Inc. v. Nevada ex rel. Dep't of Taxation, 179 P.3d 570, 573 (Nev. 2008)
7 (“Following the denial of its claim, the Nugget administratively appeal the Tax Department’s
8 decision to the tax commission. That appeal proved unsuccessful, however and having
9 exhausted its administrative remedies, the Nugget then *sued the Tax Department* in district
10 court, again seeking a refund of use taxes . . .”) (emphasis added).

11 Hence, the *existing case law* at the time of the Commission proceedings below¹⁰

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

¹⁰ *Accord*, Lohse v. Nevada ex rel. Dep't of Tax'n, Case No. CV-05-00376 (Nev. 2 Jud. Dist., Jan. 18, 2007). There, the Department moved to prevent the taxpayer from presenting evidence at trial on its sales tax refund claim, arguing primarily that, because the taxpayer had failed to conduct discovery, the case should be limited to the record developed before the Department and Commission and should proceed in a manner similar to a petition for judicial review. The district court *rejected* the Department's argument. During the ensuing bench trial, both the taxpayer and the Department presented evidence and testimony. The district court's Findings of Fact, Conclusions of Law and Judgment expressly held:

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

1 provided for a direct suit in district court following a denial by the Commission where,
2 obviously, de novo review and discovery could be obtained. More to the point, Petitioners
3 should not be constitutionally penalized because the subsequent ruling in Edison “changed the
4 game.”

5
6 In this regard, it is important to recognize the State of Nevada’s Taxpayers’ Bill of
7 Rights, which states that each taxpayer has the right “[t]o have statutes imposing taxes and any
8 regulations adopted pursuant thereto *construed in favor of the taxpayer* if those statutes or
9 regulations are of doubtful validity or effect, unless there is a specific statutory provision that is
10 applicable.” NRS 360.291(1)(o) (emphasis added). It further provides that the provisions of
11 Title 32 (which include the taxes challenged in this Petition and in the previous lawsuit)
12 “governing the administration and collection of taxes by the Department must not be construed
13 in such a manner as to interfere or conflict with the provisions of this section [*i.e.*, the Bill of
14 Rights] or any applicable regulations.” NRS 360.291(2) (clarification added).

15
16 All of this dictates that the Petitioners’ fundamental due process rights should be
17 zealously protected, and that this Court should grant the application and permit additional
18 evidence to be submitted to the Commission before this Court begins to engage in its judicial
19 review.
20

21
22 **3. The Judicial Redress Statute Under Chapter 368A Seemingly Provides**
23 **for the Right to File an Original Action for Refund With Regard to an**
24 **Adverse Decision by the Commission, as Opposed to the Submission of a**
25 **Petition for Judicial Review.**

26 NRS 368A.290, the statutory provisions pursuant to which the Petitioners filed Case 2,

27
28 The district court’s decision in favor of the taxpayer was *affirmed in an unpublished opinion* by
the Supreme Court.

1 states, in part, that: “1. Within 90 days after a final decision upon a claim filed pursuant to this
2 chapter is rendered by ... (b) [t]he Nevada Tax Commission, the claimant *may bring an action*
3 *against the department on the grounds set forth in the [administrative] claim.*” (Clarification
4 and emphasis added). The statute goes on to state that “[a]n action brought pursuant to
5 subsection 1 must be brought in a court of competent jurisdiction...*for the recovery of the*
6 *whole or any part of the amount with respect to which the claim has been disallowed.*” NRS
7 368A.290(2) (emphasis added). “Failure to bring *an action* within the time specified constitutes
8 a waiver of any demand against the State on account of alleged overpayments.” NRS
9 368A.290(3) (emphasis added).

10
11 In addition to referencing the necessity of filing an *action* to obtain a refund, Chapter
12 368A is absolutely silent in regard to the requisite submission of a petition for judicial review
13 (even though other portions of the tax code specify the filing for such relief). Moreover, the
14 requirements of NRS 368A.290(1)(b) to bring an action “*against the Department*” facially
15 conflict with the judicial review statutes at issue here found in NRS 233B.130(2)(a), where the
16 Petitioner is to “[n]ame as respondents the agency and all parties of record to the
17 administrative proceeding....”

18
19 Consequently, Petitioners relied not only upon the legal precedent at that time, but also
20 upon the statutory distinctions between the *specific* judicial redress statute for the LET (NRS
21 368A.290), as opposed to the more general (and conflicting) directives as contained in the
22 Administrative Procedures Act (NRS 233B.130). This reliance was particularly appropriate in
23 light of the fact that NRS 368A.290 was enacted *after* the general judicial review provisions
24 found in NRS 233B.130 (and the amendments discussed in Edison), and precedent of this State
25 establishes that a subsequently enacted specific statute controls over an earlier general
26
27
28

1 provision.¹¹ Petitioners, then, had a “good reason” to believe that they would not be constrained
2 in court strictly to the record in the Commission, that they would be entitled to de novo judicial
3 redress, that they could obtain discovery in any subsequent judicial proceeding, and that they
4 did not have to ensure that they submitted “every last scrap of evidence” to the Commission in
5 order to have a court be able to examine and consider the same.
6

7 **4. The Representations and Action of the State in the Federal Proceedings**
8 **and elsewhere Reasonably Lead the Petitioners to Believe that Their**
9 **Avenue of Judicial Redress from an Adverse Decision of the Commission**
10 **was by Way of an Original Action Subject to De Novo Review, as**
11 **Opposed to a Petition for Review.**

12 The State of Nevada, through the Department and the Commission, have taken
13 inconsistent positions regarding the proper procedure to appeal an adverse decision of the
14 Commission. Even in Edison, the Court began by noting that “[b]oth now and in the past, the
15 Department has taken totally inconsistent positions in quasi-judicial administrative proceedings
16 regarding the proper procedure for a taxpayer who wishes to challenge the Department’s denial
17 of a refund.” Id. 127 Nev.Adv.Op. 22, at 14. Moreover, the Department had even taken
18 inconsistent positions with regard to Edison itself, and in a brief submitted to the Commission
19 stated that Edison “may file a law suit against the Department under NRS 372.680” and that
20 “Edison would have an opportunity before the district court to more fully develop the facts, if
21 appropriate.” Id. See also Department Letter of Nov. 17, 2003, Ex. 13 hereto, p. 2 n. 1 (“the
22 failure to conduct an evidentiary hearing at the administrative level does not prejudice the
23 taxpayer at the district court level”).
24

25
26 ¹¹ Cable v. Beemer, 64 Nev. 77, 100, 177 P.2d 677 – 678, (1947) (clarification added). See
27 also Quilici v. Strosnider, 31 Nev. 9, 115, 177, 179 (1911); and Washoe Co. Water
28 Conservation Dist. v. Beemer, 56 Nev. 104, 45 P.2d 779, 784 (1935); and Andersen Family
Assocs. v. State Engineer, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008).

1 In addition to the Department taking inconsistent positions in numerous *other* cases as
2 discussed in Edison, its conduct in the series of proceedings leading up to the dismissal of Case
3 2 aptly demonstrates that Petitioners reasonably believed that a de novo action was to be
4 afforded, along with the opportunity for discovery.

5
6 As stated above, Case 1 was filed with the District Court after the Petitioners' federal
7 action was dismissed by application of the federal Tax Injunction Act ("TIA"). See Deja Vu
8 Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation, 2006 WL 2161980 (D. Nev.
9 July 28, 2006) (Ex. 14 hereto). Generally, the TIA divests the federal courts of jurisdiction over
10 state tax matters when a "plain, speedy, and efficient remedy may be had in the courts of such
11 State." In the federal action, the Department filed a motion to dismiss pursuant to the TIA,
12 arguing that a "plain, speedy, and efficient" remedy existed in the Nevada courts because, if the
13 plaintiffs there sought an administrative refund:
14

15
16 *Within ninety days* of denial by the NTC of a taxpayer's appeal of a claim for
17 refund, the taxpayer may *bring an action in court*. *NRS 368A.290*.¹² By default,
18 jurisdiction for such actions lies in the District Court. Nev. Const. art 6, § 6, NRS
19 4.370. Therefore, the Nevada Supreme Court has original appellate jurisdiction.
Nev. Const., art. 6, § 4. See also, NRS 233B.150.¹³

20 Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-
21 00480, filed May 10, 2006, Ex. 15 hereto, p. 7 (emphasis added).

22 Then, in its reply to its motion to dismiss filed in the federal court, the State noted that
23

24
25 ¹² Petitioners brought Case 2 in this Court directly pursuant to, and within the time constraints as
26 set forth in, this very statute (NRS 368A.290) *cited by the State to the federal district court as*
providing Petitioners their remedy for judicial redress.

27 ¹³ While it is true that the State also cited NRS 233B.150, they did so as a "see also," and
28 therefore referred to that provision as providing an *additional basis* for the seeking of judicial
redress. And, more importantly, however, in the Court of Appeals the State *deleted* this reference
of additional relief.

1 State v Scotsman Mfg. Co. Inc., 109 Nev. 252, 849 P.2d 317 (1993), “[w]ould support the
2 proposition that *declaratory relief is available*¹⁴ notwithstanding NRS 358A.290(1).” Reply to
3 Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed
4 June 14, 2006. Ex. 16 hereto, p. 3 n. 2 (emphasis added).

5
6 The district court *agreed with the Department in this regard*, holding that NRS
7 368A.380(1) (the anti-injunction provision):

8
9 . . . does not prevent a *judicial challenge* either to the collection of the tax or the
10 constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme
11 Court, in a case involving a statute which precluded any suit whatsoever unless an
12 administrative claim had been filed, held that notwithstanding the statute, the
13 California corporation could bring the suit to challenge the tax. State v.
Scotsman Mfg. Co. Inc., 109 Nev. 252, 849 P.2d [sic] 317 (1993). This decision
strongly suggest that *declaratory relief is available* in State court notwithstanding
NRS 368A.280(1).

14 Deja Vu Showgirls, 2006 WL 2161980 (Ex. 14 hereto), at *3 (emphasis added).

15
16 The Department got its way on its arguments, and the federal district court dismissed the
17 Petitioners’ action by concluding that, in light of the concessions made by the Department, a
18 “plain, speedy and efficient” remedy existed in state court. Id. at pp. 5-6.

19 The Department took a similar position on appeal, arguing:

20 *Within ninety days* of denial by the [Nevada Tax Commission] of a taxpayer’s
21 appeal of a claim for refund, the taxpayer may bring *an action in court*.¹⁵ *Nev.*
22 *Rev. Stat. § 368A.290*. Jurisdiction for such action lies in the District Court.
23 *Nev. Const. art 6, § 6*, [footnote omitted]¹⁶ *Nev. Rev. Stat. § 4.370*. Therefore,

24
25 ¹⁴ Declaratory relief would not be permissible, of course, in a petition for judicial review.

26 ¹⁵ The State makes no reference whatsoever to the filing of a petition for judicial review.

27 ¹⁶ The omitted footnote to this comment stated: “This section of the Nevada Constitution
28 provides in the pertinent part: ‘The District Courts in the several Judicial Districts of the State
have *original jurisdiction* in all cases excluded by law from the original jurisdiction of the

1 the Nevada Supreme Court has original appellate jurisdiction. Nev. Const. art. 6 §
2 4.

3 Appellees' Answering Brief, 9th Cir., Docket No. 06-16634, filed January 5, 2007, Ex. 17
4 hereto, p. 12 (emphasis added; footnote in original).

5 Notably, the Department's argument to the Ninth Circuit *omitted any* reference to NRS
6 233B. In addition, the Department reiterated the reasoning of the federal district court (adopted
7 with the urging of the State itself), arguing that the Nevada Supreme Court decision in Scotsman
8 meant that the clubs could file their court action *without even exhausting administrative*
9 *remedies*:
10

11 The District Court further noted that the Nevada Supreme Court had specifically
12 recognized a judicial remedy in the face of parallel language in Nev.Rev.Stat.
13 Chapters 372 and 374. State, Nevada Dept. of Taxation v. Scotsman Mfg. Co.,
Inc., 109 Nev. 252, 849 P.2d 317 (1993), E.R. 48.

14 Scotsman involved an action for declaratory relief by a taxpayer challenging
15 application of the sales tax to it. *The various components of the sales tax in*
16 *Nevada are governed by procedures set forth in Nev. Rev. Stat. Chapters 372 and*
17 *374, which contained provisions substantially identical to those in Nev. Rev. Stat.*
18 *Chapter 368A. For example, Nev. Rev. Stat. § 372.670 and Nev. Rev. Stat. §*
374.675, applicable to the sales taxes, and Nev. Rev. Stat. § 368A.280(1),
applicable to the Live Entertainment tax, are substantially identical:

19 * * *

20 Applying the sales tax law to the matter before it, the Nevada Supreme Court in
21 Scotsman found not only that the taxpayer was entitled to challenge the
22 Constitutionality of the tax *as applied to it*, but, under the circumstances, it could do
23 so without having exhausted administrative remedies. Id. at 255-6, 849 P.2d at
320-1.

24 Appellees' Answering Brief, Ex. ___ hereto, pp. 14-15 (emphasis added; footnote omitted).

25 The Department expanded its position in this regard in briefing to the Ninth Circuit after
26

27
28 justices' courts'") (emphasis added). Id. Nowhere did the State reference jurisdiction to hear a
petition for judicial review.

1 the Petitioners moved to supplement the record on appeal with a number of the Department's
2 statements made before the Commission during the administrative appeals. The Department
3 then "clarified" that it was *not* taking the position "that the administrative refund remedy stands
4 by itself as a plain, speedy and efficient remedy." Appellees' Opposition to Motion for Leave to
5 Supplement the Appellate Record, 9th Cir., Case No. 06-16634, filed April 24, 2008, Ex. 18
6 hereto, p. 6.

8 Rather, it asserted that even "[i]f Appellants are right in their contention that the
9 administrative remedy is somehow futile, that would provide an additional basis for proceeding
10 by *direct refund action* in Nevada courts under Scotsman, *supra*, at 225, 849 P.2d at 319." Id.
11 at p. 7 (emphasis added). And, to make it clear to the Ninth Circuit that there existed a "plain,
12 speedy, and efficient" remedy in the Nevada courts, the Department made sure to point out that
13 the Petitioners "have brought two actions in the Eighth Judicial District Court for the State of
14 Nevada to challenge the Constitutionality [sic] of the live entertainment tax. *See* Exhibits A and
15 B (complaints in actions A533273 and A554970 ...)." Id. at p. 3. Of course the State later
16 successfully moved to dismiss Case No. 2.

19 These representations, most of them being made *before* the proceedings in the
20 Commission, certainly lead the Petitioners to reasonably believe that they would not be restricted
21 to the limited redress provided for by way of a petition for judicial review, and that they would
22 be able to develop a complete record in court.

24 **5. The Deja Vu Petitioners Need to Protect Their Right to a Full Record.**

25 Finally, the presentation of additional evidence is particularly important to the Deja Vu
26 Petitioners, as they did not participate in the appeal considered by the Commission regarding the
27 January through April 2004 requests for refund (since they were not subject to the LET until
28

1 later). However, since Department XI permitted the Deja Vu Petitioners to be added as plaintiffs
2 in Case 2, dismissed their independent civil action along with the K-Kel Petitioners, and ordered
3 them to submit a petition for judicial review within 30 days, justice would dictate that the Deja
4 Vu Petitioners be afforded the opportunity to present evidence (and, indeed, a full record) to the
5 Commission. While it would appear to be procedurally inappropriate to include the Deja Vu
6 Petitioners in this petition, in an abundance of caution in light of the District Court's ruling, the
7 Deja Vu Petitioners are making sure they are procedurally protected by being included in the
8 petition and by seeking relief through this application.
9

10 **III. CONCLUSION**

11
12 Petitioners request this Honorable Court to immediately remand this matter to the
13 Commission to allow Petitioners to present the materials obtained through discovery to the
14 Commission (and to conduct any necessary additional discovery). A contrary result would
15 unjustly prejudice Petitioners due to their reliance on the matters set forth above.
16

17 DATED this 26nd day of September, 2011.

18 Respectfully submitted,

19 BY: /s/ William H. Brown

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Deja Vu, et al. v. Nevada Department of Taxation
Spreadsheet of LET Collections by Taxpayer Group

Taxpayer Groups	FY04	FY05	FY06	FY07	FY08	FY09
10% LET payers						
Gentlemen's Club	\$ 3,001,494.94	\$ 5,036,598.82	\$ 5,441,714.56	\$ 6,890,235.73	\$ 7,193,498.60	\$ 6,812,760.62
Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures	\$ 1,945.17	\$ -	\$ -	\$ -	\$ -	\$ -
All Other Miscellaneous Store Retailers (except Tobacco Stores)	\$ -	\$ 20,720.90	\$ 19,277.17	\$ -	\$ -	\$ -
Caterers	\$ -	\$ -	\$ 2,812.14	\$ -	\$ 150.00	\$ -
Civic and Social Organizations	\$ 11,528.35	\$ 13,444.70	\$ 77,185.89	\$ -	\$ -	\$ 15.00
Corporate, Subsidiary, and Regional Managing Offices	\$ -	\$ 1,655.37	\$ -	\$ -	\$ -	\$ -
Cosmetics, Beauty Supplies, and Perfume Stores	\$ 48,020.54	\$ 968,956.07	\$ 1,118,434.14	\$ 1,220,534.24	\$ 1,096,763.03	\$ 1,145,338.40
Drinking Places (Alcoholic Beverages)	\$ -	\$ 619.60	\$ -	\$ -	\$ 38.50	\$ -
Electronic Shopping	\$ 1,300.20	\$ 1,237.05	\$ 1,169.20	\$ 900.17	\$ 774.60	\$ 784.00
Fine Arts Schools	\$ -	\$ -	\$ 2,683.50	\$ 982.20	\$ 1,123.30	\$ -
Fitness and Recreational Sports Centers	\$ -	\$ -	\$ 5,271.44	\$ 18,017.16	\$ -	\$ -
Food Service Contractors	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Full-Service Restaurants	\$ 6,777.17	\$ 58,516.30	\$ 21,812.05	\$ -	\$ 173.50	\$ 4,312.99
Gift, Novelty, and Souvenir Stores	\$ -	\$ -	\$ -	\$ 293.80	\$ 125.11	\$ 3,338.09
Hotels (except Casino Hotels) and Motels	\$ -	\$ -	\$ -	\$ 1,405.46	\$ 7,088.44	\$ -
Independent Artists, Writers, and Performers	\$ -	\$ -	\$ -	\$ -	\$ 100.00	\$ -
Lessors of Nonresidential Buildings (except Miniwarehouses)	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 73,418.34
Motion Picture and Video Production	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Musical Groups and Artists	\$ 21,011.88	\$ 47,941.83	\$ 74,782.08	\$ 61,020.46	\$ 26,655.95	\$ 1,921.00
Other Direct Selling Establishments	\$ 302.58	\$ -	\$ -	\$ -	\$ -	\$ -
Other Spectator Sports	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Promoters of Performing Arts, Sports, and Similar Events without Facilities	\$ 39,176.58	\$ 77,738.74	\$ 113,704.49	\$ 202,196.66	\$ 46,142.18	\$ 60,816.68
Recreational Goods Rental	\$ 12,872.10	\$ 7,625.10	\$ 9,666.50	\$ 8,193.10	\$ 3,905.69	\$ -
Sound Recording Studios	\$ -	\$ 6,875.00	\$ 3,726.30	\$ 3,570.00	\$ -	\$ -
Sporting and Athletic Goods Manufacturing	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Sporting Goods Stores	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Sports and Recreation Instruction	\$ -	\$ -	\$ -	\$ -	\$ 6,802.27	\$ 4,002.73
Sports Teams and Clubs	\$ -	\$ 1,875.22	\$ 2,389.63	\$ 141,593.95	\$ -	\$ 159,338.03
Theater Companies and Dinner Theaters	\$ 142,348.10	\$ 397,063.17	\$ 8,267.96	\$ -	\$ -	\$ -
Unclassified	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Subtotal of All 10% LET payers collected by the Department	\$ 288,777.60	\$ 6,660,667.95	\$ 6,965,297.84	\$ 8,441,334.34	\$ 8,267,045.14	\$ 7,427,411.33

Deja Vu, et al. v. Nevada Department of Taxation
Spreadsheet of LET Collections by Taxpayer Group

5% LET payers

	FY04	FY05	FY06	FY07	FY08	FY09	TOTAL
Administration of General Economic Programs		\$ 99,757.47	\$ 211,194.41	\$ 279,560.21			\$ 590,512.09
Agents and Managers for Artists, Athletes, Entertainers, and Other Public Figures			\$ 30,287.05	\$ 24,708.62	\$ 20,738.94		\$ 75,734.61
All Other Miscellaneous Store Retailers (except Tobacco Stores)					\$ 10,660.65	\$ 6,422.75	\$ 17,083.40
Cosmetics, Beauty Supplies, and Perfume Stores	\$ 654,447.45	\$ 1,141,170.90	\$ 1,405,014.45	\$ 1,544,963.37	\$ 309,355.09	\$ 255,347.93	\$ 5,900,248.18
Drinking Places (Alcoholic Beverages)	\$ 49,363.85						\$ 49,363.85
Gift, Novelty, and Souvenir Stores	\$ 29,945.81	\$ 101,543.05	\$ 91,936.57	\$ 81,820.89			\$ 305,246.32
Jewelry, Watch, Precious Stone, and Precious Metals			\$ 19,806.90				\$ 19,806.90
Lessors of Nonresidential Buildings (except Miniwarehouses)							
Musical Groups and Artists	\$ -	\$ 335.00	\$ 34,133.17	\$ 38,082.17	\$ 2,080.00	\$ 1,428.57	\$ 75,063.91
Other Spectator Sports							
Promoters of Performing Arts, Sports, and Similar Events with Facilities	\$ 390,840.80	\$ 680,924.43	\$ 495,626.24	\$ 743,083.21	\$ 48,278.03	\$ 13,963.05	\$ 2,311,715.76
Promoters of Performing Arts, Sports, and Similar Events without Facilities		\$ 99,852.91			\$ 480,512.11	\$ 400,102.70	\$ 1,880,467.72
Racetracks	\$ 2,906.82	\$ 4,655.45	\$ 4,546.09	\$ 5,486.81	\$ 17,049.32		\$ 34,544.49
Sound Recording Studios					\$ 3,468.95	\$ 743.75	\$ 4,212.70
Sporting and Athletic Goods Manufacturing	\$ 4,557.50	\$ 5,982.25	\$ 6,209.00	\$ 6,568.00	\$ 3,277.50	\$ 3,088.25	\$ 29,682.50
Sports Teams and Clubs	\$ 19,610.93	\$ 23,327.71	\$ 39,734.78	\$ 39,055.69	\$ 10,045.85	\$ 12,316.00	\$ 152,090.96
Unclassified					\$ 7,422.75	\$ 5,749.50	\$ 13,172.25
Subtotal of All 5% LET payers collected by the Department	\$ 1,176,711.11	\$ 2,377,697.55	\$ 2,887,415.55	\$ 3,087,919.97	\$ 622,117.74	\$ 571,141.48	\$ 10,066,868.35
Department Total LET Collected							
Total Gaming LET Collections							
Total LET (Gaming + Department)							
Gentlemen's Clubs as % of Total Collected per FY	3%	5%	5%	5%	5%	6%	5%

Deja Vu, et al. v. Department of Taxation

Percent Error Calculations

	FY04	FY05	FY06	FY07	FY08	FY09	TOTAL
Department Totals at Years End	\$ 4,345,869.00	\$ 8,516,032.00	\$ 8,688,863.44	\$ 10,828,426.20	\$ 10,188,599.15	\$ 9,169,248.06	\$ 51,737,037.85
Department Totals by Month (Monthly Receipts)	\$ 4,438,450.77	\$ 8,698,564.10	\$ 9,343,639.40	\$ 11,312,290.91	\$ 9,656,757.86	\$ 8,986,150.26	\$ 52,435,853.30
Difference	\$ 92,581.77	\$ 182,532.10	\$ 654,775.96	\$ 483,864.70	\$ (531,841.29)	\$ (183,097.80)	\$ 698,815.45
Total Gaming LET	\$ 84,855,958.00	\$ 99,368,305.00	\$ 108,420,424.56	\$ 121,655,195.80	\$ 121,638,258.85	\$ 112,405,394.94	\$ 648,343,537.15
Total LET (Gaming + Department Monthly Receipts)	\$ 89,294,408.77	\$ 108,066,869.10	\$ 117,764,063.96	\$ 132,967,486.71	\$ 131,295,016.71	\$ 121,391,545.20	\$ 700,779,390.45
% Error Department (Difference/Totals at Year End*100)	2%	2%	8%	4%	-5%	-2%	1%
Total LET (Gaming + Department year end)	\$ 89,201,827.00	\$ 107,884,337.00	\$ 117,109,288.00	\$ 132,463,622.00	\$ 131,826,858.00	\$ 121,574,643.00	\$ 700,080,576.00
% Error Department (Difference/Totals by Month*100)	2%	2%	7%	4%	-6%	-2%	1%
% Error Department + Gaming (Difference/Total LET*100)	0%	0%	1%	0%	0%	0%	0%



KENNY C. GUINN
Governor

BARBARA SMITH CAMPBELL
Chair, Nevada Tax Commission

CHARLES E. CHINNOCK
Executive Director

DEPARTMENT OF TAXATION

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MEMORANDUM

Date: March 14, 2005
To: Chuck Chinnock
From: Marian Henderson
CC: Lynne Knack
Subject: Request for analysis of revenue impact from making changes in the LET

A request was made to analyze the fiscal impact of making changes to the Live Entertainment Tax (LET). Two scenarios were to be explored. A summary of the analysis of the scenarios is as follows:

- 1) Eliminate the 300 seats threshold: This change would cause the inclusion of many of the smaller venues which are now exempt from the tax. Businesses that would now be subject to the tax would specifically include bars, nightclubs and gentlemen's clubs with a seating capacity of fewer than 300 patrons. The fiscal impact is difficult to estimate, as not all bars and nightclubs provide live entertainment, nor do they charge a cover charge for admission. We also are not able to determine whether the live entertainment is provided on a regular, periodic or one time basis. Approximately 150 businesses which fall under the 300 seat threshold responded to our initial request for information which was sent to all potential taxpayers, including approximately 20 gentlemen's clubs. Since the gentlemen's clubs remit a much higher per-capita dollar amount of tax, two separate financial analyses were conducted. Using the seating capacities and per-capita tax collected by the existing taxpayers, we estimate that approximately \$1,614,600 in tax annually may be generated by the bars and nightclubs. In addition, using the same per-capita analysis of the existing gentlemen's clubs which currently have a seating capacity of fewer than 300 patrons, we estimate that an additional \$4,197,900 may be generated. The estimated total additional revenue from lowering the seating threshold is approximately \$5,812,500. This would be an increase of approximately 56% over the current revenue received.
- 2) Eliminate the 300 seats threshold and the 10% tax on food, beverage and merchandise: Approximately two-thirds of the existing tax which is collected is from the 10% tax on food, beverage and merchandise. For the first seven months of fiscal year 2005, \$2,053,788 in tax was collected on food, beverage and merchandise of the total tax paid of \$3,128,041. By eliminating this tax, approximately \$3,520,800 would be lost annually. Using the same per-capita figures from the first example, the estimated additional revenue from bars and nightclubs which seat fewer than 300 patrons would be approximately \$603,900. The estimated additional revenue from gentlemen's clubs would be approximately \$3,470,840. The net estimated total additional revenue from eliminating the seating threshold and the 10% tax on food, beverage and merchandise is approximately \$553,900, or an increase of about 4% over the current revenue being received.

Exhibit 2

DV000002

The following is a breakdown from calendar year 2004 of Live Entertainment Tax revenue which was received from all taxpayers:

- [REDACTED] from one time or annual events
- [REDACTED] from sporting events
- [REDACTED] from nightclubs
- [REDACTED] from promoters
- [REDACTED] from performing arts centers
- [REDACTED] from raceways
- [REDACTED] from gentlemen's clubs
- Total tax received \$8,913,795

For the first seven months of fiscal year 2005, \$4,306,370 has been collected to date. The economic forum projection for this fiscal year is \$8,700,000.

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Exhibit 2

DINO DICIANNO

From: aalonso@lionsawyer.com
Sent: Thursday, October 09, 2003 10:55 AM
To: DINO DICIANNO
Subject: LET INFO



LETMEMO.wpd
(17 KB)

Here is the information that I spoke to you about. I hope it is useful to you.

Hope all is well.

A

Alfredo T. Alonso
Government Affairs Manager
Lionel Sawyer & Collins

This e-mail message is confidential, intended only for the named recipient(s) above and may contain information that is a trade secret, proprietary, privileged or attorney work product. If you have received this message in error, or are not the named or intended recipient(s), please immediately notify the sender at 702-383-8888 and delete this e-mail message and any attachments from your workstation or network mail system.

DV000575

Exhibit 3

MEMORANDUM

To: Robert D. Falss
From: Louis V. Csoka
Subject: S.B. 8 -Construction of "Live Entertainment"
Date: October 9, 2003

As requested by Bruce A. Aguilera, Vice President and General Counsel of Bellagio Casino Hotel, I have researched certain issues involving the proper construction for "live entertainment" pursuant to Nevada Senate Bill 8 of the 20th Special Session. Below is the result of my research:

I. Questions Presented

A. Is the meaning of "live entertainment" identical under the amended Casino Entertainment Tax ("CET") and its successor, the Live Entertainment Tax ("LET")?

B. Once promulgated, will the Department of Taxation's (the "Department") definition of "live entertainment" be controlling under both the CET and the LET?

C. Will the Department's definition of "live entertainment" supercede any other administrative definitions of the same promulgated for purposes of the CET?

II. Short Answers

A. The meaning of "live entertainment" under the amended CET and LET is the same.

B. Once the Department determines the meaning of "live entertainment," that definition will control under both the CET and the LET, regardless of which agency collects the tax.

C. The Department's definition of "live entertainment" will supercede all prior or contemporaneous administrative definitions promulgated to explain that term.

DV000576

Exhibit 3

III. Analysis

A. "Live Entertainment" Under the CET and the LET

1. The Definition of "Live Entertainment" Is Identical

Words used in one place in a legislative enactment generally have the same meaning in every other place in the statute. See Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995) (subsequently, distinguished on different grounds); see also Vlelma v. Eureka Co., 218 F.3d 458 (5th Cir. 2000) (holding similarly; subsequently, distinguished on different grounds). In particular, *identical words* used in different parts of the same act are intended to have the *same meaning*. See Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 333 (1994) (subsequently, distinguished on different grounds).

Both the amended CET and the LET provide in *identical language* that "live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present." S.B. 8, 72nd Leg., 20th Spec. Sess. § 77 and 171(5) (2003) (enacted) (quotation in original).

Therefore, because S.B. 8 uses identical definitions for "live entertainment," the term must mean the same thing in both contexts.

2. Different Construction May Be Unconstitutional

The United States Supreme Court explained that the Equal Protection Clause of the United States Constitution applies "to taxation which in fact bears unequally on persons or property of the *same class*." Allegheny Pittsburg Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 343 (1989) (emphasis added; subsequently, distinguished on different grounds); see generally U.S. Const. amend. XIV, § 1.

The Nevada Supreme Court further explained that only where a tax "results in intentional discrimination, *arbitrary action*, constructive fraud, or *grossly and relatively unfair assessment* are the constitutional provisions relating to equal protection and uniformity violated." Recanzone v. Nevada Tax Comm'n, 550 P.2d

401, 404 (Nev. Sup. Ct. 1976) (emphasis added);¹ see also Topeka Cemetery Assoc. v. Schnellbacher, 542 P.2d 278 (Kan. Sup. Ct. 1975) (holding that corporate versus individual ownership of cemetery plots is not a rational, permissible basis for tax classification; subsequently, distinguished on different grounds).

Additionally, under the common law, an interpretation that produces unjust or oppressive results should be avoided. See City and County of Denver v. Holmes, 400 P.2d 901 (Colo. Sup. Ct. 1965); see also Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 376 (Iowa Sup. Ct. 2000) (holding similarly); Plerson v. Faulkner, 279 N.W. 813 (Neb. Sup. Ct. 1938) (holding that unequal operation of laws should be avoided).

Entertainment companies, regardless of whether they offer a gaming component as part of their entertainment package, are essentially the *same class of entities*. If "live entertainment" is construed differently under the amended CET than under the LET and this results in a greater scope of taxation under the CET, then this is an outcome where the casino industry faces a different burden than other entertainment industries for essentially the same activities. This would be an unequal application of the laws.

In addition, because S.B. 8 itself offers identical definitions for "live entertainment" for both the amended CET as well as the LET, creating two different administrative definitions for "live entertainment" is *arbitrary* and cannot be justified on a statutory basis. Therefore, such construction also appears to be unconstitutional.

B. Plain Language Designates the Department

Where the language of a statute is clear and unambiguous, its clear meaning may not be evaded by an administrative body or court under the guise of construction. See Davis v. North Carolina Dept. of Human Resources, 505 S.E.2d 77 (N.C. Sup. Ct. 1998).

¹Under the Nevada Constitution, taxes must be uniformly applied. Specifically, the Constitution provides that the "legislature shall provide by law for a *uniform and equal* rate of assessment and taxation . . ." N.V. Const. Art 10. §1(1) (emphasis added). In the context of property taxes, for example, where common elements in condominiums were taxed differently than common elements in planned communities, such tax was held unconstitutional. See Sun City Summerlin Community Assoc. v. Department of Taxation, 944 P.2d 234 (Nev. Sup. Ct. 1997).

Specifically, under S.B. 8, the "*Department shall provide by regulation for a more detailed definition of 'live entertainment' consistent with the general definition set forth . . . (herein) for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.*" S.B. 8, 72nd Leg., 20th Spec. Sess. § 77 (2003) (enacted) (emphasis added).

A plain reading of the foregoing provision reveals that the Nevada legislature entrusted only the Department with the responsibility of promulgating regulations for the meaning of "live entertainment." Therefore, the Department has the sole responsibility to determine the meaning of "live entertainment," regardless of which agency collects the taxes.

C. The Department Has the Ultimate Authority

Again, under S.B. 8, the "*Department shall provide by regulation for a more detailed definition of 'live entertainment' consistent with the general definition set forth . . . (herein) for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.*" S.B. 8, 72nd Leg., 20th Spec. Sess. § 77 (2003) (enacted) (emphasis added). Furthermore, under S.B. 8, the Department can already adopt regulations. See id. at § 7.²

Therefore, even if Nevada gaming regulators were to adopt an interim definition for "live entertainment" for purposes of the CET, the Department's definition -when adopted- would immediately supercede such intermediate regulatory definition for purposes of both the LET as well as the CET.

IV. Conclusion

For the foregoing reasons, the meaning of "live entertainment" under the CET and LET is identical and will be conclusively determined by the Department.

²Chairman Dennis Neillander, in an informal memorandum to the gaming industry, acknowledged that "*the Department . . . is to adopt regulations that further define live entertainment. Therefore, a conclusive determination of the types of entertainment subject to the tax cannot be made by the Board at this time . . .*" Chairman Dennis Neillander, Nevada State Gaming Control Board Industry Letter, Senate Bill 8 -Creation of Live Entertainment Tax and Amendment to the Casino Entertainment Tax (Aug. 7, 2003) at 2 (emphasis added).

Senate Bill 8
Page 5
October 9, 2003

DINO DICIANNO

From: Nevada Taxpayers Association [info@nevadataxpayers.org]
Sent: Tuesday, October 21, 2003 2:05 PM
To: Dino DiClanno
Subject: Fw: LET/Gaming
Importance: High

FYI

Carole

----- Original Message -----

From: Nevada Taxpayers Association

To: Barbara Campbell ; David Turner

Cc: Gaylyn Spriggs

Sent: Thursday, October 16, 2003 12:19 PM

Subject: LET/Gaming

Dear All -

I have attached a copy (both in Word Perfect and Word) of that portion of a transcript that Bob Faiss sent me re the Gaming Control Board meeting. I am not sending it to anyone else since I am not sure what the ground rules are concerning dissemination of transcripts. For this reason, I would appreciate it if you would use this just for your information and not share it with anyone else.

Carole

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DV000604

Exhibit 4

1 2. CONSIDERATION OF: Proposed Amendments to NGC
2 REGULATION 13, "CASINO ENTERTAINMENT TAX."

3 SECRETARY EPLING: Yes. Which is
4 consideration of proposed amendments to NGC Regulation 13,
5 casino entertainment tax.

6 CHAIRMAN NEILANDER: In respect to this
7 matter, myself and Board Member Scherer, as well as
8 Chairman Bernhard from the Commission, have been
9 participating in various public hearings with the
10 Department of Taxation. The legislation that is the basis
11 for this regulation does set forth a set of procedures
12 that are to be followed and in adopting the regulations,
13 and one of those requirements is that we work with the
14 Department of Taxation to try to make sure the regulations
15 are consistent, and we have been doing that. We have gone
16 through various drafts with them and have taken public
17 comment on at least three different occasions.

18 The process is a little bit unique because
19 the Senate Bill 8 requires that the Board actually adopt
20 the regulation, and in discussions with Chairman Bernhard,
21 the procedural method that we have proposed is sort of a
22 two-tiered method. The first is that the Board would
23 adopt the regulation under Chapter 233B of the Nevada
24 Revised Statutes, which is a different process than what
25 we're normally used to.

1 This hearing today is not a 233B hearing.
2 This is a normal hearing in the course of our business,
3 because the Commission is going to adopt an amendment to
4 Regulation 13 which will be identical to the Chapter 233B
5 regulation.

6 So I wanted to get this on the agenda today
7 so that we can give notice in respect of the Commission's
8 duties in adopting Regulation 13, and then the Board will
9 have to have a separate 233B hearing which will have to be
10 noticed in accordance with Chapter 233B. And we will do
11 that at a later time.

12 But my intent today was to get these issues
13 in front of the Board, begin to create a record for the
14 Commission, and also get some feedback from my colleagues
15 and anyone else who wants to provide comments so that I
16 can go back to the next joint meeting which the Department

17 of Taxation and continue that process. But I felt like
18 because of the timing, it was important to go ahead and
19 have this matter in front of the Board today.

20 Linda Hartzell from the Audit Division and
21 Toni Cowan from the Attorney General's Office have been
22 working on this issue with us, among other members of
23 staff, and today they are prepared to give you a brief
24 overview of where we're at in respect of the regulation.
25 You will note that you should have a draft in

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1 front of you dated 10/7. Those in the audience, if you
2 have not seen this draft, there should be copies
3 available. We did post it on our website, but I
4 understand that we were working on this as late as
5 yesterday morning even, I believe. So this is all new.
6 So I know everyone is still digesting this.

7 But with that, I'll turn it over to
8 Miss Hartzell.

9 MS. HARTZELL: Thank you, Chairman Neilander.
10 It is not my intent to walk through in a great deal of
11 depth. What I would like to do is cover each section very
12 briefly, and just hit some of the highlights.

13 The very first section that we have is the
14 definition section. Of course, the definition section
15 sets the groundwork for what is and is not taxable under
16 the regulation. It's not my intent to cover every
17 definition, but we can start by covering a couple of them.

18 The very first one we need to talk about is
19 an admission charge. This comes from section 66 of Senate
20 Bill 8. The majority of the language you see in front of
21 you comes directly from the bill.

22 However, starting with the words "This term
23 includes," those are all amendments that we have made that
24 we feel are necessary to bring clarity to the issue. We
25 are indicating that an admission price might be also a

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1 minimum purchase of food or refreshments or merchandise.
2 It also could be a table reservation fee, an entertainment
3 fee or a cover charge. None of this is new to the
4 industry at all.

5 That is not something that we have had any
6 commentary on at all so far. No one has raised the issue.

7 The boxing is simply it needs to be defined

8 because the statute exempts boxing, which is regulated
9 under NRS 467 to be exempt from the live entertainment
10 tax. The definition was broadened here based on some
11 information that we obtained from the Athletic Commission.

12 Starting in number 4, you have a very
13 critical issue, and that is the definition of a facility.
14 It is in looking at the definition of facility that we
15 first become aware that there are really two entirely
16 separate classes of taxpayers for the purpose of this
17 regulation. All I have done with this facility definition
18 is taken it basically from the statute and simply reworded
19 it slightly because of the awkwardness of referring to any
20 other licensee.

21 I felt it was better to simply take an
22 approach of defining facility for the smaller gaming
23 properties and then separately defining it for the larger
24 gaming properties.

25 And you can see here that I have indicated in

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1 item (a) that if the entertainment is provided at a
2 licensed gaming establishment that is licensed for less
3 than 51 slot machines and less than six games, a facility
4 means an area or premises where live entertainment is
5 provided and an admission charge or other consideration is
6 collected.

7 This becomes very significant because you
8 will note here that if you are one of those smaller gaming
9 properties, that unless you charge an admission charge,
10 your facility is not subject to tax. That is a very
11 critical issue. So I wanted to highlight that one.

12 One other -- there are a couple of areas that
13 you will see printed in gray here. The gray areas in here
14 are ones that represent changes from an August 22nd draft.
15 Not everything that I added is in gray. These are simply
16 changes from an August 22nd draft.

17 One thing you will see is where we have
18 indicated other consideration is collected from one or
19 more persons, and that is because the issue has been
20 raised that if an admission charge is not collected from
21 everyone, there was the question as to whether or not the
22 facility was taxable at all. It is of course our position
23 that if an admission charge is collected, from anyone, an
24 admission charge is being collected and it's subject to
25 tax.

1 Also there is some additional language that
 2 we have put in here, and this is something we feel will
 3 primarily apply to restricted locations, although there is
 4 some potential for it to apply to other people as well.
 5 But we are looking at an increase in the price of food,
 6 refreshments or merchandise that occurs exactly when the
 7 entertainment begins is going to be deemed as
 8 consideration paid for the right or privilege of entering
 9 the area or premises where the live entertainment is
 10 provided. Now that is something that we have had some
 11 controversy expressed at this point, and I wanted to make
 12 you aware of that.

13 Section (b) deals with the larger properties
 14 where the question of what a facility is, is much broader.
 15 There is no requirement that there be an admission charge,
 16 and it is essentially any area on the curb-to-curb
 17 premises where live entertainment might be offered.

18 It is when we reach section 5 that we get
 19 into probably the most difficult area of this regulation,
 20 and that is the very definition of live entertainment. As
 21 you can see, the way that Board staff at this point has
 22 approached the issue is to essentially say that it's
 23 everything except what is listed below.

24 That is not the approach at this point that
 25 the Department of Taxation is taking. They are taking the

1 opposite approach of defining what it is. I'm simply
 2 putting it out there for your awareness.

3 CHAIRMAN NEILANDER: I would comment there
 4 that actually they have defined it as what it is but then
 5 in the most recent hearing also added a section that said
 6 what it isn't. So I don't know that we're that far apart.
 7 Ours says here is what it isn't and also here is what it
 8 is.

9 So I think it is just a drafting issue. I
 10 don't think it is substantive. We chose to go to that
 11 direction because the casino entertainment tax
 12 historically has defined entertainment and then provided a
 13 list of exclusions. So we felt that that was the way it
 14 was drafted previously. So we just followed in that same
 15 direction.

16 MS. HARTZELL: Thank you, Mr. Chairman.
 17 You will note here that we have several

18 issues listed and they are alphabetized. I wanted to
19 point out that we are presenting today two alternatives on
20 item (b). We have the issue of recorded music, which as
21 anyone who has been following this issue at all is aware
22 is a very controversial issue.

23 We have presented the first option as saying
24 that if you have a disc jockey that is presenting recorded
25 music, they would not be considered subject to the tax

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1 unless they do one of three things: unless the manner or
2 the presentation constitutes a performance in its own
3 right; if the person that is the DJ has some notoriety, or
4 if dancing is permitted. That is option one. That is the
5 paragraph that's printed first for item (b).

6 There is also an alternative (b) in which we
7 essentially take the position of ignoring the issue of
8 dancing and simply saying that the DJ would have to
9 essentially become a performer. And we have listed three
10 tests under which we would consider them to be a
11 performer: namely, that this individual engages in
12 substantial interaction with patrons, or the advertising
13 is directed at bringing attention to the person who is
14 going to serve as the DJ, or if this individual does
15 something more than just spin records. And I'm not
16 talking about just vocalizing; I'm talking about visual
17 entertainment, such as physical stunts, dancing,
18 pantomimes, similar activity of that nature.

19 Are there some questions or would you like me
20 to continue to move forward on that?

21 CHAIRMAN NEILANDER: This is the area where
22 we have had the most difficulty in terms of trying to
23 define these activities. Just a little bit more
24 background.

25 When the Legislature adopted Senate Bill 8,

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1 there weren't really any hearings, and there really is not
2 a lot of -- actually, there isn't any legislative history
3 with respect to the meaning of some of these terms.
4 Although there is a statement that Senator Townsend made
5 in the Senate journal when he and his colleagues voted for
6 this bill which in essence said that it was the intent of
7 the Legislature not to reduce the tax base on matters that
8 were currently being subject to the old casino

9 entertainment tax. But rather, the notion was to add
10 these other venues and pick up additional revenue.

11 Having said that, however, the legislation
12 itself in defining live entertainment among other things
13 is subject to interpretation. I think when we first
14 looked at this, at least I was taking the position that
15 dancing in and of itself was a form of entertainment.

16 We have had this debate with the Tax
17 Commission for some time now, and I think that based on
18 the comments that we have received jointly, I felt it was
19 appropriate at this time to go ahead and propose an
20 alternative that did not rely solely on the dancing,
21 because if you read the statute literally, I mean you
22 definitely can come to that interpretation. Because
23 Taxation to some extent was uncomfortable taking it that
24 far, what we have proposed here, and would like to get
25 your thoughts on this, is that rather than -- we go back

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1 more to the language in the statute, and rather than
2 relying on the dancing alone, we're really looking at, as
3 Miss Hartzell outlined, a different sort of a test, which
4 would rely more on I think what would be a traditional
5 interpretation of entertainment by other persons.

6 So that's what alternative (b) is. And I
7 personally think that that is the direction that we need
8 to go in order to resolve this matter.

9 MEMBER SCHERER: I guess I have some concern
10 about that for a number of reasons. One, it is my
11 understanding the legislative counsel bureau in putting
12 together their projections started with the current base
13 of the casino entertainment tax and then they added on to
14 that. They did not subtract anything.

15 This definition would subtract from what is
16 currently taxable, which is the dancing that occurs in
17 these nightclubs at various casino premises. So I don't
18 know that that is consistent with anything that the
19 Legislature did or what little legislative history there
20 is based on the LCB's projections and based on Senator
21 Townsend's comments.

22 The definition of live entertainment talks
23 about any activity provided by a person. It doesn't say
24 provided by a performer. It doesn't say provided by an
25 entertainer. It says provided by a person.

1 So clearly with this new subsection (c) that
 2 Miss Hartzell has added that excludes jukeboxes, clearly
 3 that is excluded I think in the language. I don't know
 4 that there is any room for interpretation there at all.
 5 But where you have a DJ there spinning records, I think
 6 there is at least a legitimate argument that the
 7 Legislature intended that to be taxable, and in fact, what
 8 little legislative history there is I think supports the
 9 view that the Legislature intended that to be taxable.

10 And I will say that this alternative
 11 language, I'm not sure how we go about as a practical
 12 matter in the Audit Division having to determine what is
 13 substantial interaction with patrons and having different
 14 auditors come up with different conclusions based on what
 15 their view of substantial interaction is. So I am
 16 concerned about that.

17 I guess I would like to -- I'm not a big fan
 18 of taxes generally, would prefer to see a lot not taxable.
 19 But I also don't want to fail in our statutory duty to
 20 enforce what the law as the Legislature has adopted it.

21 And I guess what I might suggest is this.
 22 That if we adopt an interpretation that is different from
 23 what the Tax Commission has adopted, because these
 24 regulations are being adopted pursuant to 233B, that means
 25 they are going to go to the legislative commission for

1 review and we can allow the legislative commission to
 2 resolve this and tell us what they think the legislative
 3 intent was behind this and whether there are supposed to
 4 be two different definitions here, one for gaming
 5 establishments that have historically paid this tax and
 6 one for others, or whether we need to reconcile them with
 7 one definition, and if so, which definition that is.

8 CHAIRMAN NEILANDER: That's the issue.
 9 Lawyers will differ on this.

10 I think the other side of that argument is if
 11 you read the plain language in the statute, you don't even
 12 look at the legislative intent. That is the argument that
 13 we have been getting at the Tax Committee hearing, is that
 14 the plain language of the statute doesn't address dancing,
 15 and the fact is that the Legislature deleted the dancing
 16 language from the old statute.

17 MEMBER SCHERER: I think if you had only

18 recorded music with no person there physically spinning
19 the records, I think that would certainly be with the
20 plain language, and I think the jukebox exception in
21 (5)(c), clearly that is supported by the plain language.
22 I think because they chose to use the word person rather
23 than performer or entertainer, I think there is some room
24 for interpretation in the statutory definition of live
25 entertainment.

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1 I really don't have a strong feeling one way
2 or the other except for the fact that I'm concerned that
3 we could end up losing tax revenue when the Legislature's
4 intent was to raise additional revenue. I don't want to
5 go back in front of them next session and have them say
6 how come you failed to collect this tax that we told you
7 to go collect. If the legislative commission tells us
8 that wasn't what they intended, I certainly don't have any
9 heartaches with that.

10 CHAIRMAN NEILANDER: One of the things we're
11 doing right now is we're doing some research to try to
12 compile some numbers to the extent we can to see what
13 percentage of these activities are attributable to
14 essentially what we're talking about is nightclubs, the
15 kind of nightclub atmosphere, venue. And so we are doing
16 that research right now because, obviously, that is
17 something that both the Governor's office and the
18 Legislature will be interested in as we proceed. We spent
19 a lot of time at the joint hearings discussing that issue.
20 Mr. Hartzell, why don't you go ahead and
21 briefly hit the other major points.

22 MS. HARTZELL: Thank you. As Member Scherer
23 has already covered, (c) is simply the jukebox exception.

24 Item (d), just for informational purposes,
25 what we're trying to do there is simply to clarify once

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1 and for all that acts like the circus acts that are free
2 of charge and they are out in the open area are clearly
3 not subject to the tax.

4 Also there is the possibility that you could
5 have a live band presenting music in the middle of the
6 pit. As long as they are not recreating a lounge around
7 the area where the bandstand is, there is the potential
8 for looking at that as not being live entertainment, if we

9 can basically substantiate that it is a draw to the gaming
10 area rather than live entertainment provided in
11 conjunction with the selling of food and beverage. So
12 that is all that that is for is to try to eliminate or at
13 least to clarify that we do not wish to try to tax that,
14 that we do not consider that to be consistent with the
15 intent of taxing live entertainment.

16 Item (e) is something that's been well
17 addressed. We have already sent out a September 5th
18 letter indicating basically that ambient background music
19 that is incidental to the primary purpose does not
20 constitute live entertainment. I continue to get
21 inquiries periodically asking for determinations. I think
22 we have a very good handle on where that dividing line is
23 at this point.

24 The only other thing that I really wanted to
25 highlight here is after you see letter (m), you will see

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1 another gray block of language that starts with the
2 words "Except as otherwise limited above." In conjunction
3 with doing some drafting work with the rest of the staff
4 on this regulation, one of the things that was done was a
5 visit to some of the clubs basically looking for the issue
6 of DJ's as performers.

7 But one of the things that we have found that
8 needs to be addressed in the regulation is the issue that
9 a number of these nightclubs do have what might be termed
10 go-go dancers. They are employees or independent
11 contractors -- I'm not sure which -- but clearly they are
12 authorized to be on specific stages or platforms. They
13 are dressed typically in costumes, probably selected by
14 the club, and so on. They are clearly acting as
15 performers.

16 So what I did here is basically put in a
17 section that says unless it falls under some other
18 exception listed above, the presence of those go-go
19 dancers, or whatever name you might like to call them,
20 that does constitute live entertainment.

21 CHAIRMAN NEILANDER: I guess that this comes
22 up in a couple different contexts in terms of trying to
23 make sure that Taxation and the Gaming Control Board are
24 being consistent. The first is the notion of patrons.
25 And as I said earlier, there is -- I think I started out

1 from the position that patrons who may be entertaining
 2 each other could be construed under the statute as being a
 3 form of live entertainment. But I think there again are
 4 two schools of thought on that.

5 There is also the notion that really if it is
 6 a patron driven activity, it's not within the definition
 7 of live entertainment.

8 The other thing is that there is, has been
 9 testimony provided in front of the joint committee in
 10 respect of the Legislature's intent to capture these
 11 gentlemen's clubs where there is a form of live
 12 entertainment is the dancing which is performed in those
 13 clubs. And I don't know, this is just some suggested
 14 language that we came up with based on our observations.
 15 But it seems that you really need to treat those kind of
 16 things equally.

17 So to me, they seem to be along the same
 18 lines. So that's why we have added that definition.

19 MEMBER SCHERER: If I might ask a question on
 20 subsection (e) there, the ambient background music. It
 21 says "which is incidental to the primary attraction to the
 22 facility, or to the primary basis for the admission charge
 23 for the facility." I wanted to ask, what kind of
 24 facilities did you have in mind that might charge an
 25 admission charge but where the background music would be

1 ambient in nature and not taxable?

2 MS. HARTZELL: I believe probably one example
 3 was the much publicized Eifel Tower restaurant where there
 4 is a charge to go upstairs. There is an admission charge.
 5 Presumably, I think the thinking is if someone were to pay
 6 that charge, they are not paying it specifically because
 7 they had a piano player.

8 Admittedly, for licensed gaming
 9 establishments, I look at that as a pretty limited issue,
 10 because typically if there is live entertainment and they
 11 are paying an admission charge, it ordinarily would not be
 12 considered incidental. But we did not want to have a
 13 situation where if there was an admission charge it was
 14 automatically -- that they were going to end up being
 15 treated substantially different if the music was
 16 identical.

17 MEMBER SCHERER: As I just try and brainstorm

18 through this, I don't know if, for example, like the
19 Guggenheim Museum, if they happen to have a string quartet
20 come in and was playing in the background as you went
21 around and looked at the exhibits, I guess you might say
22 that was incidental, ambient, background music. I assume
23 they charge an admission charge to get into the museum
24 there.

25 MS. HARTZELL: Another area that I wanted to

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1 highlight to your attention is item 10, the shopping mall.
2 This is a definition created. However, it is basically
3 taken as a dictionary definition. It is nothing
4 particularly unusual.

5 The only thing is that I think there may be
6 situations which are going to be purported to be shopping
7 malls that may not meet our common understanding of a
8 shopping mall, and that is an issue that going forward we
9 are going to have to wrestle with. As you know, we have
10 some issues basically related to shopping malls as to
11 whether they are part of the gaming establishment or not,
12 but that is addressed a little bit later in the
13 regulation.

14 The next major section of this regulation is
15 applicability. And it's in this section where we
16 basically kind of lay down the ground rules about when a
17 facility goes into entertainment status and so on. It
18 basically moves from defining live entertainment to saying
19 when does this live entertainment apply.

20 You will notice that paragraph 1 is the
21 paragraph that actually imposes the tax. This is worded
22 almost identical to the statute. The only difference is
23 that in that grayed language, you do see during live
24 entertainment status. I believe that was also the
25 intended meaning. But we simply inserted that for

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1 clarity.

2 Just because a facility might happen to be in
3 operation during the day but there is no entertainment,
4 that certainly we would not take the position that it
5 should be taxed all day long if there is a portion of the
6 day when it does not have live entertainment.

7 You will see some new language over in items
8 2 and 3. This is really not new information. The

9 definition of when live entertainment status commenced is
10 not significantly different than it was before.

11 We did decide that it was worthwhile to try
12 to define when it ends also. And that is why it got moved
13 from the definition section to the applicability section,
14 simply because the language wasn't very manageable as a
15 definition.

16 Items 10 and 11 might be worth taking a
17 little bit closer look at. We have always historically
18 had a little bit of trouble with the issue of if you have
19 bars that are nearby an entertainment area, is that
20 subject to tax or is it not. And you can see that I have
21 added some language to address the issue of a -- actually
22 number 11 is the one where there's -- let me start over
23 here.

24 Section 10 deals with the issue of where you
25 have a facility where an admission charge is collected but

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1 you might have that facility divided into two areas. For
2 example, it might have a main restaurant and a patio.

3 We are taking the position at staff at this
4 point that if there is an admission charge to the facility
5 as a whole, the patron is free to come and go in between
6 the patio area and the main restaurant and therefore has
7 paid for the right to view the live entertainment, whether
8 that individual happens to walk to the patio or stay
9 within the main facility. As long as he is granted the
10 access to move freely between those two areas, we are
11 deeming that any sales made within that overall facility
12 will be subject to the tax.

13 Section 11 is the counterpart to that. When
14 there is no admission charge collected, we're again
15 looking at the issue if there are areas within the
16 facility where the patrons cannot hear or see the
17 entertainment, that if the licensee can demonstrate which
18 sales were made to patrons who could not see or hear, that
19 there is a way for them to exclude a portion of the sales.
20 But the record keeping burden is on them to make that
21 distinction.

22 Section 13.025 is the exemption section. And
23 these exemptions come primarily directly out of the
24 statute. You can again see in number 3 where I address
25 the issue of the price of food and refreshment going up

1 during entertainment to be essentially consideration paid
2 for the right to access the live entertainment.

3 We did in item 6 try to bring some clarity to
4 the issue of private meeting and casual assemblages. That
5 language is not new. It was in the historical CET
6 statutes. It is also repeated in SB 8.

7 All we have done is basically reorganized the
8 language to make it clear that this clause concerning the
9 purpose of the event not primarily for entertainment
10 applies both to the private meetings and to the casual
11 assemblages.

12 We have looked at saying that we're going to
13 deem the event to have a primary purpose other than
14 entertainment if it occurs within like a convention or a
15 series of business meetings. Item 7 is where we begin
16 to -- well, actually this is out of the statute where we
17 say that if it is live entertainment that is provided in
18 the common area of a shopping mall is not subject to the
19 tax. However, if the entertainment occurs in a facility
20 subject -- facility within that mall, it would be subject
21 to the tax. Again, that is consistent with the statute.

22 In Regulation 13.030, we address the issue of
23 charitable and nonprofit benefits. This is one that has
24 evolved quite a bit from our historical interpretation
25 under the old statutes.

1 Basically the long and short of this
2 paragraph is that if a licensee donates 100 percent of the
3 admission proceeds, there will be no tax on the event even
4 if another for-profit company sells the food and beverage,
5 and the licensee may offset its costs. The only thing
6 they cannot do is keep a portion of the admission
7 proceeds. In other words, they can't say, well, 50-50.

8 That's basically the position that we were moving toward.
9 CHAIRMAN NEILANDER: Just for the record, we
10 haven't fully explored the latest version of Taxation's
11 draft, but there is a bit of a difference here. We have
12 chosen to take the hundred percent of the admission charge
13 approach. Their latest draft, they are using a 20 percent
14 of gross proceeds.

15 So as long as the charity keeps, I believe it
16 was 80 percent of the gross proceeds, 20 percent could go
17 to any profit organization that was assisting in the

18 event. And we're still exploring that with Taxation where
19 the 20 percent, why that threshold was set at that moment.

20 We're also doing some additional research now
21 to try to get a better handle on how the costs are split
22 in some of the events that occur at least that are under
23 the jurisdiction of the Gaming authorities.

24 MS. HARTZELL: I think the next area that's
25 worthy of highlight is Regulation 13.050, payment of the

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1 tax. Item 7. Here is where we talk about the shopping
2 malls and making a distinction between those that are part
3 of the gaming establishment and therefore subject to the
4 same rules as far as is an admission charge necessary,
5 does the head count matter.

6 Basically what we're stating here is if the
7 shopping mall is owned by the same people that own the
8 gaming operation, then we would take the position that it
9 is in fact part of the gaming establishment and the tax
10 should be collected by Gaming rather than Taxation, and it
11 should follow the rules for gaming establishments in terms
12 of determining whether something is or is not a facility.

13 I think there is just one more item that I
14 feel is appropriate to highlight at this point given the
15 stage that we're at. That is Regulation 13.060, records,
16 and item 3. We have had some controversy in the past over
17 some issues where perhaps a group of patrons might have
18 come in shortly before the show and ordered a round of
19 drinks or something, but the tab stayed open till long
20 after entertainment was closed or even perhaps just a
21 little while -- or excuse me -- the entertainment
22 started. It's very difficult to establish which of those
23 drinks is taxable if there is no means by which we can
24 identify what time a particular drink was purchased,
25 because if they order, say, one round before the

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1 entertainment starts and a second round after the
2 entertainment starts, only that second round is taxable.

3 What we have had in the past is some record
4 keeping issues. So what we have done is address in the
5 record keeping section is that if you are going to say
6 that a portion of those sales are not taxable because a
7 portion of the drinks were ordered before entertainment,
8 that those records -- the burden is on the licensee to

9 keep the records to isolate those sales. We do have some
10 existing CET systems that do not properly isolate that and
11 have caused some difficulties for our auditors.

12 I believe that those are the essential areas
13 that I wanted to cover.

14 CHAIRMAN NEILANDER: Questions for Miss Cowan
15 or Miss Hartzell?

16 Before I open it up for additional testimony,
17 I'll submit these letters for the record. I haven't read
18 this particular letter yet. I think we just got it. But
19 we got a letter from the Nevada Taxpayers Association, and
20 it appears that it is addressing two issues. One is the
21 notion of curb to curb, and Miss Velardo is I think asking
22 for some clarification in respect of what curb to curb
23 means in the context of who would have jurisdiction to
24 collect the tax.

25 The second issue she raises is in respect of

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1 the definition of live entertainment, and she's
2 essentially stating that it's her belief that the
3 definitions adopted by the Nevada Gaming Control Board,
4 Gaming Commission, and the Department of Taxation should
5 be the same.

6 The second letter is from Haunani Dew, and
7 this is a letter which we just received as well, and this
8 individual is raising some concerns about how hula dancers
9 might be treated under the new taxation, and in fact,
10 whether or not they are, could be considered ambient
11 background performers. We will enter those into the
12 record.

13 With that, why don't we open it up for
14 anybody who wants to provide any additional testimony
15 today. One last chance.

16 MR. BIBLE: Let me just indicate for the
17 record, again, Bill Bible from the Nevada Resort
18 Association. We just received this draft, as you
19 indicated in your introductory comments, yesterday, and we
20 have not had an opportunity to review it and will provide
21 written comments on the various provisions that have been
22 added or changed.

23 Additionally, as you are aware, I did provide
24 comments to both yourself and Chairman Bernhard of the
25 Nevada Gaming Commission earlier under letter draft and

1 would like that draft at least to be incorporated into
2 today's record.

3 CHAIRMAN NEILANDER: Sure. We will
4 incorporate that draft into the record.

5 With respect to the issue that we have
6 identified in subsection -- section 5, Mr. Scherer, I
7 guess just so I can understand your comments, to go back
8 to as we regather ourselves and head back to our next
9 joint hearing, you still are of the position that you
10 would favor the first approach as opposed to the
11 alternative approach?

12 MEMBER SCHERER: Yes. That's -- well, at
13 least in terms of I think it would make -- with this one
14 particular issue, which is somewhat controversial and
15 contested, I think that it would make sense for us to
16 adopt that interpretation and allow the Department of
17 Taxation if they are going to go ahead and adopt the other
18 interpretation, to do so, and allow the legislative
19 commission then to in effect resolve the conflict between
20 the two interpretations.

21 CHAIRMAN NEILANDER: Mr. Siller, did you have
22 any particular thoughts on that?

23 MEMBER SILLER: No. My thoughts from
24 listening to the discussion is that seemed to be, Member
25 Scherer's recommendation seemed to be the most logical way

1 to address that concern.

2 I'm real concerned with words like
3 substantial interaction with patrons. I can see that as
4 being a lawyer's field day, and justifying why something
5 was or was not done. Even if we were to go with
6 alternative (b), that would just send chills up my spine
7 seeing substantial interaction.

8 But that put aside, I think Member Scherer's
9 suggestion, I support it. I think that is the best course
10 of action.

11 MEMBER SCHERER: I would perhaps suggest that
12 we might add some language into subsection 5 there, the
13 term includes without limitation dancing by patrons to
14 recorded music, and perhaps we could add, presented by a
15 person who is physically present, which would parrot the
16 language of the statute.

17 Again, I don't intend to get at the jukebox

18 or the muzak system or those kinds of things, but rather
19 more the DJ situation where you have got spinning records,
20 CD's.

21 CHAIRMAN NEILANDER: But in respect of the
22 DJ, it would not -- the DJ would not have to be a
23 performer themselves. They would simply be facilitating
24 the playing of music.

25 MEMBER SCHERER: Correct. I think that as I

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1 said earlier, I think that is one reasonable
2 interpretation of the language of the statute. I don't
3 disagree that the alternative interpretation is also
4 reasonable. I just think the legislative commission --
5 what little legislative history we have seems to indicate
6 the Legislature intended us to continue to collect things
7 that were already taxable, which this is clearly already
8 taxable. Unless the legislative commission tells us to
9 the contrary.

10 MS. COWAN: Mr. Chairman, may I raise one
11 issue and that you just mentioned, the dancing by the hula
12 girls, could that possibly be ambient dancing? I think
13 that raises an issue that we may have to grapple with.

14 Again, like the problem we had where the
15 piano players were summarily fired to avoid paying the
16 tax. In my conversations with counsel for the Taxation
17 Department, I'm understanding that their position is if
18 there is a go-go dancer, or a dancer providing any
19 entertainment to the crowd, that they think that that
20 would be live entertainment also. My concern is if that's
21 where everyone is agreeing is live entertainment, that
22 facilities might fire their go-go dancers to avoid having
23 to pay the tax similarly as what happened with the piano
24 players.

25 CHAIRMAN NEILANDER: Well, I think until we

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1 decide the issue of what's taxable and what's not taxable,
2 I mean, people will make business decisions based on
3 whatever the law eventually reads.

4 MR. BIBLE: Before I leave the podium I did
5 want to ask Miss Hartzell for clarification when she
6 explained 5(d)(2), you indicated, and this would be where
7 there is entertainment that is provided within the gaming
8 area, I think you indicated live music was permissible?

9 MS. HARTZELL: Yes, that is correct, as long
10 as the band is simply in the gaming area, and we're not
11 talking about a lounge that's in the center of the casino,
12 for example.

13 MR. BIBLE: It appears to me the language on
14 the top of page 3 does not reflect that intent.

15 MS. HARTZELL: Can you clarify your question?

16 MR. BIBLE: It appears to me that you have --
17 that it does not apply if it is offered as ambiance or to
18 attract people unless there's live music. As I read the
19 proposed regulation. Maybe I'm not reading it correctly.

20 MS. HARTZELL: I guess I will need to take a
21 closer look at that and re-analyze it. But where I was
22 going with this is saying that if you have -- for example,
23 there are a number of properties that have some form of
24 entertainment out on the casino floor. Its primary
25 purpose is to simply draw people into the casino. There

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1 are a limited number of them who have gone so far as to
2 put a small bandstand out on the casino floor. It's in
3 the gaming area. It's not a lounge or it is not by a
4 lounge. It is really designed to just create an
5 attraction off the street into the pit area.

6 If that bandstand is out there and all that
7 is happening is some live music but they don't have a
8 dance floor nearby, they don't have any kind of tables to
9 sit at, I think that it is possible to suggest that that
10 is not going to be subject to the tax because there is no
11 direct food and beverage sales associated with it. It's
12 really out in the pit, and the only option would be to
13 start taxing bars that are nearby.

14 MR. BIBLE: Or food and beverage sales that
15 occur within the pit.

16 MS. HARTZELL: Generally those are comped.
17 It's never our position to try to tax things like that
18 unless -- there are some situations where I have gone out
19 and reviewed and they put a bandstand there, but
20 unfortunately, they also put a dance floor in front of it
21 and some tables immediately around it, and it would be
22 very difficult, if there is cocktail service to that, to
23 establish that that is any different than any other kind
24 of lounge.

25 MR. BIBLE: You may want to take a look at

1 the language. At least I had the different impression.

2 MS. HARTZELL: Okay, I will take a look at
3 it.

4 MR. BIBLE: Thank you.

5 CHAIRMAN NEILANDER: Thank you. Further
6 testimony? Good afternoon, Mr. Faiss.

7 MR. FAISS: Mr. Chairman, Mr. Siller,
8 Mr. Scherer, Madam Secretary. I'm Bob Faiss of Lionel,
9 Sawyer & Collins, appearing as counsel for MGM Mirage.
10 I'm in the company of Bruce Aguilera, who is
11 the vice president and general counsel of Bellagio, and he
12 serves the function as being the leader of the MGM Mirage
13 team with regard to the amended CET and the LET.

14 Another important member of the team is Jorge
15 Perez, who is Bellagio Hotel controller.

16 As Mr. Bible said, Mr. Chairman, we did not
17 receive this draft until the last several hours. It was
18 not our intention to testify today. We were and are going
19 to present you a detailed written response draft in
20 response to several points.

21 I do want to take the opportunity to commend
22 Linda Hartzell and Toni Cowan, Steve Hixon and you for the
23 tremendous work you have done. I'm delighted that Member
24 Scherer is getting involved so heavily. I think that will
25 enhance and help define the discussion.

1 I'm up here because I didn't expect that the
2 Board would be voting on anything today.

3 CHAIRMAN NEILANDER: We are not.

4 MR. FAISS: Because perhaps Member Siller
5 hasn't had the opportunity to read a lot of background
6 things that we have submitted to you privately and also at
7 the various hearings.

8 While I'm up here, Mr. Chairman, for example,
9 you are talking about recorded music. That is entirely
10 separate from what happens to anything in response to the
11 recorded music. You do not tax recorded music now.
12 Recorded music, as we suggested to you, is not a
13 performance, not necessarily a performance. Recorded
14 music are presented in various venues, and you do not tax
15 it now.

16 It's not presented unless a human being makes
17 that responsible, makes that happen. He pushes a button.

18 What we have suggested to the Board and to
19 the Commission, to the department, is that the mere fact
20 that a person who is in the same room with the audience
21 pushes that button does not make that a performance. That
22 there is a difference between the facilitation of music
23 and the performance and the presentation of it. And
24 that's one thing.
25 I do not know if Mr. Siller has had the

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1 advantage of the background discussion on that. I'm sure
2 he will want to before he makes any vote as to what
3 direction the Board will take.

4 And if you are not taking any vote and
5 setting any direction today, then I have made a mistake in
6 what I heard in the audience.

7 CHAIRMAN NEILANDER: No. Perhaps I should
8 restate that because if I was unclear, it's because we're
9 wandering into strange 233B lands that we have never been
10 to, at least not this body.

11 The intention is to at the end of the day
12 have a regulation adopted under Chapter 233B which will
13 have to be adopted by the Board, and then an identical
14 regulation under the Nevada Revised Statutes, and it will
15 be a portion of NGC Regulation 13, which the Commission
16 will adopt, and the procedures by which you get there are
17 different under both.

18 The purpose today was just to get some
19 feedback from my colleagues and also to begin to create a
20 record for the Commission. We have no intention of taking
21 any action today.

22 MR. FAISS: Mr. Chairman, thank you. I
23 understand that. The vote I was talking about, you are
24 talking about two alternatives present in today's draft.
25 I understood some indication of preference to one of two

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1 alternatives was being given today. That is what I was
2 talking about.

3 CHAIRMAN NEILANDER: To present those views
4 back at the Tax Commission meeting, not for purposes of
5 voting or taking any action.

6 MR. FAISS: I thank you.

7 CHAIRMAN NEILANDER: I think Mr. Scherer has
8 a question for you.

9 MEMBER SCHERER: Mr. Faiss, perhaps we don't
10 want to go down this road today. I'm not sure. But why
11 does it matter whether it is a performance or not?

12 MR. FAISS: Well, it has to be live
13 entertainment, and recorded music is not a live
14 entertainment.

15 MEMBER SCHERER: There is nothing in the
16 definition of live entertainment that the Legislature
17 passed that requires a performance.

18 MR. FAISS: It provides the presentation of
19 live entertainment.

20 MEMBER SCHERER: It requires any activity
21 provided for pleasure, enjoyment, recreation, relaxation,
22 diversion or other similar purpose by a person or persons
23 who are physically present when providing that activity to
24 a patron or group of patrons who are physically present.

25 MR. FAISS: I concede that, and I'm sure you

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1 will concede the presentation of recorded music does not
2 come within that definition.

3 MEMBER SCHERER: If a person is present, it
4 does.

5 MR. FAISS: I'm not arguing the point. It
6 would be good to understand the basis of your position.
7 You're saying that if the sole activity by the person who
8 is pushing a button, he is inside the room, that that is
9 live entertainment; is that correct?

10 MEMBER SCHERER: I'm saying that that could
11 fall within that definition.

12 MR. FAISS: Would you concede that that same
13 person was in a different room that had a one-way mirror
14 and had a wall, and could see what was happening in that
15 room, and pushed that same button, that it would not be?

16 MEMBER SCHERER: I would have to think about
17 that.

18 MR. FAISS: I urge you to think about it
19 because in some cases the people who press the button do
20 not perform. They are in isolated areas and sometimes in
21 enclosed areas looking at the room.

22 MEMBER SCHERER: No, I understand that. But
23 there are also ways to get requests in to them, and if
24 there is any kind of -- when you have that ability to make
25 requests, I think arguably you come back within this

1 definition of live entertainment, as the Legislature has
2 written it.

3 I'm not suggesting that that is the only
4 reasonable definition of live entertainment. I'm simply
5 suggesting that it is one.

6 I saw a newspaper -- a story on the news the
7 other night with new street entertainers, that new fashion
8 for street entertainers is to take their laptop computers
9 out and play music for the people that gather around, on
10 their laptop computer. Because that music is being
11 artificially created by their laptop commuter, does that
12 mean that it is not entertaining in any form of
13 entertainment?

14 I guess that's the issue. The more
15 technologically advanced we get, the more we have to
16 determine how we are going to interpret those different
17 forms of entertainment and whether they fall within this
18 definition or not.

19 I'm not necessarily saying that they ought to
20 be taxable. What I'm saying, I guess, is there is nothing
21 that says it has to be a performance in the Legislature's
22 definition.

23 So I'm concerned because of the, granted,
24 very little legislative history there is, Senator
25 Townsend's statement and then the LCB's basis for their

1 projections. I'm concerned about taking away things that
2 have previously been taxable without some indication from
3 the Legislature that that is what they want us to do.

4 MR. FAISS: Mr. Scherer, I understand your
5 position. I'm sure that you would agree that you'll come
6 to a position to say this is our position, but you will
7 say why. If those are the two reasons that you use, that
8 will be the basis for your position. We can respond to
9 that.

10 CHAIRMAN NEILANDER: Thank you, Mr. Faiss.
11 And I should also point out before we close that the
12 Department of Taxation and the Board and the Commission
13 are continuing to work closely together, and it's not -- I
14 hope it's not coming off as there is some kind of dispute,
15 because there is not. We're struggling through these
16 issues the same as they are, and hopefully at the end of
17 the day we can come to some consensus.

18 Let's see if there is any additional
19 testimony before we close the hearing.
20 Seeing none, we will stand in recess until
21 the hour of 9:00 a.m. tomorrow.
22 (Recess for day at 3:04 p.m.)
23
24
25

SENATE BILL NO. 247—SENATOR TITUS

MARCH 21, 2005

Referred to Committee on Taxation

SUMMARY—Revises provisions governing tax on live entertainment. (BDR 32-680)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

EXPLANATION — Matter in *bolded italics* is new; matter between brackets ~~(omitted material)~~ is material to be omitted.

AN ACT relating to taxation; revising the provisions governing the applicability, imposition, collection and administration of the tax on live entertainment; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law imposes a tax on an admission charge to any facility where live entertainment, including live adult entertainment, is provided. (NRS 368A.200) The tax is administered by the State Gaming Control Board with respect to taxpayers who are licensed gaming establishments and by the Department of Taxation with respect to all other taxpayers. (NRS 368A.140)

This bill repeals the provisions of the existing law applicable to a facility that does not hold a nonrestricted gaming license and provides for the separate taxation of any facility where live adult entertainment is provided. This bill imposes a tax on live adult entertainment at the rate of 10 percent of any admission charge to such a facility, plus 10 percent of any amounts paid for food, refreshments, alcoholic beverages and merchandise purchased at the facility. This bill excludes houses of prostitution and facilities for which a nonrestricted gaming license has been issued from the tax on live adult entertainment, and provides for the administration of the tax solely by the Department of Taxation.

This bill also amends the existing law to provide for the separate taxation of a facility for which a nonrestricted gaming license has been issued. This bill does not change the application or rate of the tax on live entertainment currently in effect for such facilities, except that sporting events are exempted from taxation. This bill provides for the administration of the tax solely by the State Gaming Control Board.

This bill provides that if the provisions of this bill concerning the tax on live adult entertainment are held to be unconstitutional, the tax on all forms of live



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23 entertainment will be reinstated as currently set forth in the provisions of Chapter
24 368A of NRS.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 368A of NRS is hereby amended by
2 adding thereto the provisions set forth as sections 2 to 32, inclusive,
3 of this act.

4 **Sec. 2.** *As used in sections 2 to 32, inclusive, of this act,*
5 *unless the context otherwise requires, the words and terms defined*
6 *in sections 3 to 10, inclusive, of this act have the meanings*
7 *ascribed to them in those sections.*

8 **Sec. 3.** *"Admission charge" means the total amount,*
9 *expressed in terms of money, of consideration paid for the right or*
10 *privilege to have access to a facility where live adult entertainment*
11 *is provided.*

12 **Sec. 4.** *"Business" means any activity engaged in or caused*
13 *to be engaged in by a business entity with the object of gain,*
14 *benefit or advantage, either direct or indirect, to any person or*
15 *governmental entity.*

16 **Sec. 5. 1.** *"Business entity" includes:*

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

22 (b) *A natural person engaging in a business if the person is*
23 *required to file with the Internal Revenue Service a Schedule C*
24 *(Form 1040), Profit or Loss From Business Form, or its*
25 *equivalent or successor form, or a Schedule E (Form 1040),*
26 *Supplemental Income and Loss Form, or its equivalent or*
27 *successor form, for the business.*

28 2. *The term does not include a governmental entity.*

29 **Sec. 6. 1.** *"Facility" means, except as otherwise provided in*
30 *subsection 2, any area or premises where live adult entertainment*
31 *is provided and for which consideration is collected for the right*
32 *or privilege of entering that area or those premises.*

33 2. *The term does not include any portion of:*

34 (a) *A licensed gaming establishment; or*

35 (b) *A house of prostitution.*

36 **Sec. 7.** *"Licensed gaming establishment" has the meaning*
37 *ascribed to it in NRS 368A.080.*



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1 Sec. 8. "Live adult entertainment" means any activity
2 provided for pleasure, enjoyment, recreation, relaxation, diversion
3 or other similar purpose which includes the exposure of one or
4 more personal anatomical features by a person or persons who are
5 physically present when providing that activity to a patron or
6 group of patrons who are physically present.

7 Sec. 9. "Personal anatomical feature" means any portion of
8 the:

9 1. Genitals, pubic region, anus or perineum of any human
10 person; or

11 2. Areola of any female human breast or of any male human
12 breast which has been surgically altered to appear as a female
13 human breast.

14 Sec. 10. "Taxpayer" means:

15 1. Except as otherwise provided in subsection 2, the owner or
16 operator of the facility where the live adult entertainment is
17 provided.

18 2. If live adult entertainment that is taxable under sections 2
19 to 32, inclusive, of this act is provided at a publicly owned facility
20 or on public land, the person who collects the taxable receipts.

21 Sec. 11. 1. There is hereby imposed an excise tax on
22 admission to any facility in this State where live adult
23 entertainment is provided at the rate of 10 percent of any
24 admission charge to the facility plus 10 percent of any amounts
25 paid for food, refreshments, alcoholic beverages and merchandise
26 purchased at the facility.

27 2. Amounts paid for gratuities directly or indirectly remitted
28 to persons employed at a facility where live adult entertainment is
29 provided or for service charges, including those imposed in
30 connection with the use of credit cards or debit cards, which are
31 collected and retained by persons other than the taxpayer are not
32 taxable pursuant to this section.

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

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

41 Sec. 12. A taxpayer shall hold the amount of all taxes for
42 which he is liable pursuant to sections 2 to 32, inclusive, of this act
43 in a separate account in trust for the State.



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1 **Sec. 13. 1. The Department shall:**

2 **(a) Collect the tax imposed by section 11 of this act; and**

3 **(b) Adopt such regulations as are necessary to carry out the**
4 **provisions of paragraph (a), including, without limitation,**
5 **regulations providing for a more detailed definition of "live adult**
6 **entertainment" consistent with the general definition set forth in**
7 **section 8 of this act for use in determining whether an activity is a**
8 **taxable activity under the provisions of sections 2 to 32, inclusive,**
9 **of this act.**

10 **2. For the purposes of subsection 1, the provisions of chapter**
11 **360 of NRS relating to the payment, collection, administration and**
12 **enforcement of taxes, including, without limitation, any provisions**
13 **relating to the imposition of penalties and interest, shall be**
14 **deemed to apply to the payment, collection, administration and**
15 **enforcement of the taxes imposed by sections 2 to 32, inclusive, of**
16 **this act to the extent that the provisions of chapter 360 of NRS do**
17 **not conflict with the provisions of sections 2 to 32, inclusive, of**
18 **this act.**

19 **Sec. 14. 1. Except as otherwise provided in this section,**
20 **each taxpayer shall file with the Department, on or before the last**
21 **day of each month, a report showing the amount of all taxable**
22 **receipts for the preceding month. The report must be in a form**
23 **prescribed by the Department.**

24 **2. The Department, if it deems it necessary to ensure payment**
25 **to or facilitate the collection by the State of the tax imposed by**
26 **section 11 of this act, may require reports to be filed not later than**
27 **10 days after the end of each calendar quarter.**

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

31 **4. The Department shall deposit all taxes, interest and**
32 **penalties it receives pursuant to sections 2 to 32, inclusive, of this**
33 **act in the State Treasury for credit to the State General Fund.**

34 **Sec. 15. Upon written application made before the date on**
35 **which payment must be made, the Department may, for good**
36 **cause, extend by 30 days the time within which a taxpayer is**
37 **required to pay the tax imposed by section 11 of this act. If the tax**
38 **is paid during the period of extension, no penalty or late charge**
39 **may be imposed for failure to pay at the time required, but the**
40 **taxpayer shall pay interest at the rate of 1 percent per month from**
41 **the date on which the amount would have been due without the**
42 **extension until the date of payment, unless otherwise provided in**
43 **NRS 360.232 or 360.320.**



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1 *Sec. 16. 1. Each person responsible for maintaining the*
2 *records of a taxpayer shall:*

3 *(a) Keep such records as may be necessary to determine the*
4 *amount of the liability of the taxpayer pursuant to the provisions*
5 *of sections 2 to 32, inclusive, of this act;*

6 *(b) Preserve those records for at least 4 years or until any*
7 *litigation or prosecution pursuant to sections 2 to 32, inclusive, of*
8 *this act is finally determined, whichever is longer; and*

9 *(c) Make the records available for inspection by the*
10 *Department upon demand at reasonable times during regular*
11 *business hours.*

12 *2. The Department may by regulation specify the types of*
13 *records which must be kept to determine the amount of the*
14 *liability of a taxpayer.*

15 *3. Any agreement that is entered into, modified or extended*
16 *after July 1, 2005, for the lease, assignment or transfer of any*
17 *premises upon which any activity subject to the tax imposed by*
18 *section 11 of this act is, or thereafter may be, conducted shall be*
19 *deemed to include a provision that the taxpayer who is required to*
20 *pay the tax must be allowed access to, upon demand, all books,*
21 *records and financial papers held by the lessee, assignee or*
22 *transferee which must be kept pursuant to this section. Any person*
23 *conducting activities subject to the tax imposed by section 11 of*
24 *this act who fails to maintain or disclose his records pursuant to*
25 *this subsection is liable to the taxpayer for any penalty paid by the*
26 *taxpayer for the late payment or nonpayment of the tax caused by*
27 *the failure to maintain or disclose records.*

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

30 *Sec. 17. 1. To verify the accuracy of any report filed or, if*
31 *no report is filed by a taxpayer, to determine the amount of tax*
32 *required to be paid, the Department, or any person authorized in*
33 *writing by the Department, may examine the books, papers and*
34 *records of any person who may be liable for the tax imposed by*
35 *section 11 of this act.*

36 *2. Any person who may be liable for the tax imposed by*
37 *section 11 of this act and who keeps outside of this State any*
38 *books, papers and records relating thereto shall pay to the*
39 *Department an amount equal to the allowance provided for state*
40 *officers and employees generally while traveling outside of the*
41 *State for each day or fraction thereof during which an employee*
42 *of the Department is engaged in examining those documents, plus*
43 *any other actual expenses incurred by the employee while he is*



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1 absent from his regular place of employment to examine those
2 documents.

3 Sec. 18. 1. Except as otherwise provided in this section and
4 NRS 360.250, the records and files of the Department concerning
5 the administration of sections 2 to 32, inclusive, of this act are
6 confidential and privileged. The Department and any employee of
7 the Department engaged in the administration of sections 2 to 32,
8 inclusive, of this act or charged with the custody of any such
9 records or files shall not disclose any information obtained from
10 the records or files of the Department or from any examination,
11 investigation or hearing authorized by the provisions of sections 2
12 to 32, inclusive, of this act. The Department and any employee of
13 the Department may not be required to produce any of the records,
14 files and information for the inspection of any person or for use in
15 any action or proceeding.

16 2. The records and files of the Department concerning the
17 administration of sections 2 to 32, inclusive, of this act are not
18 confidential and privileged in the following cases:

19 (a) Testimony by a member or employee of the Department
20 and production of records, files and information on behalf of the
21 Department or a taxpayer in any action or proceeding pursuant to
22 the provisions of sections 2 to 32, inclusive, of this act if that
23 testimony or the records, files or information, or the facts shown
24 thereby, are directly involved in the action or proceeding.

25 (b) Delivery to a taxpayer or his authorized representative of a
26 copy of any report or other document filed by the taxpayer
27 pursuant to sections 2 to 32, inclusive, of this act.

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

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

33 (e) Disclosure in confidence to the Governor or his agent in
34 the exercise of the Governor's general supervisory powers, or to
35 any person authorized to audit the accounts of the Department in
36 pursuance of an audit, or to the Attorney General or other legal
37 representative of the State in connection with an action or
38 proceeding pursuant to sections 2 to 32, inclusive, of this act, or to
39 any agency of this or any other state charged with the
40 administration or enforcement of laws relating to taxation.

41 Sec. 19. 1. If the Department determines that a taxpayer is
42 taking any action with intent to defraud the State or to evade the
43 payment of the tax or any part of the tax imposed by section 11 of



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1 this act, the Department shall establish an amount upon which
2 that tax must be based.

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

7 Sec. 20. 1. If a taxpayer:

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

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

15 he is entitled to receive a credit for the amount of tax paid on
16 account of that uncollected amount. The credit may be used
17 against the amount of tax that the taxpayer is subsequently
18 required to pay pursuant to sections 2 to 32, inclusive, of this act.

19 2. If the Internal Revenue Service disallows a deduction
20 described in paragraph (b) of subsection 1 and the taxpayer
21 claimed a credit on a return for a previous reporting period
22 pursuant to subsection 1, the taxpayer shall include the amount of
23 that credit in the amount of taxes reported pursuant to sections 2
24 to 32, inclusive, of this act in the first return filed with the
25 Department after the deduction is disallowed.

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

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

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

35 in the first return filed with the Department after that
36 collection.

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

41 (a) For the first return of any taxpayer that contains one or
42 more violations, issue a letter of warning to the taxpayer which
43 provides an explanation of the violation or violations contained in
44 the return.



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

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

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

15 Sec. 21. The remedies of the State provided for in sections 2
16 to 32, inclusive, of this act are cumulative, and no action taken by
17 the Department or the Attorney General constitutes an election by
18 the State to pursue any remedy to the exclusion of any other
19 remedy for which provision is made in sections 2 to 32, inclusive,
20 of this act.

21 Sec. 22. If the Department determines that any tax, penalty
22 or interest has been paid more than once or has been erroneously
23 or illegally collected or computed, the Department shall set forth
24 that fact in its records and shall certify to the State Board of
25 Examiners the amount collected in excess of the amount legally
26 due and the person from whom it was collected or by whom it was
27 paid. If approved by the State Board of Examiners, the excess
28 amount collected or paid must be credited on any amounts then
29 due from the person under sections 2 to 32, inclusive, of this act
30 and the balance refunded to the person or his successors in
31 interest.

32 Sec. 23. 1. Except as otherwise provided in NRS 360.235
33 and 360.395:

34 (a) No refund may be allowed unless a claim for it is filed with
35 the Department. A claim must be filed within 3 years after the last
36 day of the month following the reporting period for which the
37 overpayment was made.

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

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



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1 3. Failure to file a claim within the time prescribed in
2 subsection 1 constitutes a waiver of any demand against the State
3 on account of overpayment.

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

8 Sec. 24. 1. Except as otherwise provided in this section and
9 NRS 360.320, interest must be paid upon any overpayment of any
10 amount of the tax imposed by section 11 of this act in accordance
11 with the provisions of section 13 of this act. The interest must be
12 paid:

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

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

22 2. If the Department determines that any overpayment has
23 been made intentionally or by reason of carelessness, the
24 Department shall not allow any interest on the overpayment.

25 Sec. 25. 1. No injunction, writ of mandate or other legal or
26 equitable process may issue in any suit, action or proceeding in
27 any court against this State or against any officer of the State to
28 prevent or enjoin the collection under sections 2 to 32, inclusive,
29 of this act of the tax imposed by section 11 of this act or any
30 amount of tax, penalty or interest required to be collected.

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

35 Sec. 26. 1. Within 90 days after a final decision upon a
36 claim filed pursuant to sections 2 to 32, inclusive, of this act is
37 rendered by the Nevada Tax Commission, the claimant may bring
38 an action against the Department on the grounds set forth in the
39 claim.

40 2. An action brought pursuant to subsection 1 must be
41 brought in a court of competent jurisdiction in Carson City, the
42 county of this State where the claimant resides or maintains his
43 principal place of business or a county in which any relevant
44 proceedings were conducted by the Department, for the recovery



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

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

6 Sec. 27. 1. If the Department fails to mail notice of action
7 on a claim within 6 months after the claim is filed, the claimant
8 may consider the claim disallowed and file an appeal with the
9 Nevada Tax Commission within 30 days after the last day of the
10 6-month period.

11 2. If the claimant is aggrieved by the decision of the Nevada
12 Tax Commission rendered on appeal, the claimant may, within 90
13 days after the decision is rendered, bring an action against the
14 Department on the grounds set forth in the claim for the recovery
15 of the whole or any part of the amount claimed as an
16 overpayment.

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

20 4. The balance of the judgment must be refunded to the
21 plaintiff.

22 Sec. 28. In any judgment, interest must be allowed at the rate
23 of 6 percent per annum upon the amount found to have been
24 illegally collected from the date of payment of the amount to the
25 date of allowance of credit on account of the judgment, or to a
26 date preceding the date of the refund warrant by not more than 30
27 days. The date must be determined by the Department.

28 Sec. 29. A judgment may not be rendered in favor of the
29 plaintiff in any action brought against the Department to recover
30 any amount paid when the action is brought by or in the name of
31 an assignee of the person paying the amount or by any person
32 other than the person who paid the amount.

33 Sec. 30. 1. The Department may recover a refund or any
34 part thereof which is erroneously made and any credit or part
35 thereof which is erroneously allowed in an action brought in a
36 court of competent jurisdiction in Carson City or Clark County in
37 the name of the State of Nevada.

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

41 3. The Attorney General shall prosecute the action, and the
42 provisions of NRS, the Nevada Rules of Civil Procedure and the
43 Nevada Rules of Appellate Procedure relating to service of



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1 summons, pleadings, proofs, trials and appeals are applicable to
2 the proceedings.

3 Sec. 31. 1. If any amount in excess of \$25 has been
4 illegally determined, either by the person filing the return or by the
5 Department, the Department shall certify this fact to the State
6 Board of Examiners, and the latter shall authorize the
7 cancellation of the amount upon the records of the Department.

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

13 Sec. 32. 1. A person shall not:

14 (a) Make, cause to be made or permit to be made any false or
15 fraudulent return or declaration or false statement in any report
16 or declaration, with intent to defraud the State or to evade
17 payment of the tax or any part of the tax imposed by section 11 of
18 this act.

19 (b) Make, cause to be made or permit to be made any false
20 entry in books, records or accounts with intent to defraud the State
21 or to evade the payment of the tax or any part of the tax imposed
22 by section 11 of this act.

23 (c) Keep, cause to be kept or permit to be kept more than one
24 set of books, records or accounts with intent to defraud the State
25 or to evade the payment of the tax or any part of the tax imposed
26 by section 11 of this act.

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

29 Sec. 33. NRS 368A.010 is hereby amended to read as follows:

30 368A.010 As used in ~~this chapter,~~ NRS 368A.010 to
31 368A.370, inclusive, unless the context otherwise requires, the
32 words and terms defined in NRS 368A.020 to 368A.110, inclusive,
33 have the meanings ascribed to them in those sections.

34 Sec. 34. NRS 368A.050 is hereby amended to read as follows:

35 368A.050 1. "Business entity" includes:

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

41 (b) A natural person engaging in a business if ~~he is deemed to~~
42 ~~be a business entity pursuant to NRS 368A.120,~~ the person is
43 required to file with the Internal Revenue Service a Schedule C
44 (Form 1040), Profit or Loss From Business Form, or its



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1 *equivalent or successor form, or a Schedule E (Form 1040),*
2 *Supplemental Income and Loss Form, or its equivalent or*
3 *successor form, for the business.*

4 2. The term does not include a governmental entity.

5 Sec. 35. NRS 368A.060 is hereby amended to read as follows:
6 368A.060 "Facility" means:

7 1. Any area or premises where live entertainment is provided
8 and for which consideration is collected for the right or privilege of
9 entering that area or those premises if the live entertainment is
10 provided at ~~the~~:

11 ~~— (a) An establishment that is not a licensed gaming~~
12 ~~establishment; or~~

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

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

19 Sec. 36. NRS 368A.080 is hereby amended to read as follows:

20 368A.080 "Licensed gaming establishment" ~~has the meaning~~
21 ~~ascribed to it in NRS 463.0169.~~ *means any premises for which a*
22 *nonrestricted license has been issued pursuant to chapter 463 of*
23 *NRS.*

24 Sec. 37. NRS 368A.110 is hereby amended to read as follows:

25 368A.110 "Taxpayer" means ~~the~~:

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

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

33 ~~3. If live entertainment that is taxable under this chapter is~~
34 ~~provided at a publicly owned facility or on public land, the person~~
35 ~~who collects the taxable receipts.~~ *a licensed gaming establishment*
36 *where live entertainment is provided.*

37 Sec. 38. NRS 368A.140 is hereby amended to read as follows:

38 368A.140 1. The Board shall:

39 (a) Collect the tax imposed by ~~this chapter from taxpayers who~~
40 ~~are licensed gaming establishments.~~ *NRS 368A.200; and*

41 (b) Adopt such regulations as are necessary to carry out the
42 provisions of paragraph (a) ~~the~~, *including, without limitation,*
43 *regulations providing for a more detailed definition of "live*
44 *entertainment" consistent with the general definition set forth in*



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1 *NRS 368A.090 for use in determining whether an activity is a*
2 *taxable activity under the provisions of NRS 368A.010 to*
3 *368A.370, inclusive.* The regulations must be adopted in accordance
4 with the provisions of chapter 233B of NRS and must be codified in
5 the Nevada Administrative Code.

6 2. ~~{The Department shall:~~

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

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

11 ~~—3.} For the purposes of {:~~

12 ~~—(a) Subsection} subsection 1, the provisions of chapter 463 of~~
13 ~~NRS relating to the payment, collection, administration and~~
14 ~~enforcement of gaming license fees and taxes, including, without~~
15 ~~limitation, any provisions relating to the imposition of penalties and~~
16 ~~interest, shall be deemed to apply to the payment, collection,~~
17 ~~administration and enforcement of the taxes imposed by {this~~
18 ~~chapter} *NRS 368A.010 to 368A.370, inclusive,* to the extent that~~
19 ~~{those} the provisions of chapter 463 of NRS do not conflict with~~
20 ~~the provisions of {this chapter.~~

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

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

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

33 ~~—(b) Upon request, assist the other agency in the collection of that~~
34 ~~tax.} *NRS 368A.010 to 368A.370, inclusive.*~~

35 **Sec. 39.** NRS 368A.150 is hereby amended to read as follows:

36 368A.150 1. If {:

37 ~~—(a) The} *the* Board determines that a taxpayer {who is a licensed~~
38 ~~gaming establishment} is taking any action with intent to defraud the~~
39 ~~State or to evade the payment of the tax or any part of the tax~~
40 ~~imposed by {this chapter.} *NRS 368A.200,* the Board shall establish~~
41 ~~an amount upon which {the tax imposed by this chapter} *that tax*~~
42 ~~must be based.~~

43 ~~{(b) The Department determines that a taxpayer who is not a~~
44 ~~licensed gaming establishment is taking any action with intent to~~



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1 defraud the State or to evade the payment of the tax or any part of
2 the tax imposed by this chapter, the Department shall establish an
3 amount upon which the tax imposed by this chapter must be based.

4 2. The amount established by the Board ~~for the Department~~
5 pursuant to subsection 1 must be based upon the tax liability of
6 business entities that are deemed comparable by the Board ~~for the~~
7 ~~Department~~ to that of the taxpayer.

8 Sec. 40. NRS 368A.160 is hereby amended to read as follows:

9 368A.160 1. Each person responsible for maintaining the
10 records of a taxpayer shall:

11 (a) Keep such records as may be necessary to determine the
12 amount of the liability of the taxpayer pursuant to the provisions of
13 ~~this chapter;~~ *NRS 368A.010 to 368A.370, inclusive;*

14 (b) Preserve those records for ~~for~~
15 ~~(1) At~~ at least 5 years ~~if the taxpayer is a licensed gaming~~
16 ~~establishment~~ or until any litigation or prosecution pursuant to ~~this~~
17 ~~chapter~~ *NRS 368A.010 to 368A.370, inclusive,* is finally
18 determined, whichever is longer; ~~for~~

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

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

25 2. The Board ~~and the Department~~ may by regulation specify
26 the types of records which must be kept to determine the amount of
27 the liability of a taxpayer. ~~from whom they are required to collect~~
28 ~~the tax imposed by this chapter.~~

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

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



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1 Sec. 41. NRS 368A.170 is hereby amended to read as follows:
2 368A.170 1. To verify the accuracy of any report filed or, if
3 no report is filed by a taxpayer, to determine the amount of tax
4 required to be paid ~~by~~
5 ~~—(a) The~~, *the* Board, or any person authorized in writing by the
6 Board, may examine the books, papers and records of any ~~licensed~~
7 ~~gaming establishment that~~ *person who* may be liable for the tax
8 imposed by ~~this chapter.~~
9 ~~—(b) The Department, or any person authorized in writing by the~~
10 ~~Department, may examine the books, papers and records of any~~
11 ~~other person who may be liable for the tax imposed by this chapter.~~
12 *NRS 368A.200.*
13 2. Any person who may be liable for the tax imposed by ~~this~~
14 ~~chapter~~ *NRS 368A.200* and who keeps outside of this State any
15 books, papers and records relating thereto shall pay to the Board ~~for~~
16 ~~the Department~~ an amount equal to the allowance provided for state
17 officers and employees generally while traveling outside of the State
18 for each day or fraction thereof during which an employee of the
19 Board ~~for the Department~~ is engaged in examining those
20 documents, plus any other actual expenses incurred by the employee
21 while he is absent from his regular place of employment to examine
22 those documents.
23 Sec. 42. NRS 368A.180 is hereby amended to read as follows:
24 368A.180 1. ~~Except as otherwise provided in this section~~
25 ~~and NRS 360.250, the~~ *The* records and files of the Board ~~and the~~
26 ~~Department~~ concerning the administration of ~~this chapter~~ *NRS*
27 *368A.010 to 368A.370, inclusive*, are confidential and privileged.
28 The Board ~~for the Department~~ and any employee of the Board ~~for the~~
29 ~~Department~~ engaged in the administration of ~~this chapter~~ *NRS*
30 *368A.010 to 368A.370, inclusive*, or charged with the custody of
31 any such records or files shall not disclose any information obtained
32 from the records or files of the Board ~~for the Department~~ or from
33 any examination, investigation or hearing authorized by the
34 provisions of ~~this chapter~~ *NRS 368A.010 to 368A.370, inclusive.*
35 The Board ~~for the Department~~ and any employee of the Board ~~for the~~
36 ~~Department~~ may not be required to produce any of the records, files
37 and information for the inspection of any person or for use in any
38 action or proceeding.
39 2. The records and files of the Board ~~and the Department~~
40 concerning the administration of ~~this chapter~~ *NRS 368A.010 to*
41 *368A.370, inclusive*, are not confidential and privileged in the
42 following cases:
43 (a) Testimony by a member or employee of the Board ~~for the~~
44 ~~Department~~ and production of records, files and information on



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1 behalf of the Board ~~for the Department~~ or a taxpayer in any action
2 or proceeding pursuant to the provisions of ~~this chapter~~ NRS
3 368A.010 to 368A.370, inclusive, if that testimony or the records,
4 files or information, or the facts shown thereby, are directly
5 involved in the action or proceeding.

6 (b) Delivery to a taxpayer or his authorized representative of a
7 copy of any report or other document filed by the taxpayer pursuant
8 to ~~this chapter~~ NRS 368A.010 to 368A.370, inclusive.

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

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

13 (e) Disclosure in confidence to the Governor or his agent in the
14 exercise of the Governor's general supervisory powers, or to any
15 person authorized to audit the accounts of the Board ~~for the~~
16 ~~Department~~ in pursuance of an audit, or to the Attorney General or
17 other legal representative of the State in connection with an action
18 or proceeding pursuant to ~~this chapter~~ NRS 368A.010 to
19 368A.370, inclusive, or to any agency of this or any other state
20 charged with the administration or enforcement of laws relating to
21 taxation.

22 Sec. 43. NRS 368A.200 is hereby amended to read as follows:

23 368A.200 1. Except as otherwise provided in this section,
24 there is hereby imposed an excise tax on admission to any facility in
25 this State where live entertainment is provided. If the live
26 entertainment is provided at a facility with a maximum seating
27 capacity of:

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

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

33 2. Amounts paid for gratuities directly or indirectly remitted to
34 persons employed at a facility where live entertainment is provided
35 or for service charges, including those imposed in connection with
36 the use of credit cards or debit cards, which are collected and
37 retained by persons other than the taxpayer are not taxable pursuant
38 to this section.

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

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



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

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

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

7 (b) Live entertainment that is provided by or entirely for the
8 benefit of a nonprofit religious, charitable, fraternal or other
9 organization that qualifies as a tax-exempt organization pursuant to
10 26 U.S.C. § 501(c).

11 (c) Any ~~boxing contest or exhibition governed by the~~
12 ~~provisions of chapter 467 of NRS.~~ *contest, game or other event*
13 *involving the athletic or physical skills of amateur or professional*
14 *athletes.*

15 (d) Live entertainment that is not provided at a licensed gaming
16 establishment. ~~if the facility in which the live entertainment is~~
17 ~~provided has a maximum seating capacity of less than 300.~~

18 (e) Live entertainment that is provided at a licensed gaming
19 establishment that is licensed for less than 51 slot machines, less
20 than six games, or any combination of slot machines and games
21 within those respective limits, if the facility in which the live
22 entertainment is provided has a maximum seating capacity of less
23 than 300.

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

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

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

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

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

38 6. As used in this section, "maximum seating capacity" means,
39 in the following order of priority:

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



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

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

7 Sec. 44. NRS 368A.210 is hereby amended to read as follows:

8 368A.210 A taxpayer shall hold the amount of all taxes for
9 which he is liable pursuant to ~~{this chapter}~~ *NRS 368A.010 to*
10 *368A.370, inclusive*, in a separate account in trust for the State.

11 Sec. 45. NRS 368A.220 is hereby amended to read as follows:

12 368A.220 1. Except as otherwise provided in this section ~~{~~
13 ~~(a) Each taxpayer who is a licensed gaming establishment}~~,
14 *each taxpayer* shall file with the Board, on or before the 24th day of
15 each month, a report showing the amount of all taxable receipts for
16 the preceding month. The report must be in a form prescribed by the
17 Board.

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

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

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

29 4. The Board ~~{and the Department}~~ shall deposit all taxes,
30 interest and penalties it receives pursuant to ~~{this chapter}~~ *NRS*
31 *368A.010 to 368A.370, inclusive*, in the State Treasury for credit to
32 the State General Fund.

33 Sec. 46. NRS 368A.230 is hereby amended to read as follows:

34 368A.230 Upon written application made before the date on
35 which payment must be made, the Board ~~{or the Department}~~ may,
36 for good cause, extend by 30 days the time within which a taxpayer
37 is required to pay the tax imposed by ~~{this chapter}~~ *NRS 368A.200*.
38 If the tax is paid during the period of extension, no penalty or late
39 charge may be imposed for failure to pay at the time required, but
40 the taxpayer shall pay interest at the rate of 1 percent per month
41 from the date on which the amount would have been due without the
42 extension until the date of payment. ~~{, unless otherwise provided in~~
43 ~~NRS 360.232 or 360.320.}~~



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1 Sec. 47. NRS 368A.240 is hereby amended to read as follows:
2 368A.240 1. If a taxpayer:
3 (a) Is unable to collect all or part of an admission charge or
4 charges for food, refreshments and merchandise which were
5 included in the taxable receipts reported for a previous reporting
6 period; and
7 (b) Has taken a deduction on his federal income tax return
8 pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to
9 collect,
10 ↳ he is entitled to receive a credit for the amount of tax paid on
11 account of that uncollected amount. The credit may be used against
12 the amount of tax that the taxpayer is subsequently required to pay
13 pursuant to ~~this chapter~~ *NRS 368A.010 to 368A.370, inclusive*.
14 2. If the Internal Revenue Service disallows a deduction
15 described in paragraph (b) of subsection 1 and the taxpayer claimed
16 a credit on a return for a previous reporting period pursuant to
17 subsection 1, the taxpayer shall include the amount of that credit in
18 the amount of taxes reported pursuant to ~~this chapter~~ *NRS*
19 *368A.010 to 368A.370, inclusive*, in the first return filed with the
20 Board ~~for the Department~~ after the deduction is disallowed.
21 3. If a taxpayer collects all or part of an admission charge or
22 charges for food, refreshments and merchandise for which he
23 claimed a credit on a return for a previous reporting period pursuant
24 to subsection 2, he shall include:
25 (a) The amount collected in the charges reported pursuant to
26 paragraph (a) of subsection 1; and
27 (b) The tax payable on the amount collected in the amount of
28 taxes reported,
29 ↳ in the first return filed with the Board ~~for the Department~~ after
30 that collection.
31 4. Except as otherwise provided in subsection 5, upon
32 determining that a taxpayer has filed a return which contains one or
33 more violations of the provisions of this section, the Board ~~for the~~
34 ~~Department~~ shall:
35 (a) For the first return of any taxpayer that contains one or more
36 violations, issue a letter of warning to the taxpayer which provides
37 an explanation of the violation or violations contained in the return.
38 (b) For the first or second return, other than a return described in
39 paragraph (a), in any calendar year which contains one or more
40 violations, assess a penalty equal to the amount of the tax which was
41 not reported.
42 (c) For the third and each subsequent return in any calendar year
43 which contains one or more violations, assess a penalty of three
44 times the amount of the tax which was not reported.



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

Sec. 48. NRS 368A.260 is hereby amended to read as follows:
368A.260 1. ~~{Except as otherwise provided in NRS 360.235 and 360.395:~~

~~—(a)—~~ No refund may be allowed unless a claim for it is filed with ~~the~~

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

~~—(2) The Department, if the taxpayer is not a licensed gaming establishment.~~ *the Board.* A claim must be filed within 3 years after the last day of the month following the reporting period for which the overpayment was made.

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

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

3. Failure to file a claim within the time prescribed in ~~{this chapter}~~ *subsection 1* constitutes a waiver of any demand against the State on account of overpayment.

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

Sec. 49. NRS 368A.270 is hereby amended to read as follows:

368A.270 1. Except as otherwise provided in this section, ~~{and NRS 360.320,}~~ interest must be paid upon any overpayment of any amount of the tax imposed by ~~{this chapter}~~ *NRS 368A.200* in accordance with the provisions of NRS 368A.140.

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

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



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

4 ~~— 3. If the Board for the Department determines that any~~
5 ~~overpayment has been made intentionally or by reason of~~
6 ~~carelessness, the Board for the Department shall not allow any~~
7 ~~interest on the overpayment.~~

8 Sec. 50. NRS 368A.280 is hereby amended to read as follows:

9 368A.280 1. No injunction, writ of mandate or other legal or
10 equitable process may issue in any suit, action or proceeding in any
11 court against this State or against any officer of the State to prevent
12 or enjoin the collection under ~~this chapter~~ NRS 368A.010 to
13 368A.370, inclusive, of the tax imposed by ~~this chapter~~ NRS
14 368A.200 or any amount of tax, penalty or interest required to be
15 collected.

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

20 Sec. 51. NRS 368A.290 is hereby amended to read as follows:

21 368A.290 1. Within 90 days after a final decision upon a
22 claim filed pursuant to ~~this chapter~~ NRS 368A.010 to 368A.370,
23 inclusive, is rendered by ~~it~~

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

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

29 2. An action brought pursuant to subsection 1 must be brought
30 in a court of competent jurisdiction in Carson City, the county of
31 this State where the claimant resides or maintains his principal place
32 of business or a county in which any relevant proceedings were
33 conducted by the Board, ~~for the Department,~~ for the recovery of
34 the whole or any part of the amount with respect to which the claim
35 has been disallowed.

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

39 Sec. 52. NRS 368A.300 is hereby amended to read as follows:

40 368A.300 1. If the Board fails to mail notice of action on a
41 claim within 6 months after the claim is filed, the claimant may
42 consider the claim disallowed and file an appeal with the Nevada
43 Gaming Commission within 30 days after the last day of the 6-
44 month period.



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1 2. ~~If the Department fails to mail notice of action on a claim~~
2 ~~within 6 months after the claim is filed, the claimant may consider~~
3 ~~the claim disallowed and file an appeal with the Nevada Tax~~
4 ~~Commission within 30 days after the last day of the 6 month period.~~
5 ~~3.~~ If the claimant is aggrieved by the decision of ~~the~~
6 ~~(a) The~~ *the* Nevada Gaming Commission rendered on appeal,
7 the claimant may, within 90 days after the decision is rendered,
8 bring an action against the Board on the grounds set forth in the
9 claim for the recovery of the whole or any part of the amount
10 claimed as an overpayment.
11 ~~(b) The Nevada Tax Commission rendered on appeal, the~~
12 ~~claimant may, within 90 days after the decision is rendered, bring an~~
13 ~~action against the Department on the grounds set forth in the claim~~
14 ~~for the recovery of the whole or any part of the amount claimed as~~
15 ~~an overpayment.~~
16 ~~4.~~ 3. If judgment is rendered for the plaintiff, the amount of
17 the judgment must first be credited towards any tax due from the
18 plaintiff.
19 ~~5.~~ 4. The balance of the judgment must be refunded to the
20 plaintiff.
21 Sec. 53. NRS 368A.310 is hereby amended to read as follows:
22 368A.310 In any judgment, interest must be allowed at the rate
23 of 6 percent per annum upon the amount found to have been
24 illegally collected from the date of payment of the amount to the
25 date of allowance of credit on account of the judgment, or to a date
26 preceding the date of the refund warrant by not more than 30 days.
27 The date must be determined by the Board. ~~for the Department.~~
28 Sec. 54. NRS 368A.320 is hereby amended to read as follows:
29 368A.320 A judgment may not be rendered in favor of the
30 plaintiff in any action brought against the Board ~~for the Department~~
31 to recover any amount paid when the action is brought by or in the
32 name of an assignee of the person paying the amount or by any
33 person other than the person who paid the amount.
34 Sec. 55. NRS 368A.330 is hereby amended to read as follows:
35 368A.330 1. The Board ~~for the Department~~ may recover a
36 refund or any part thereof which is erroneously made and any credit
37 or part thereof which is erroneously allowed in an action brought in
38 a court of competent jurisdiction in Carson City or Clark County in
39 the name of the State of Nevada.
40 2. The action must be tried in Carson City or Clark County
41 unless the court, with the consent of the Attorney General, orders a
42 change of place of trial.
43 3. The Attorney General shall prosecute the action, and the
44 provisions of NRS, the Nevada Rules of Civil Procedure and the



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1 Nevada Rules of Appellate Procedure relating to service of
2 summons, pleadings, proofs, trials and appeals are applicable to the
3 proceedings.

4 Sec. 56. NRS 368A.340 is hereby amended to read as follows:

5 368A.340 1. If any amount in excess of \$25 has been
6 illegally determined, either by the person filing the return or by the
7 Board, ~~for the Department,~~ the Board ~~for the Department,~~ shall
8 certify this fact to the State Board of Examiners, and the latter shall
9 authorize the cancellation of the amount upon the records of the
10 Board. ~~for the Department.~~

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

17 Sec. 57. NRS 368A.350 is hereby amended to read as follows:

18 368A.350 1. A person shall not:

19 (a) Make, cause to be made or permit to be made any false or
20 fraudulent return or declaration or false statement in any report or
21 declaration, with intent to defraud the State or to evade payment of
22 the tax or any part of the tax imposed by ~~this chapter.~~
23 *NRS 368A.200.*

24 (b) Make, cause to be made or permit to be made any false entry
25 in books, records or accounts with intent to defraud the State or to
26 evade the payment of the tax or any part of the tax imposed by ~~this~~
27 ~~chapter.~~ *NRS 368A.200.*

28 (c) Keep, cause to be kept or permit to be kept more than one set
29 of books, records or accounts with intent to defraud the State or to
30 evade the payment of the tax or any part of the tax imposed by ~~this~~
31 ~~chapter.~~ *NRS 368A.200.*

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

34 Sec. 58. NRS 368A.370 is hereby amended to read as follows:

35 368A.370 The remedies of the State provided for in ~~this~~
36 ~~chapter.~~ *NRS 368A.010 to 368A.370, inclusive,* are cumulative, and
37 no action taken by the Board ~~for the Department,~~ or the Attorney
38 General constitutes an election by the State to pursue any remedy to
39 the exclusion of any other remedy for which provision is made in
40 ~~this chapter.~~ *NRS 368A.010 to 368A.370, inclusive.*

41 Sec. 59. NRS 368A.120, 368A.130 and 368A.250 are hereby
42 repealed.

43 Sec. 60. This act becomes effective on July 1, 2005, and
44 expires by limitation on the last day of the month in which a court of



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- 1 competent jurisdiction enters a final order declaring unconstitutional
- 2 or invalid any of the provisions of sections 2 to 32, inclusive, of this
- 3 act which differ from the provisions of chapter 368A of NRS, as that
- 4 chapter existed on June 30, 2005.

TEXT OF REPEALED SECTIONS

368A.120 Natural persons who are deemed to be business entities. A natural person engaging in a business shall be deemed to be a business entity that is subject to the provisions of this chapter if the person is required to file with the Internal Revenue Service a Schedule C (Form 1040), Profit or Loss From Business Form, or its equivalent or successor form, or a Schedule E (Form 1040), Supplemental Income and Loss Form, or its equivalent or successor form, for the business.

368A.130 Adoption by Department of regulations for determining whether activity is taxable. The Department shall provide by regulation for a more detailed definition of "live entertainment" consistent with the general definition set forth in NRS 368A.090 for use by the Board and the Department in determining whether an activity is a taxable activity under the provisions of this chapter.

368A.250 Certification of excess amount collected; credit and refund. If the Department determines that any tax, penalty or interest it is required to collect has been paid more than once or has been erroneously or illegally collected or computed, the Department shall set forth that fact in its records and shall certify to the State Board of Examiners the amount collected in excess of the amount legally due and the person from whom it was collected or by whom it was paid. If approved by the State Board of Examiners, the excess amount collected or paid must be credited on any amounts then due from the person under this chapter, and the balance refunded to the person or his successors in interest.

(30)



* S B 2 4 7 R 1 *

Exhibit 5

Westlaw.

Nevada Bill History, Seventy-Third Session, Assembly Bill 554, NV B. Hist., 73rd Sess. A.B. 554, June 17, 2005

Nevada Senate Committee Minutes, June 5, 2005, NV S. Comm. Min., 6/5/2005, June 05, 2005

Nevada Senate Committee Minutes, June 5, 2005, NV S. Comm. Min., 6/5/2005, June 05, 2005

Nevada Senate Committee Minutes, June 5, 2005, NV S. Comm. Min., 6/5/2005, June 05, 2005

Nevada Senate Committee Minutes, June 4, 2005, NV S. Comm. Min., 6/4/2005, June 04, 2005

Nevada Assembly Committee Minutes, June 3, 2005, NV Assem. Comm. Min., 6/3/2005, June 03, 2005

Nevada Assembly Committee Minutes, June 2, 2005, NV Assem. Comm. Min., 6/2/2005, June 02, 2005

Nevada Assembly Committee Minutes, June 1, 2005, NV Assem. Comm. Min., 6/1/2005, June 01, 2005

Nevada Assembly Committee Minutes, May 20, 2005, NV Assem. Comm. Min., 5/20/2005, May 20, 2005

✓ Nevada Assembly Committee Minutes, April 13, 2005, NV Assem. Comm. Min., 4/13/2005, April 13, 2005

Nevada Assembly Committee Minutes, March 29, 2005, NV Assem. Comm. Min., 3/29/2005, March 29, 2005

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Exhibit 5

Assemblyman Seale:

Are there other states on the West Coast that have an exemption on this kind of equipment as well?

Senator Rhoads:

I'm sure there are, but LCB [Legislative Counsel Bureau] staff would have to tell you that.

Chairwoman Buckley:

Thanks for that. We'll close the public hearing on S.B. 398 and open the hearing on S.B. 247.

Senate Bill 247 (1st Reprint): Revises provisions governing tax on live entertainment. (BDR 32-680)

Senator Dina Titus, Clark County Senatorial District No. 7:

The tax package from the 2003 Legislative Session included the entertainment tax, which quickly proved a bookkeeping nightmare. It also failed to generate the revenue we had anticipated and it didn't adequately bring in a group some of us intended to be covered, which are the striptease clubs that have proliferated, primarily in southern Nevada. It did, however, introduce us to the touring hula girls who are constantly before us and were helpful in bringing some of the problems with the original bill to our attention. For those reasons, I've introduced S.B. 247 as a reform of the entertainment tax.

The amended bill sets up parallel entertainment taxes, a live entertainment tax, and an adult entertainment tax. The live entertainment tax applies only to non-restricted gaming facilities. It's administered by the Gaming Control Board and exempts sporting events that occur in non-restricted gaming facilities, keeping the same tax that was in place before, at 10 percent on admission, drinks, food, and souvenirs.

The adult entertainment tax in Section 11 provides a tax at 10 percent on everything in non-restricted gaming and non-gaming facilities that offer live adult entertainment, which is defined in Section 8 of the statute. It would be administered by the Department of Taxation and it does not include houses of prostitution.

This eliminates seating requirements, which were problematic in the original bill. It eliminates sporting events, which are family oriented. We believe those are attended by local families, and eliminating this would help to get a second

NASCAR race, an all-star basketball game, and a baseball team. It also eliminates taverns and restaurants that have occasional entertainment on weekends such as a piano player or a small band. It will do a better job of capturing adult live entertainment because it eliminates that 300 seating requirement. This is an industry that should pay its fair share because it does put additional burdens on society in terms of law enforcement and alcohol regulation. Because these people don't pay workers' comp or any benefits, their employees often become a burden on social services of the state, so it's only fair they should contribute.

[Senator Titus, continued.] An amendment (Exhibit D) is being brought forward by the Nevada Resort Association and others who would like us to put in statute the regulations that have worked over the last 18 months. The Tax Commission did a good job of working those out, so we don't want to start that process all over again. I support putting those regulations in the statute; it's a good amendment. There's also an amendment (Exhibit E) to clarify that mechanical rides like you find in the "*Star Trek* Experience" would not be considered live entertainment. I don't have any problem with that amendment, either.

There was some testimony on the Senate side by a group of naturists. I thought that meant people who hiked and picked flowers, but in the old days you called them nudist colonies. Certainly the intent of the live entertainment tax was not to get nudist colonies, but to get striptease clubs. If there's some way you can accommodate them, that is fine too.

If you are going to consider amendments to this bill, you might also consider amending the provision that's the severability clause. The clause says that if some part of this is found to be unconstitutional, it goes back to the old entertainment tax. We don't want that to happen, so it should be written to say if something is found unconstitutional the other part of the tax in this new bill would stand.

Chairwoman Buckley:

My biggest concern with the bill is its constitutionality. We already had an Assembly bill we passed that exempts the *Star Trek* ride. Now someone is claiming the free pens they give you at a convention should be taxed, so we put that in there. We clarified the strolling and the hula girls, and I don't think anyone opposes the Resort Association language (Exhibit D). We can clarify that wasn't the intent and everyone supports that. A lot of that was already in the Assembly bill that we sent to Ways and Means. I'm concerned that if we just put live adult entertainment, that might be held unconstitutional. I wonder if a better approach might be to pick out a few more things like the racetrack and

sporting events, but to delineate all those separate ones and leave it like that. We could fix and refine the language to make sure we're more careful and more able to describe things that might be caught up rather than to put into our statute the phrase "adult entertainment," which puts a big red flag on it for the courts. What are your thoughts on that?

Senator Titus:

At one time, the brothels were included, so that would be broader. You can make the argument that this is a special kind of business that poses special kinds of social problems and therefore you can attach them. It's worth doing, and if an elected court in the state wants to challenge it, that's fine. None of the parts of the *Constitution* are absolute and they're all subject to interpretation. They interpreted the property tax we recently passed as maybe constitutional, and we can see how flexible the *Constitution* is in Nevada. I think it's worth the chance to put it in there.

Chairwoman Buckley:

I wonder if we could do it in a way that's a little broader but gets at the problems so we would avoid losing the revenue. We're getting the most revenue from adult entertainment clubs, which is \$6 million dollars, the highest amount paid under the live entertainment tax. The next one is race tracks at \$1.5 million, but everything else pales in comparison to how much they're bringing in now, and I would hate to give them back their \$6 million. Perhaps with the severability clause, but I hate to bring back anything we might want to fix now in terms of getting them excluded from the bill. It sounds like the goals are pretty much the same.

Senator Titus:

I agree with that. The 300-seat requirement has kept a lot of those clubs from paying. If you decide to amend this and do something with it, be sure to keep that in mind because that's where a lot of the revenue is. The Fiscal Division in the Senate argued that if you eliminate some of the family-oriented businesses like NASCAR and you take out the 300-seat at the same time, that will more than make up for any lost revenue.

Chairwoman Buckley:

Could staff obtain the fiscal information on the live entertainment tax for the Committee members? It can't be by business, but it can be by group and you can distribute that to the entire Committee. Senator Titus, we thank you for your testimony. We don't have a problem with the *Star Trek* amendment (Exhibit E); we already approved codifying the definitions.

Bill Bible, President, Nevada Resort Association [NRA], Las Vegas, Nevada:
You've seen the proposed amendment (Exhibit D) which codifies some of the existing regulations resolved in a lot of work between the Department of Taxation, the Tax Commission, the Gaming Control Board, and the Nevada Gaming Commission to resolve the less-than-perfect bill that emerged from the 2003 Legislative Session. We had a concern if S.B. 247 included or excluded it from taxation, and it doesn't exclude them, but we have a problem in outdoor venues in Laughlin and northern Nevada. Clearly in an outdoor venue, if you have some type of entertainment function that would be subject to the live entertainment tax and you pay a live admission fee, that becomes a taxable event. You also have a number of activities that take place with a band where there's no admission charge. Typically, those events have been excluded from taxation through some of the regulatory structure, but it would be helpful if we had a specific amendment that indicated that in an outdoor venue there would be no applicability of tax unless there's actually an admission charge. This created a two-part threshold which is an admission charge, and the other being live entertainment present.

Chairwoman Buckley:
That's current law?

Bill Bible:
That's current law through interpretation. This was a very complicated bill and we spent a lot of time debating and refining the various points of the various regulatory bodies, which is why we want to codify some of those existing regulations. That would at least provide additional clarity, principally in northern Nevada, but to some extent in Laughlin, where we have outdoor events on a seasonal basis.

Denis Neilander, Chairman, Nevada State Gaming Control Board:
There are a number of exemptions we've created through the rule-making process, and if the Committee chooses to codify those, that would be appropriate. Mr. Bible mentioned the situation with outdoor venues, and most of them have been excluded from the tax because they fit under one of these other exemptions in the amendment. There is no one particular provision that just addresses outdoor venues and there could be an open question about whether or not it's a taxable event even if you don't have an admission charge. The intent has been to focus on venues where there are no admission charges, and that would be an appropriate amendment. There are amendments that are currently in S.B. 392, which hasn't come over yet, but if you choose to process this legislation, the Board would be able to provide you with those amendments.

[Denis Neilander, continued.] The original legislation housed the regulation authority with the Board instead of the Nevada Gaming Commission, and that was an oversight. While the Board adopted the regulations, we did it together with the Commission and the Nevada Tax Commission, so that would go back to the way we do rulemaking, which is to say the Nevada Gaming Commission does it.

There is a provision in the existing law that requires you to place funds in a certain trust account and you'll hear from the Department of Taxation and us. That's not necessary, we've never required it before, and it would be a simple repeal of that provision.

You can read certain provisions that require the taxes be paid on a cash basis within the month they're collected, but it's probably more appropriate to give licensees the option of paying on either an accrual or cash basis. Right now, we do allow licensees to pay some of those taxes on an accrual basis, so we give them the option.

Assemblyman Anderson:

I can think of several events that take place outside in my community because of the redevelopment agency. Are you saying within an outdoor area you have one part of it with a separate entry which requires an admission fee, compared to something that is provided free of charge to everyone who's at the event? If it's part of Reno's ArtTown and if you had to come into Idylwild Park to see the entertainment show, you'd have to pay for it, but if you stand on the river, you don't have to pay for it? So if you can stand outside and see it, you don't have to pay for it, but if you enter into a special area where you have designated seating, you do have to pay for it, and therefore it's subject to the entertainment tax?

Bill Bible:

That's correct. In outdoor venues, mostly in northern Nevada or Laughlin, there has been some difficulty in the interpretation of the statute. If you conceptualize with the Rib Cook-Off, you have a "village" sponsored by the Sparks Nugget, and maybe two other licensees. In order to get into that village, you have to go through a gate to control access and pay an admission fee. There is live entertainment present, so that is subject to tax. In a different situation in the parking lot of the Hilton during Hot August Nights, there are vending stands, a bandstand, and sales of food and beverages. There was an argument that this would be subject to an entertainment tax because you could hear and see the live entertainment even though you did not pay an admission fee. Because of the way the existing regulations were interpreted by the Nevada State Gaming Control Board, they did not choose to apply the tax, but it was their legal

construction of some of the language that was adopted through the rule-making process, so we want to codify it to make it clear that in an outdoor venue, unless there's restricted access and someone is charged an admission price, there is no applicability of the tax.

Assemblyman Anderson:

If we were to take the Candy Dance in Genoa and it had music and there was an admission charge, then it would —

Bill Bible:

Under this proposal, the Candy Dance will no longer be a valid example because that's not a licensed gaming premise. If that was a licensed gaming premise, if you had to pay an admission fee and there was live entertainment, everything from the food, beverages, merchandise, and the admission fee would be subject to the entertainment tax.

Assemblyman Anderson:

The Rib Cook-Off, because it's put on by the Nugget, fits into the scenario, as does the Big Easy, which is put on by the Silver Club. But Hot August Nights doesn't because it's not put on by a casino?

Bill Bible:

It's not necessarily who sponsors, but who has control of the property and what are considered the premises of the establishment. With the Rib Cook-Off, part of that is done within the property controlled by the City of Sparks, but they've agreed to allow the Nugget and the sponsoring entities control over that particular property. It becomes a technical issue as to the applicability of the tax. If you think about them within the parking lot of the Hilton, or the parking lot of the Atlantis across Virginia Street, those are considered part of the premises of licensed gaming establishments, even though they're not within the confines of the buildings.

Assemblyman Anderson:

This bill doesn't change when we are taxing those entertainments and when we aren't?

Bill Bible:

This will clarify the existing tax and make it abundantly clear that those outdoor venues, unless there is an admission charge and live entertainment, don't have applicability with the tax.

Chairwoman Buckley:

I'm going to ask our staff to do a comprehensive document combining these proposed amendments, the ones we already approved, the clarifications on further exempting some of the folks from the live entertainment tax, and prepare it for our Ways and Means staff. We should not just say only the adult entertainment tax, but look at all the ones we want to exempt and pass it out that way. We really get into constitutional trouble. I don't have a problem with any of these amendments, including the one from the nudist colony (Exhibit D). I don't think the current term was intended to sweep into this. If we could list all the exemptions, we can re-refer this to Ways and Means, which has our other live entertainment bill. The Chairman of Ways and Means can identify fiscal impact. Most of these things we've identified are de minimus and can be passed. At some point with the larger ticket items, there might be a concern, but we should list and price them all and re-refer it to Ways and Means and have all the bills in one Committee. Is this exempted, Brenda?

Brenda Erdoes:

I don't believe it is exempted at this time. We might need to ask Mark [Stevens, Fiscal Division] if he's going to declare this eligible for exemption.

Chairwoman Buckley:

What about the other bill that Mr. Parks presented testimony on? That's definitely exempted, so maybe we can exempt this one, too, if Mark is willing to look at it. The same issues are with the Assembly committee bill, so we could combine them all after we price them all and figure out which way we're going to go. Why don't we refer without recommendation, get the complete list, and then we'll see those members in Ways and Means or on the Floor as we put them all together so we don't delay it.

Assemblywoman Giunchigliani:

I'll email Mark to see if this will qualify for an exemption at the same time.

Assemblyman Anderson:

I appreciate the fact that we want to move with some speed and dispatch, but if we don't have it exempt ahead of time, we'll have a problem, and we need at least a couple of the amendments for clarity.

Chairwoman Buckley:

We'll hold it to Wednesday or Friday, but in the meantime I'd ask staff to go ahead and work on that list.

Assemblyman Perkins:

If there's a problem with an exemption, you can always refer it back to Committee, and if you hold onto it until Wednesday or Friday and you can't get the exemption, then we'll have other issues. As Ways and Means looks at the bills collectively to see what we want to do with the live entertainment tax in the state, it's best to remove that without recommendation. If it's not exemptible, then we can refer it back to Commerce and Labor and we'll deal with it here.

**ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO RE-REFER
SENATE BILL 247 TO THE ASSEMBLY COMMITTEE ON WAYS
AND MEANS.**

ASSEMBLYMAN ANDERSON SECONDED THE MOTION.

Senator Titus:

There are a number of people who made a special trip up here to testify in favor of the bill. Would you let them come forward and put it on the record to make their trip worthwhile?

Chairwoman Buckley:

Of course.

**Terry Graves, Legislative Advocate, representing The Beach Night Club,
Las Vegas, Nevada:**

We participated extensively during the interim hearings with the Tax Commission and the Gaming Commission on formulating the regulations. I did not have a chance to see what NRA [Nevada Resort Association] was proposing in that amendment (Exhibit D), but we certainly helped craft that. On the Senate side, we were supportive of Senator Titus's bill to try to clean up the live entertainment tax, and we appreciated her efforts.

**Don Logan, President and General Manager, Las Vegas 51s Baseball Club,
Las Vegas, Nevada:**

We're the only professional team that's survived in Las Vegas for 23 years. We do provide the best fun, family-oriented entertainment in southern Nevada. The explosive growth and changes that have taken place down there make it more and more difficult each year, and the entertainment tax is one added burden that fell in our lap inadvertently last time. Unfortunately, we've had to pay the bill, and not having to do it would make it that much easier. Our margins

continue to shrink, and for us to provide entertainment with something real and wholesome in Las Vegas, it would help us.

Joe Brown, Legislative Advocate, representing Las Vegas Motor Speedway, Las Vegas, Nevada:

In my 40 years practicing law in Las Vegas, the term "entertainment capital" has been based on bringing tourists to Nevada and attracting them any way possible. We then get taxes from them by room taxes, sales taxes, gasoline taxes, gaming taxes, and every other way you can take money from their wallets. A few years ago, some people invested millions of dollars in a speedway and it's not the largest event in Nevada every year.

Chris Powell, General Manager, Las Vegas Motor Speedway, Las Vegas, Nevada:

I'm here in support of S.B. 247. The Las Vegas Motor Speedway provides an enormous contribution to Nevada's economy. The implementation of the live entertainment tax has proven to be unduly burdensome to our business. The passage of S.B. 247 not only will enhance our business, but it will put us back on an equal playing field with other speedways in an increasingly competitive environment. We've not yet received comparable numbers for the 2005 NASCAR Weekend; the 2004 Weekend put more than \$142 million into Nevada's economy. That's a one-time expenditure that did not just affect Las Vegas Motor Speedway, but also gaming, hotels, restaurants, taxicabs, and retail shops. Furthermore, we employ roughly 2,500 people during the course of the weekend in March.

NASCAR's growth over the years has been astounding. These events routinely draw 100,000 to 175,000 people at various events across the country. Several members of the Legislature were in attendance at our March event. In the past year, speedways in the Los Angeles and Phoenix markets have been awarded with a second annual NASCAR event, an event that has put millions of dollars into their communities. A second date in Las Vegas, possibly in the fall, would be worth hundreds of millions of dollars to our state each year and would yield much more to our economy than the current live entertainment tax.

Occasionally we have issues where an event might get rained out, yet we've already paid the tax on it. As we sit here right now, there are ticket agents at the speedway who are putting numbers into computers, selling tickets, and entering in renewals for next year's event. If one day gets rained out and we have to refund money, the tax we are paying for next March's event is being paid at the end of this quarter, so it gets unwieldy. A lot of our tickets are tied to food, so the food is not taxed, but the ticket is. Another issue is a ticket may say \$49, but because of our ticketing system, a \$49 ticket has to be advertised

at the total price of \$51.45, which is above that \$50 threshold that any retailer wants to be below.

Chairwoman Buckley:

Could you tell us if the other states where other tracks are have any sort of tax?

Chris Powell:

The two markets that in the last 12 months have been awarded second NASCAR dates per year are in California in Arizona. They don't have an admissions tax.

Chairwoman Buckley:

What about ones with the first race? How does it compare to any one? Are there other places?

Chris Powell:

I'm just speaking to states whose speedways have recently been given second dates.

Chairwoman Buckley:

What other states have speedways with a tax?

Chris Powell:

Texas has some type of tax, but it's not just an admissions tax, it's everything involved in that category.

Chairwoman Buckley:

So it's more extensive than ours. The most convincing thing is last year it raised \$1.5 million?

Chris Powell:

According to the Las Vegas Convention and Visitors Authority, which intercepts customers throughout the course of the event weekend, those three days in March pumped \$142.5 million into the economy.

Chairwoman Buckley:

I'm saying that last year, the tax only rose. What you paid was relatively small, which means it doesn't affect the budget much; so I'm trying to make a point for you.

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada:

I appreciate your comments regarding the *Star Trek* amendment (Exhibit E). If this bill is processed in this fashion with regard to the effective date, it might make sense to make these exemptions that are being added effective upon passage and approval so they would be part of the chapter as it exists on June 30, 2005, if in fact there is any ruling on the unconstitutionality.

Chairwoman Buckley:
Let's move to Las Vegas.

Taylor Dew, Magical Hula Girls, Las Vegas, Nevada:

Lines 21 through 24 state "this bill provides that if the provisions of this bill concerning the tax on adult entertainment are held to be unconstitutional, the tax and all forms of live entertainment will be reinstated as currently set forth in provisions in NRS 368A." If this is removed, I'm in favor of this bill.

Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada:

If you think the Speedway had a relatively small total in tax, wait until you hear about ours. Don Logan of the 51s was right when he said that they are the only franchise in Las Vegas to make it in 20 years. We're relatively new at two years old, going into our third season. That's a factor that we looked at when we decided to put a minor league hockey team in Las Vegas. That history in Las Vegas has been very difficult.

Our business in minor league sports tends to be fragile. In hockey, we only have 36 dates, which means we're effectively closed 11 months out of the season, so we have to capture our revenues in order to survive in a brief period of time. We only have 36 three-hour opportunities to do that. Most of our customers are families who want affordable entertainment. That's how we thrive and that's why we're fragile as a business. The tax last year meant we had to charge and pass that tax on to our customers. Oftentimes, families buy four to six season tickets at \$144 for a family of four, and one season ticket holder told me last season when the tax was applied, "That's basically an electric bill for me for one month." We're here to represent our contingency of families in Las Vegas who are looking for something to do with quality time with their kids, friends, and families, to preserve that and increase our chances of surviving.

Chairwoman Buckley:

Thank you, and good luck with the Wranglers. For those of us with children who want more options, we do appreciate you, so thanks very much.

Richard Clauser, Nativist Society and The Nativist Action Committee:

We've changed the terms of what we call ourselves. "Colonies" doesn't fit anymore, so we call ourselves resorts and groups. We are not opposed to the adult entertainment tax. If you look at nudist people, probably 95 percent wouldn't go to an adult entertainment place. Our concern is that the definition of "adult entertainment" is so broad that it would encompass a lot of activities of a nudist group or resort. Our activities are family-oriented and are no different than if you went to a clothed resort; our patrons simply don't have clothes on. Our concern is that it's so broad that we need to better define what constitutes "adult entertainment." I realize there are constitutional issues if you narrow it down too much, but it's so broad it could be onerous on some of these small groups, and some are trying to help and doing good things. The Tahoe area nudists are always out there helping with causes around the Lake, and if they have a fundraiser this could conceivably apply, and that's what our concern is.

Sabra Smith-Newby, Legislative Advocate, representing the City of Las Vegas, Nevada:

I'm in support of this bill.

Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada:

We're here to talk about the lack of constitutionality in this bill. This isn't a new issue for the courts. I dealt with an issue similar to this about 10 years ago as it related to a Clark County ordinance. The adult entertainment tax specifies a particular type of expressive content, and the courts have been very reluctant to allow that. It doesn't mean that adult entertainment venues are free from a general applicability tax, but taxing one particular type of content is not acceptable, and the courts have been clear about that. One possible exception in that is if taxes or fees can be specifically related to administrative costs for checking working cards, et cetera. This is not a revenue-neutral tax. It is not to relieve the state of certain burdens; the only exception might be to cover administrative costs. There is ample case law that proves this.

If this is passed in its current form, someone will challenge it. We at the ACLU [American Civil Liberties Union] don't involve ourselves in adult entertainment, but we would certainly lend our hand in opposing this. If it is dressed up differently, the impact is still to burden one particular type of business involving one type of content. That fact would weigh on the federal court, which would likely turn it down. The federal courts have dealt with these issues before, and we're sure this would fall as it has in other states.

Chairwoman Buckley:

I'll close the public hearing on S.B. 247. This bill is eligible for an exemption. I'd like to have the opportunity to work out the language of NRS 545, some more

exemptions, and have our Fiscal staff price it out. There
that will cost the state relatively little. Some changes w
and that has to be part of the discussions of the money C

ASSEMBLYMAN ANDERSON MOVED T
SENATE BILL 247 WITHOUT RECOMMENDA
ASSEMBLY COMMITTEE ON WAYS AND MEANS.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED T

THE MOTION CARRIED. (Mr. Arberry and Mr. P
present for the vote.)

Chairwoman Buckley:
We'll open the hearing on S.B. 188.

Senate Bill 188 (1st Reprint): Makes various chang
(BDR 58-364)

Don Soderberg, Chairman, Public Utilities Commission of
Senate Bill 188 is a product of discussions that have g
bringing together people involved in Nevada's ener
regulation, and people with overall interest in how we
weren't going to get together and talk about a number of
we wanted to proactively address some of our bigger pr
who participated in this group from the beginning was th
who was the Governor's Energy Advisor. Prior to that, he
Commission. Mr. Burdett continually reminded us that v
\$3 billion a year in fossil fuels. This \$3 billion for the m
the state. We kept asking ourselves what we can do abo
at the renewable portfolio standard, which was put toge
in past sessions, to reduce our dependence on fossil fuel
In Nevada, we're not doing a very good job of conservatio

We are called the Saudi Arabia of renewable energy in
the Western United States, in which we are a leader wh
is also the Saudi Arabia of energy waste, because over t
the last oil crisis, we've lost the art of conserving. It's
part of our daily lives and it's looked at from a dollar-and

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Chris Powell:

I'm just speaking to states whose speedways have recently been given second dates.

Chairwoman Buckley:

What other states have speedways with a tax?

Chris Powell:

Texas has some type of tax, but it's not just an admissions tax, it's everything involved in that category.

Chairwoman Buckley:

So it's more extensive than ours. The most convincing thing is last year it raised \$1.5 million?

Chris Powell:

According to the Las Vegas Convention and Visitors Authority, which intercepts customers throughout the course of the event weekend, those three days in March pumped \$142.5 million into the economy.

Chairwoman Buckley:

I'm saying that last year, the tax only rose. What you paid was relatively small, which means it doesn't affect the budget much; so I'm trying to make a point for you.

Scott Sherer, Legislative Advocate, representing Paramount Parks, Las Vegas, Nevada:

I appreciate your comments regarding the *Star Trek* amendment (Exhibit E). If this bill is processed in this fashion with regard to the effective date, it might make sense to make these exemptions that are being added effective upon passage and approval so they would be part of the chapter as it exists on June 30, 2005, if in fact there is any ruling on the unconstitutionality.

Chairwoman Buckley:
Let's move to Las Vegas.

Taylor Dew, Magical Hula Girls, Las Vegas, Nevada:

Lines 21 through 24 state "this bill provides that if the provisions of this bill concerning the tax on adult entertainment are held to be unconstitutional, the tax and all forms of live entertainment will be reinstated as currently set forth in provisions in NRS 368A." If this is removed, I'm in favor of this bill.

Billy Johnson, Vice President and Chief Operating Officer, Las Vegas Wranglers, Las Vegas, Nevada:

If you think the Speedway had a relatively small total in tax, wait until you hear about ours. Don Logan of the 51s was right when he said that they are the only franchise in Las Vegas to make it in 20 years. We're relatively new at two years old, going into our third season. That's a factor that we looked at when we decided to put a minor league hockey team in Las Vegas. That history in Las Vegas has been very difficult.

Our business in minor league sports tends to be fragile. In hockey, we only have 36 dates, which means we're effectively closed 11 months out of the season, so we have to capture our revenues in order to survive in a brief period of time. We only have 36 three-hour opportunities to do that. Most of our customers are families who want affordable entertainment. That's how we thrive and that's why we're fragile as a business. The tax last year meant we had to charge and pass that tax on to our customers. Oftentimes, families buy four to six season tickets at \$144 for a family of four, and one season ticket holder told me last season when the tax was applied, "That's basically an electric bill for me for one month." We're here to represent our contingency of families in Las Vegas who are looking for something to do with quality time with their kids, friends, and families, to preserve that and increase our chances of surviving.

Chairwoman Buckley:

Thank you, and good luck with the Wranglers. For those of us with children who want more options, we do appreciate you, so thanks very much.

Richard Clauser, Naturist Society and The Naturist Action Committee:

We've changed the terms of what we call ourselves. "Colonies" doesn't fit anymore, so we call ourselves resorts and groups. We are not opposed to the adult entertainment tax. If you look at nudist people, probably 95 percent wouldn't go to an adult entertainment place. Our concern is that the definition of "adult entertainment" is so broad that it would encompass a lot of activities of a nudist group or resort. Our activities are family-oriented and are no different than if you went to a clothed resort; our patrons simply don't have clothes on. Our concern is that it's so broad that we need to better define what constitutes "adult entertainment." I realize there are constitutional issues if you narrow it down too much, but it's so broad it could be onerous on some of these small groups, and some are trying to help and doing good things. The Tahoe area naturists are always out there helping with causes around the Lake, and if they have a fundraiser this could conceivably apply, and that's what our concern is.

Sabra Smith-Newby, Legislative Advocate, representing the City of Las Vegas, Nevada:

I'm in support of this bill.

Allen Lichtenstein, General Counsel, American Civil Liberties Union, Nevada:

We're here to talk about the lack of constitutionality in this bill. This isn't a new issue for the courts. I dealt with an issue similar to this about 10 years ago as it related to a Clark County ordinance. The adult entertainment tax specifies a particular type of expressive content, and the courts have been very reluctant to allow that. It doesn't mean that adult entertainment venues are free from a general applicability tax, but taxing one particular type of content is not acceptable, and the courts have been clear about that. One possible exception in that is if taxes or fees can be specifically related to administrative costs for checking working cards, et cetera. This is not a revenue-neutral tax. It is not to relieve the state of certain burdens; the only exception might be to cover administrative costs. There is ample case law that proves this.

If this is passed in its current form, someone will challenge it. We at the ACLU [American Civil Liberties Union] don't involve ourselves in adult entertainment, but we would certainly lend our hand in opposing this. If it is dressed up differently, the impact is still to burden one particular type of business involving one type of content. That fact would weigh on the federal court, which would likely turn it down. The federal courts have dealt with these issues before, and we're sure this would fall as it has in other states.

Chairwoman Buckley:

I'll close the public hearing on S.B. 247. This bill is eligible for an exemption. I'd like to have the opportunity to work out the language of NRS 545, some more

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