

**MARK E. FERRARIO** (1625)  
**GREENBERG TRAUIG, LLP**  
3773 Howard Hughes Parkway  
Suite 400 North  
Las Vegas, Nevada 89136  
Tel: (702) 792-3773  
Fax: (702) 792-9002  
Email: [FerrarioM@gtlaw.com](mailto:FerrarioM@gtlaw.com)  
*Counsel for Appellant SHAC, LLC*

Electronically Filed  
Oct 27 2016 04:30 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**WILLIAM H. BROWN** (7623)  
**LAMBROSE | BROWN PLLC**  
300 S. Fourth St., Ste. 700  
Las Vegas, Nevada 89101  
Tel: (702) 816-2200  
Fax: (702) 816-2300  
Email: [WBrown@LambroseBrown.com](mailto:WBrown@LambroseBrown.com)  
*Counsel for all Petitioners  
except SHAC, LLC*

**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**

**APPELLANTS' APPENDIX**  
**VOLUME 2, PAGES 250 – 497**

## **INDEX TO APPELLANTS' APPENDIX**

Filing Date	Description	Vol.	Page																
06/24/2016	Amended Notice of Appeal	19	4036-4038																
06/23/2016	Amended Order Denying Judicial Review of Administrative Decision	19	4021-4026																
09/28/2011	<p>Application for Leave to Present Additional Evidence to the Nevada Tax Commission</p> <p>Exhibit 13 (ONLY) – Department Letter of November 17, 20013 Re: Southern California Edison</p> <p>(This exhibit was erroneously omitted in the Supplement to the Record Filed on January 26, 2015)</p>	1	13-15																
01/26/2015	<p>Entire Record of Administrative Proceedings Filed with District Court via Compact Disc (District Court Case No. A-11-648894-J):</p> <table border="1"> <tr> <td>Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11</td><td>1-30</td><td>1</td><td>140-169</td></tr> <tr> <td>Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group.</td><td>31-34</td><td>1</td><td>170-173</td></tr> <tr> <td>Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen's clubs in the proposed amended version of Chapter 368A.</td><td>35-37</td><td>1</td><td>174-176</td></tr> <tr> <td>Ex. 3 – October 9, 2003, email to former Department Director Dino</td><td>38-43</td><td>1</td><td>177-182</td></tr> </table>	Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11	1-30	1	140-169	Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group.	31-34	1	170-173	Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen's clubs in the proposed amended version of Chapter 368A.	35-37	1	174-176	Ex. 3 – October 9, 2003, email to former Department Director Dino	38-43	1	177-182		
Application for Leave to Present Additional Evidence to the Nevada Tax Commission, dated 09/28/11	1-30	1	140-169																
Ex. 1 – Charts by the Department showing LET Collections by Taxpayer Group.	31-34	1	170-173																
Ex. 2 – March 14, 2005, Department memo discussing the specific inclusion of gentlemen's clubs in the proposed amended version of Chapter 368A.	35-37	1	174-176																
Ex. 3 – October 9, 2003, email to former Department Director Dino	38-43	1	177-182																

Filing Date	Description	Vol.	Page
	DiCianno from an attorney on behalf of the Bellagio hotel and casino discussion the constitutionality of the proposed amendments.		
	Ex. 4 – October 21, 2003, email to DiCianno with a transcript of the Nevada Gaming Commission discussing the importance of subjecting the gentlemen’s clubs to the LET.	44-67	1 183-206
	Ex. 5 – First Reprint of Senate Bill 247 which contains a counsel digest specifically referencing adult entertainment and what would happen if that proposed portion of the Bill were held unconstitutional.	68-92	1 207-231
	Ex. 6 – Minutes of the May 16, 2005, meeting of the Assembly Committee on Commerce and Labor which discusses what happens if the proposed live adult entertainment provisions are held unconstitutional.	93-110	1 232-249
	Ex. 7 – Minutes of the May 26, 2005, meeting of the Assembly Committee on Ways and Means, which specifically references the Department’s position on there being two distinct categories: live entertainment and live adult entertainment. Exhibit E to the minutes is an email from DiCianno setting forth this distinction.	111-118	2 250-257

Filing Date	Description	Vol.	Page
	Ex. 8 – Untitled Revenue Analysis.	119-121	258-260
	Ex. 9 – November 9, 2004, Memo to Chinnock, Executive Director of Department.	122	261
	Ex. 10 – April 24, 2004, DiCianno Email.	123	262
	Ex. 11 – November 18, 2003, Barbara Smith Campbell Email.	124-125	263-264
	Ex. 12 – Minutes of June 5, 2005, Meeting of Senate Committee on Taxation.	126-137	265-276
	Ex. 14 – <b><u>Deja Vu Showgirls of Las Vegas, L.L.C., v. Nevada Dept. of Taxation</u></b> , 2006 WL 2161980 (D. Nev. July 28, 2006) – dismissal of lawsuit.	138-141	277-280
	Ex. 15 – Motion to Dismiss Amended Complaint, Document 12, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed May 10, 2006.	142-153	281-292
	Ex. 16 – Reply to Motion to Dismiss Complaint, Document 17, U.S.D.C. Nevada, Case No. 2:06-cv-00480, filed June 14, 2006.	154-165	293-304
	8 <sup>th</sup> Judicial District Court Administrative Record, filed 10/21/11		
	(Index of Documents)	166-170	306-309

Filing Date	Description			Vol.	Page
	Petitioner's Claims for Refund of Tax on Live Entertainment, February 27, 2007 (Tax Period: January 2004)	1-41	171-211	2	310-350
	Petitioners' Claim for Refund of Tax on Live Entertainment, March 28, 2007 (Tax Period: February 2004)	42-84	212-254	2	351-393
	Respondent's Response to Refund Requests, April 3, 2007	85-96	255-266	2	394-405
	Petitioners' Claims for Refund of Tax on Live Entertainment, April 26, 2007 (Tax Period: March 2004)	97-139	267-309	2	406-448
	Respondent's Response to Refund Requests, April 30, 2007	140-145	310-315	2	449-454
	Petitioners' Claims for Refund of Tax on Live Entertainment, May 30, 2007 (Tax Period: April 2004)	146-188	316-358	2	455-497
	Respondent's Response to Refund Requests, June 4, 2007	189-194	359-364	3	498-503
	Petitioners' Formal Notice of Appeal, May 1, 2007 (The following pages in this section were intentionally left blank)	195-273	365-443	3	504-582
	Petitioners' Correspondence Regarding Amended Notice of Hearing, June 19, 2007	274-276	444-446	3	583-585

Filing Date	Description			Vol.	Page
	Respondents' Amended Notice of Hearing, June 8, 2007	277-280	447-450	3	586-589
	Respondents' Notice of Hearing, June 7, 2007	281-284	451-454	3	590-593
	Bradley J. Shafer Formal Notice of Appearance, June 8, 2007	285-286	455-456	3	594-595
	Petitioners' Correspondence Regarding Notice of Appeal of Denial of Claim for Refund, June 21, 2007	287-333	457-503	3	596-642
	Department's Brief and Exhibits in Support of the Department's Denial of Appellant's Refund Requests, June 15, 2007	334-351	504-521	3	643-660
	Appellants' Reply Brief and Exhibits in Opposition to the Nevada Department of Taxation's Denial of Appellant's Refund Requests	352-387	522-557	3	661-696
	Department's Supplemental Brief in Support of the Department's Denial of Appellant's Refund Requests	388-392	558-562	3	697-701
	Department's Power Point Presentation	393-415	563-585	3	702-724
	Department's Appendix of Cases, Statutes and Other Authorities				
	(Index of Appendix)	416-418	586-588	3	725-727

Filing Date	Description			Vol.	Page
	Appendix 1 – Sheriff v. Burdg	419-426	589-596	3	728-735
	Appendix 2 – Cashman Photo Concessions and Labs v. Nevada Gaming Commission	427-432	597-602	3	736-741
	Appendix 3 – List v. Whisler	433-441	603-611	4	742-750
	Appendix 4 – Whitehead v. Comm’n on Judicial Discipline	442-482	612-652	4	751-791
	Appendix 5 – Murdock v. Commonwealth of Pennsylvania	483-493	653-663	4	792-802
	Appendix 6 – Jimmy Swaggart Ministries v. Board of Equalization	494-509	664-679	4	803-818
	Appendix 7 – Minneapolis Star v. Minnesota Comm’r of Revenue	510-530	680-700	4	819-839
	Appendix 8 – Adams Outdoor Advertising v. Borough of Stroudsburg	531-546	701-716	4	840-855
	Appendix 9 – Ward v. Rock Against Racism	547-568	717-738	4	856-877
	Appendix 10 – Leathers v. Medlock	569-586	739-756	4	878-895



Filing Date	Description			Vol.	Page
	Appendix 11 – Madden v. Kentucky	587-596	757-766	4	896-905
	Appendix 12 – Forbes v. City of Seattle	597-612	767-782	4	906-921
	Appendix 13 – Simon & Schuster, Inc. v. Members of New York State Crime Victims Board	613-630	783-800	4	922-939
	Appendix 14 – City of Las Angeles v. Alameda Books, Inc.	631-651	801-821	4	940-960
	Appendix 15 – California Highway Patrol v. Superior Court	652-668	822-838	4	961-977
	Appendix 16 – Vermont Society of Assoc. Executives v. Milne	669-680	839-850	4	978-989
	Appendix 17 – Comptroller of the Treasury v. Clyde’s of Chevy Chase, Inc.	681-704	851-874	5	990-1013
	Appendix 18 – Chapter 368A	705-720	875-890	5	1014-1029
	Appendix 19 – IRC §§ 4231 through 4234	721-727	891-897	5	1030-1036
	Appendix 20 – Nevada State Attorney General Opinion No. 85-17	728-733	898-903	5	1037-1042

Filing Date	Description			Vol.	Page
	Appendix 21 – Committee Notes regarding S.B. 497, June 6, 1995	734-746	904-916	5	1043-1055
	Petitioners’ Correspondence Regarding Supplemental Material Submitted for Appeal	747-749	917-919	5	1056-1058
	Petitioners’ Power Point Presentation	750-787	920-957	5	1059-1096
	Supplemental Submission on Behalf of Taxpayers/Appellants				
	Index	788-792	958-962	5	1097-1101
	1. Arkansas Writers Project, Inc. v. Charles D. Ragland	793-803	963-973	5	1102-1112
	2. Grosjean v. American Press Co.	804-812	974-982	5	1113-1121
	3. Jimmy Swaggard Ministries v. Board of Equalization of California	813-826	983-996	5	1122-1135
	4. Leathers v. Medlock	827-843	997-1013	5	1136-1152
	5. Minneapolis Star and Tribune Company v. Minnesota Commissioners of Revenue	844-863	1014-1033	5	1153-1172
	6. Murdock v. Commonwealth of Pennsylvania	864-872	1034-1042	5	1173-1181

Filing Date	Description			Vol.	Page
	7. Regan v. Taxation with Representation of Washington and Taxation with Representation of Washington v. Donald T. Regan	873-884	1043-1054	5	1182-1193
	8. City of Las Angeles v. Alameda Books, Inc.	885-907	1055-1077	5	1194-1216
	9. TK's Video, Inc. v. Denton County, Texas	908-935	1078-1105	6	1217-1244
	Theresa Enterprises, Inc. v. United State of America	936-949	1106-1119	6	1245-1258
	10. Festival Enterprises, Inc. v. City of Pleasant Hill	950-954	1120-1124	6	1259-1263
	11. United Artists Communications, Inc. v. City of Montclair	955-960	1125-1130	6	1264-1269
	12. Vermont Society of Association Executives v. James Milne	961-982	1131-1152	6	1270-1291
	13. Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah	983-1017	1153-1187	6	1292-1326
	14. City of LaDue v. Margaret Gilleo	1018-1029	1188-1199	6	1327-1338
	15. United States v. Eichman	1030-1039	1200-1209	6	1339-1348

Filing Date	Description			Vol.	Page
	16. Adams Outdoor Advertising v. Borough or Stroudsburg	1040-1052	1210-1222	6	1349-1361
	17. Forbes v. City of Seattle	1053-1066	1223-1236	6	1362-1375
	18. NRS 360.291	1067-1070	1237-1240	6	1376-1379
	19. NRS Chapter 368 A	1071-1086	1241-1256	6	1380-1395
	20. Excerpts of Minutes of Senate Committee on Taxation – May 26, 2003	1087-1090	1257-1260	6	1396-1399
	21. Excerpts of Senate Bill No. 8 – 2003 Nevada Laws 20 <sup>th</sup> Sp. Sess. Ch. 5 (S.B. 8)	1091-1109	1261-1279	6	1400-1418
	22. Adopted Regulation of the Nevada tax Commission – R212-03	1110-1122	1280-1292	6	1419-1431
	23. Excerpts of the Legislative History of A.B. 554-2005	1123-1146	1293-1316	6	1432-1455
	24. Excerpts of Minutes of the Assembly Committee on Commerce and Labor Meeting – May 16, 2005	1147-1162	1317-1332	7	1456-1471
	25. Senate Bill No. 3 – 2005 Nevada Laws 22 <sup>nd</sup> Sp. Sess. Ch. 9 (S.B. 3)	1163-1171	1333-1341	7	1472-1480

Filing Date	Description			Vol.	Page
	26. Assembly Bill No. 554 – 2005 Nevada Laws Ch. 484 (A.B. 554)	1172- 1179	1342- 1349	7	1481-1488
	27. Assembly Bill No. 487 – 2007 Nevada Laws Ch. 547 (A.B. 487)	1180- 1182	1350- 1352	7	1489-1491
	28. Nevada Department of Taxation Annual Report for Fiscal Years 2004- 2005 and 2005-2006	1183- 1187	1353- 1357	7	1492-1496
	29. Initial Request for Refund Letter (specimen copy)	1188- 1194	1358- 1364		1497-1503
	30. Nevada Tax Department’s Denials of Request for Refunds	1195- 1218	1365- 1388	7	1504-1527
	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, July 9, 2007	1219- 1237	1389- 1407	7	1528-1546
	Transcript of the State of Nevada Tax Commission Teleconferenced Open Meeting, Monday, August 6, 2007	1238- 1332	1408- 1502	7	1547-1641
	Commission’s Findings of Facts and Conclusions of Law and Decision, October 12, 2007	1333- 1334	1503- 1504	7	1642-1643
	Petitioners’ Request for a Copy of the Nevada Tax Commission’s Formal	1335	1505	7	1644

Filing Date	Description	Vol.	Page
	Written Ruling, August 22, 2007		
	These Bates Numbered Pages Were Left Blank Intentionally: 202; 210; 218; 226; 234; 242; 250; 258; 266; 294; 309; 317; 318; and 326		
	Opposition to Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 10/21/11	1506-1555	7
	Reply in Support of Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 11/07/11	1556-1642	8
	Transcript of Hearing, dated 12/09/11	1643-1656	8
	Notice of Entry of Order Granting Petitioner's Application for Leave to Present Additional Evidence to the Nevada Tax Commission, filed 02/02/12	1657-1662	8
	Document submitted by Taxpayer on Remand		
	A – Memorandum - Analysis of Revenue Impact	1663-1665	8
	B – Live Entertainment Tax by number of seats (2004)	1666-1668	8
	C – Department of Taxation Update Request	1669-1672	8
	D – Live Entertainment Tax information and press releases	1673-1681	8
			1645-1694
			1695-1781
			1782-1795
			1796-1801
			1802-1804
			1805-1807
			1808-1811
			1812-1820

Filing Date	Description	Vol.	Page
	(various dated and undated documents)		
	E – LET Updates, Southern Nevada, 7/19/04	1682-1683	8 1821-1822
	F – Live Entertainment Tax- Seating Capacity 300-7400, January-December 2004	1684-1685	8 1823-1824
	G – LET by venue (DV000028-blank page)	1686-1694	8 1825-1833
	H – LET by category and venue	1695-1699	8 1834-1838
	I – 10% LET- Gentleman's Clubs	1700-1703	8 1839-1842
	J – LET account summary	1704-1710	8 1843-1849
	K – Various Correspondence to and from taxpayers - December 10, 2003, December 12, 2003, May 17, 2005, April 2, 2007, January 3, 2008	1711-1720	8 1850-1859
	L – LET Tax received 2004- 2008	1721-1777	8 1860-1916
	M – LET Tax received fiscal year 2007	1778-1779	8 1917-1918
	N – Monthly deposit report, prepared April 17 2009	1780-1788	8 1919-1927
	O – General Fund Revenues, fiscal year 2005- 2008, forecast 2009 - 2011	1789-1790	8 1928-1929
	P – SB 247 Bill History	1791-1793	8 1930-1932

Filing Date	Description	Vol.	Page
	Q – Department of Taxation- "What You Need to Know About Nevada's Live Entertainment Tax" 10/21/03, 7/6/05 and 8/15/05 and PowerPoint presentation	1794-1855	9 1933-1994
	R – Seating capacity information by district	1856-1858	9 1995-1997
	S – LET tax information for LCB	1859-1862	9 1998-2001
	T – Memorandum regarding LET tax- 5/21/04	1863-1867	9 2002-2006
	U – LET tax seating capacity 300 - 7400, January - September 2004	1868-1869	9 2007-2008
	V – AB 281 information regarding LET	1870-1872	9 2009-2011
	W – Draft Regulations for discussions 8/25/03	1873-1881	9 2012-2020
	X – Changes effective July 2005	1882-1883	9 2021-2022
	Y – Public Notice September 5, 2003, proposed regulations	1884-1935	9 2023-2074
	Z – Memorandum and adopted regulations, December 7, 2003	1936-2007	9 2075-2146
	AA – Regulation, LCB File No. R1 05-05, February 23, 2006	2008-2055	10 2147-2194
	BB – Minutes of Senate Committee on Taxation June 5, 2005	2056-2135	10 2195-2274



Filing Date	Description	Vol.	Page
	CC – LET PowerPoint presentation	2136-2146	10 2275-2285
	DD – Public Notice September 26, 2003, proposed regulations	2147-2201	10 2286-2340
	EE – Public Notice October 23, 2003 for meeting dated October 30, 2003	2202-2290	11 2341-2429
	FF – Public Notice October 24, 2003, proposed regulations	2291-2370	11 2430-2509
	GG – Notice of Public Meeting and Transcript of Public Meeting November 25, 2003	2371-2414	11 2510-2553
	HH – Nevada Tax Commission Meeting and Proposed Regulations - Posted November 19, 2003	2415-2496	12 2554-2635
	II – LET reports	2497-2512	12 2636-2651
	JJ – LET workshop- Compact Disc	2513-2514	12 2652-2653
	KK – Legislative History	2515-2569	12 2654-2708
	KK – Legislative History (Continued)	2570-2815	13 2709-2954
	KK – Legislative History (Continued)	2816-2856	14 2955-2995
	LET Updated Requests	2857-3064	14 2996-3203
	LET Updated Requests (Continued)	3065-3156	15 3204-3295
	LET PowerPoint	3157-3168	15 3296-3307

Filing Date	Description	Vol.	Page
	Letter from Petitioner's counsel to the Nevada Tax Commission re: NAC 360.135 Request for Subpoenas to Dino DiCianno, Michelle Jacobs, and Tesa Wanamaker, dated 06/14/12	3169-3173	15 3308-3312
	Letter from Respondent's counsel to the Nevada Tax Commission in opposition to the request for subpoenas, dated 06/15/12	3174-3179	15 3313-3318
	Letter from Petitioner's counsel to the Nevada Tax Commission in reply to Petitioner's opposition to the request for subpoenas, plus Exhibit A-B, dated 06/19/12	3180-3190	15 3319-3329
	Nevada Department of Taxation's Brief on Remand to Consider Additional Evidence, plus Exhibits A-G, dated 06/19/12	3191-3341	16 3330-3480
	Letter from Respondent's counsel to the Nevada Tax Commission re: Sur-Reply to the request for subpoenas, dated 06/20/12	3342-3373	16 3481-3512
	Letter from Petitioner's counsel to the Nevada Tax Commission re: Supplement to Reply to the request for subpoenas, dated 06/20/12	3374-3567	17 3513-3706
	Transcript of Nevada Tax Commission, 06/25/12	3658-3604	17 3707-3743
	Nevada Tax Commission Decision Letter, dated 09/06/12	3605-3610	17 3744-3749
	Hearing Officer's Order on Remand, dated 08/27/13	3611-3618	17 3750-3757
	Stipulation for Submission on the Record, 10/24/13	3619-3634	18 3758-3773
	Nevada Tax Commission Notice of Hearing, dated 11/22/13	3635-3636	18 3774-3775

Filing Date	Description		Vol.	Page
	Waiver of Notice, dated 11/22/13	3637	18	3776
	Transcript of Nevada Tax Commission (only the portions of Nevada Tax Commission relevant to this matter), 12/09/13	3638-3642	18	3777-3781
	Nevada Tax Commission's Decision, 02/12/14	3643-3718	18	3782-3857
12/09/2011	Minutes		1	48-49
12/16/2011	Minutes		1	50-51
06/08/2012	Minutes		1	84-85
09/22/2015	Minutes		18	3867-3868
10/27/2015	Minutes		18	3877-3878
11/24/2015	Minutes		18	3907-3909
10/15/2013	Minutes – Status Check		1	95-96
02/26/2016	Notice of Appeal		18	3934-4006
06/24/2016	Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision		19	4027-4035
10/26/2011	Notice of Entry of Order		1	19-23
11/21/2011	Notice of Entry of Order		1	28-33
02/02/2012	Notice of Entry of Order		1	54-59
06/22/2012	Notice of Entry of Order		1	88-93
3/28/2014	Notice of Entry of Order		1	119-126

Filing Date	Description	Vol.	Page
02/04/2016	Notice of Entry of Order Denying Judicial Review of Administrative Decision	18	3921-3933
10/13/2015	Notice of Entry of Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review	18	3872-3876
03/31/2015	Notice of Entry of Order Granting Stipulation and Order to Extend Time	18	3861-3866
03/26/2014	Notice of Entry of Stipulation and Order Consolidating Cases	1	111-118
01/22/2015	Notice of Entry of Stipulation and Order for Extension of Time	1	130-134
06/27/2016	Notice of Entry of Stipulation and Proposed Amended Order	19	4039-4055
01/15/2016	Order Denying Judicial Review of Administrative Decision	18	3911-3920
06/21/2012	Order Denying Stay	1	86-87
10/09/2015	Order Granting Petitioner's Motion to File Supplemental Brief and Setting Hearing on Petition for Judicial Review	18	3869-3871
02/01/2012	Order Granting Plaintiffs Application for Leave to Present Additional Evidence to the Nevada Tax Commission	1	52-53
09/09/2013	Order Scheduling Status Check	1	94
12/02/2015	Order to Statistically Close Case	18	3910
09/23/2011	Petition for Judicial Review	1	1-12

Filing Date	Description	Vol.	Page
03/11/2014	Petition for Judicial Review (District Court Case No. A-14-697515-J)	1	97-106
03/24/2014	Stipulation and Order Consolidating Cases (Consolidating A-14-697515-J with A-11-648894-J)	1	107-110
11/21/2011	Stipulation and Order for Continuance	1	25-27
10/25/2011	Stipulation and Order for Extension of Time	1	16-18
01/21/2015	Stipulation and Order for Extension of Time	1	127-129
03/30/2015	Stipulation and Order for Extension of Time	18	3858-3860
06/23/2016	Stipulation and Proposed Amended Order	19	4007-4020
01/26/2015	Supplement to the Record on Appeal in Accordance with the Nevada Administrative Procedure Act (Entire Record - Index)	1	136-139
12/09/2011	Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J)	1	34-47
06/08/2012	Transcript (Entered on 10/30/2012 into District Court Case No. A-11-648894-J)	1	60-83
10/27/2015	Transcript of Proceedings Before the Honorable Jerry A. Wiese, II – October 27, 2015 (Re: Oral Argument on Petition for Judicial Review) (District Court Case No. A- 11-648894-J) (Entered into District Court Case No. A-14-697515-J)	18	3879-3906
01/26/2015	Transmittal of Supplement to the Record on Appeal	1	135

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

March 28, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway, Suite 100  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: Olympus Garden, Inc.**  
**Tax Period: February 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents Olympus Garden, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Seventy-Nine Thousand Five Hundred Eighty-Eight and 04/100 Dollars (\$79,588.04) via check number 72227 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the

First Amendment guarantee. . .") (emphasis added); Winters v. New York, 333 U.S.507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

§ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

§ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

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

§ Live entertainment provided in the common area of a shopping mall (j)

§ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

§ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)

§ An outdoor concert (n)

§ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

§ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

§ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)

§ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

§ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)

§ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by



newspapers. Noting the “[d]ifferential taxation of the press,” the Court commented that it could not “countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation.” *Id.* at 586 (emphasis added). Then, in Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that “. . . the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end.” (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are “*presumed unconstitutional*.” Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (“A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech”) (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, “it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that.” *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is “available to all, not merely to those who can pay their own way,” and that “the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary

---

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the “least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert “a counterbalancing interest of compelling importance that it cannot achieve without differential taxation”). Nevada cannot do that here.

for its maintenance.” ” *Id.* at 111-12. The Court flatly stated that “a state may not impose a charge for the enjoyment of a right granted by the federal constitution.” *Id.* at 112 (emphasis added). This is because “the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down.” *Id.* at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated “that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.” Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a “powerful weapon” to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not.

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. *Id.* at 632. The court noted that “exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. ‘[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.’ Murdock v. Pennsylvania 319 U.S. 105, at 111.” *Id.* at 632. See also American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that “the fee does no more than defray reasonable administrative costs.” *Id.* at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this “imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond ‘unnecessarily interfer[es] with First Amendment freedoms,’ . . . and is therefore unconstitutional. . . .” *Id.* at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

**Id.** This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

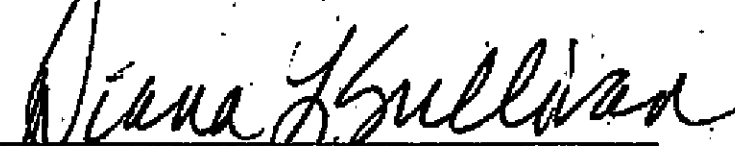
3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

  
By: Diana L. Sullivan, Esq.

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

March 28, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: D.I. Food & Beverage of Las Vegas, LLC**  
**Tax Period: February 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents D.I. Food & Beverage of Las Vegas, LLC ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a full refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. . .") (emphasis added); *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and *Zacchini v. Scripts-Howard Broadcasting Co.*, 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball).

performance) (“...entertainment itself can be important news.”). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“the First Amendment affords protection to symbolic or expressive conduct as well as actual speech”). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to “live entertainment.”<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is “live”) – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of “live entertainment” is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

§ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

§ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

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

§ Live entertainment provided in the common area of a shopping mall (j)

---

<sup>1</sup> Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap’s A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 (“Nor may an entertainment program be prohibited solely because it displays the nude human figure. ‘[N]udity alone’ does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation”).

§ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

§ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)

§ An outdoor concert (n)

§ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

§ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

§ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)

§ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

§ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)

§ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State

must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." *Id.* at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*"

---

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.



.” Id. at 112 (emphasis added). This is because “the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down.” Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada’s Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated “that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.” Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a “powerful weapon” to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. Id. This scheme, like that in Minneapolis

---

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that “exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. ‘[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.’ Murdock v. Pennsylvania 319 U.S. 105, at 111.” Id. at 632. See also American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that “the fee does no more than defray reasonable administrative costs.” Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this “imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond ‘unnecessarily interfer[es] with First Amendment freedoms,’ . . . and is therefore unconstitutional. . . .” Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

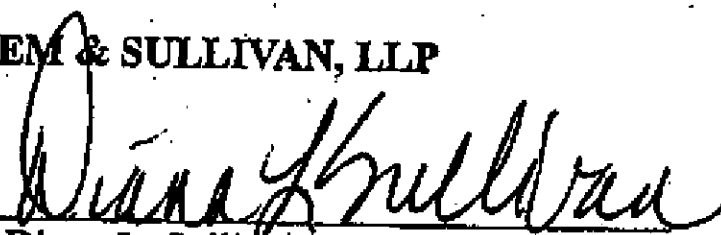
3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

  
By: Diana L. Sullivan, Esq.



**GHANEM SULLIVAN**  
Attorneys At Law

**RECEIVED**

MAR 29 2007

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

March 28, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway, Suite 100  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: D. Westwood, Inc.**  
**Tax Period: February 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents D. Westwood, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Seventy Thousand Three Hundred Sixty-Six and 56/100 Dollars (\$70,366.56) via check number 11017 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as

well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . .") (emphasis added); Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- § Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)
- § Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

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

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

§ Live entertainment provided in the common area of a shopping mall (j)

§ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

§ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise (m)

§ An outdoor concert (n)

§ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

§ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

§ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)

§ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

§ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)

§ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "... the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.



The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*" Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two

---

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

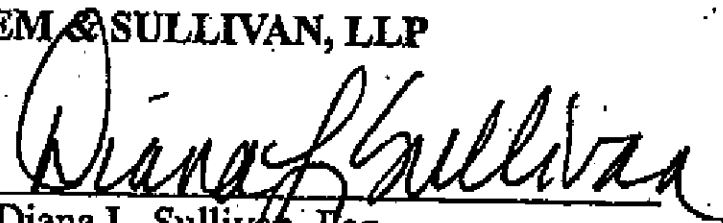
3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

  
By: Diana L. Sullivan, Esq.

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

March 28, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway, Suite 100  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: SHAC, LLC**  
**Tax Period: February 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents SHAC, LLC ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Fifty-Nine Thousand Nine Hundred Seventy-Six and 66/100 Dollars (\$59,976.66) via check number 1740 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as

well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . . .") (emphasis added); Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

§ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

§ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, § 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

- \$ Live entertainment that is provided at a trade show (g)
  - \$ Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
  - \$ Live entertainment provided in the common area of a shopping mall (j)
  - \$ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
  - \$ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m).
  - \$ An outdoor concert (n)
  - \$ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
  - \$ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
- \$ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - \$ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
  - \$ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
  - \$ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev.,

460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*" Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Giant, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).



hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (e). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

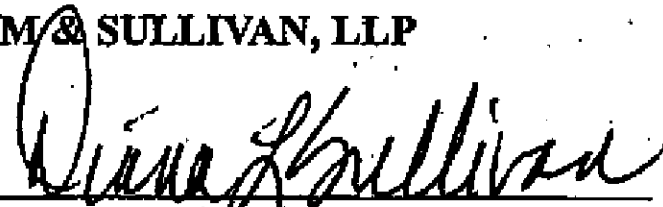
3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

  
By: Diana L. Sullivan, Esq.

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

March 28, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway, Suite 100  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: K-Kel, Inc.**  
**Tax Period: February 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Ninety-Eight Thousand One and 70/100 Dollars (\$98,001.70) via check number 5525 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***I. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the

First Amendment guarantee. . .") (emphasis added); Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

§ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

§ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, § 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

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

§ Live entertainment provided in the common area of a shopping mall (j)

§ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)

§ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)

§ An outdoor concert (n)

§ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)

§ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

§ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)

§ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

§ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)

§ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the

"[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "... the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction. . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

for its maintenance." *Id.* at 111-12. The Court flatly stated that "a state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Id.* at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." *Id.* at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. *Id.* at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.'" Murdock v. Pennsylvania 319 U.S. 105, at 111." *Id.* at 632. See also American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." *Id.* at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." *Id.* at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

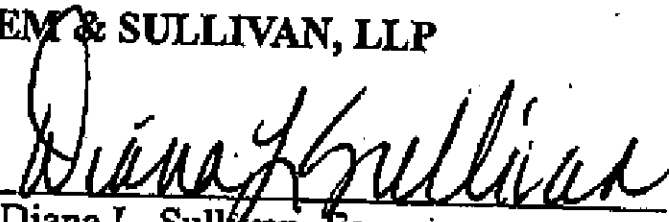
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.



Sincerely,

GHANEM & SULLIVAN, LLP

  
By: Diana L. Sullivan, Esq.

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

March 28, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway, Suite 100  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: The Power Company, Inc.**  
**Tax Period: February 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents The Power Company, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Eighty-One Thousand Five Hundred Seventy-Four and 82/100 Dollars (\$81,574.82) via check number 7987 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. . .") (emphasis added); *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct.

2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

§ Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

§ Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)

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

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

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

- \$ Live entertainment provided in the common area of a shopping mall (j)
- \$ Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- \$ Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)
- \$ An outdoor concert (n)
- \$ Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- \$ Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).

Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:

- \$ Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
- \$ Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
- \$ Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
- \$ Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it

cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "... the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." *Id.* at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution*." *Id.* at 112 (emphasis

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." *Id.* at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. *Id.* at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." *Id.* at 632. See also American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." *Id.* at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." *Id.* at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP

  
By: Diana L. Sullivan, Esq.





JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89708-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4800 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1285  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5495

April 3, 2007

D.I.FOOD & BEVERAGE OF LAS VEGAS LLC  
JAGUARS  
3355 PROCYON ST  
LAS VEGAS NV 89102

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by D.I. Food & Beverage of Las Vegas LLC for the period ending February, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude D.I. Food & Beverage of Las Vegas LLC, DBA Jaguars, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4800 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5501

April 3, 2007

THE POWER COMPANY INC  
CRAZY HORSE TOO  
2476 INDUSTRIAL RD  
LAS VEGAS NV 89102

Dear Mr. Rizzolo:

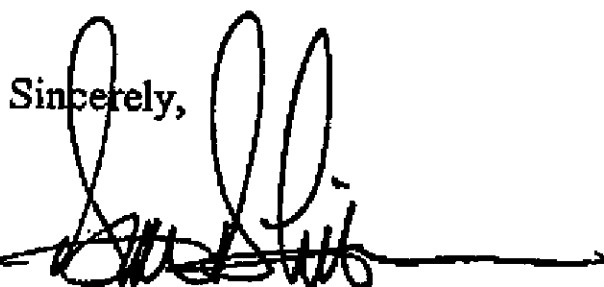
Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by The Power Company, Inc. for the period ending February 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude The Power Company, Inc. DBA Crazy Horse Too from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,  


Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DI CIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89708-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 160  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5488

April 3, 2007

PETER ELIADES & OG ELIADES LLC  
OLYMPIC GARDEN  
1531 LAS VEGAS BLVD S  
LAS VEGAS NV 89104

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by Olympus Garden, Inc. for the period ending February, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude Peter Eliades and Og Eliades LLC, DBA Olympic Garden, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5471

April 3, 2007

SHAC LLC  
SAPPHIRE  
3025 INDUSTRIAL RD  
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by SHAC LLC, for the period ending February, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude SHAC LLC, DBA Sapphire, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

## LAS VEGAS OFFICE

Grant Sawyer Office Building, Suite 1300  
556 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

## RENO OFFICE

4600 Kietzke Lane  
Building L, Suite 236  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

## HENDERSON OFFICE

2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5464

April 3, 2007

K-KEL INC  
SPEARMINT RHINO  
15423 E VALLEY BLVD  
CITY OF INDUSTRY CA 91746

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending February, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude K-KEL, Inc., DBA Spearmint Rhino, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89708-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
655 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 488-2300 Fax: (702) 488-2373

RENO OFFICE  
4800 Kletzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 488-2300  
Fax: (702) 488-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5457

April 3, 2007

D. WESTWOOD INC  
TREASURES  
2801 WESTWOOD DR  
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated March 28, 2007, requesting a refund of Live Entertainment Taxes paid by D. Westwood Inc. for the period ending February, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude D. Westwood, Inc., DBA Treasures, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89708-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 488-2300 Fax: (702) 488-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 488-2300  
Fax: (702) 488-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2868

April 3, 2007

PETER ELIADES & OG ELIADES LLC  
OLYMPIC GARDEN  
1531 LAS VEGAS BLVD S  
LAS VEGAS NV 89104

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

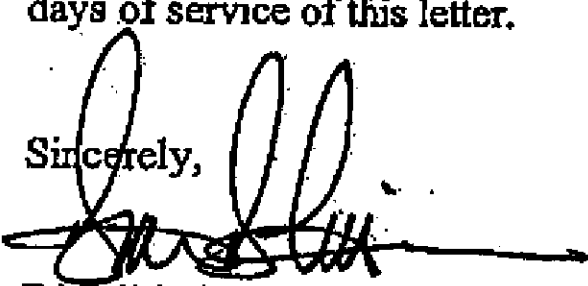
I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by Olympus Garden, Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude Peter Eliades and Og Eliades LLC, DBA Olympic Garden, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

  
Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
666 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4800 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2875

April 3, 2007

THE POWER COMPANY INC  
CRAZY HORSE #2  
2476 INDUSTRIAL RD  
LAS VEGAS NV 89102

Dear Mr. Rizzolo:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by The Power Company, Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude The Power Company, Inc. DBA Crazy Horse 2 from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP





JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE

Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 488-2300 Fax: (702) 488-2373

RENO OFFICE

4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE

2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 488-2300  
Fax: (702) 488-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2851

April 3, 2007

K-KEL INC  
SPEARMINT RHINO  
15423 E VALLEY BLVD  
CITY OF INDUSTRY CA 91746

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude K-KEL, Inc., DBA Spearmint Rhino, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

  
Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor  
THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1285  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2813

April 3, 2007

D. WESTWOOD INC  
TREASURES  
2801 WESTWOOD DR  
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by D. Westwood Inc. for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude D. Westwood, Inc., DBA Treasures, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor  
THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4800 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 686-1295  
Fax: (775) 686-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2837

April 3, 2007

D.I. FOOD & BEVERAGE OF LAS VEGAS LLC  
JAGUARS  
3355 PROCYON ST  
LAS VEGAS NV 89102

Dear Sir,

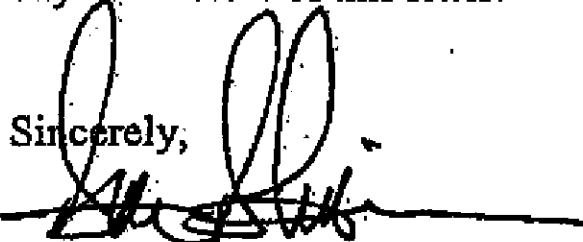
Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by D.I. Food & Beverage of Las Vegas LLC for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude D.I. Food & Beverage of Las Vegas LLC, DBA: Jaguars, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,  


Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115

Carson City, Nevada 89708-7937

Phone: (775) 684-2000 Fax: (775) 684-2020

## LAS VEGAS OFFICE

Grant Sawyer Office Building, Suite 1300

555 E. Washington Avenue

Las Vegas, Nevada, 89101

Phone: (702) 488-2300 Fax: (702) 488-2373

## RENO OFFICE

4800 Kietzke Lane

Building L, Suite 235

Reno, Nevada 89502

Phone: (775) 688-1295

Fax: (775) 688-1303

## HENDERSON OFFICE

2550 Paseo Verde Parkway Suite 180

Henderson, Nevada 89074

Phone: (702) 488-2300

Fax: (702) 488-3377

CERTIFIED MAIL: 7005 1820 0003 8673 2844

April 3, 2007

SHAC LLC  
SAPPHIRE  
3025 INDUSTRIAL RD  
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated February 27, 2007, requesting a refund of Live Entertainment Taxes paid by SHAC LLC, for the period ending January, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment excise tax.

As I find no basis in law that would preclude SHAC LLC, DBA Sapphire, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

April 26, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: D. Westwood, Inc.**  
**Tax Period: March 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents D. Westwood, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Sixty-Eight Thousand Six Hundred Sixteen and 01/100 Dollars (\$68,616.01) for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

**1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.**

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by

radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . .”) (emphasis added); Winters v. New York, 333 U.S.507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) (“. . .entertainment itself can be important news.”). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“the First Amendment affords protection to symbolic or expressive conduct as well as actual speech”). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to “live entertainment.”<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is “live”) – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of “live entertainment” is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)
- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- Live entertainment that is provided at a trade show (g)

<sup>1</sup> Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, § 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap’s A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 (“Nor may an entertainment program be prohibited solely because it displays the nude human figure. ‘[N]udity alone’ does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation”).

- Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- Live entertainment provided in the common area of a shopping mall (j)
- Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)
- An outdoor concert (n)
- Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
  - Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
  - Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
  - Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. §

368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *factually*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.



not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*" Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.'" Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

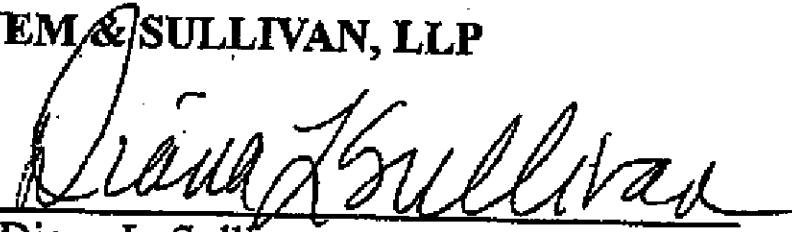
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general.

Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

April 26, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: Olympus Garden, Inc.**  
**Tax Period: March 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents Olympus Garden, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Ninety-Four Thousand Nine Hundred Fifty-Five and 85/100 Dollars (\$94,955.85) via check number 72401 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

**1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.**

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by

radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . .”) (emphasis added); Winters v. New York, 333 U.S.507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) (“. . .entertainment itself can be important news.”). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“the First Amendment affords protection to symbolic or expressive conduct as well as actual speech”). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to “live entertainment.”<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is “live”) – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of “live entertainment” is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)
- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- Live entertainment that is provided at a trade show (g)

<sup>1</sup> Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap’s A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 (“Nor may an entertainment program be prohibited solely because it displays the nude human figure. ‘[N]udity alone’ does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation”).

- Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- Live entertainment provided in the common area of a shopping mall (j)
- Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise (m)
- An outdoor concert (n)
- Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
  - Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
  - Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
  - Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. §

368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "a state may not impose a charge for the enjoyment of a right granted by the federal constitution." Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Glani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249, (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).



As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

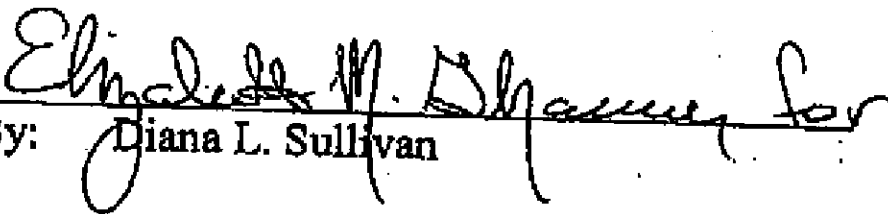
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general.

Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

**GHANEM & SULLIVAN, LLP**

  
By: Diana L. Sullivan

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

April 26, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: SHAC, LLC**  
**Tax Period: March 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents SHAC, LLC ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of Eighty Thousand Two Hundred Forty and 97/100 Dollars (\$80,240.97) via check number 1917 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by

radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . .”) (emphasis added); Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) (“. . .entertainment itself can be important news.”). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“the First Amendment affords protection to symbolic or expressive conduct as well as actual speech”). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to “live entertainment.”<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is “live”) – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of “live entertainment” is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)

- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- Live entertainment that is provided at a trade show (g)

<sup>1</sup> Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap’s A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 (“Nor may an entertainment program be prohibited solely because it displays the nude human figure. ‘[N]udity alone’ does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation”).

- Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- Live entertainment provided in the common area of a shopping mall (j)
- Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)
- An outdoor concert (n)
- Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
  - Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
  - Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
- Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. §

368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "a state may not impose a charge for the enjoyment of a right granted by the federal constitution." Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.'" Murdock v. Pennsylvania, 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Giant, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general.

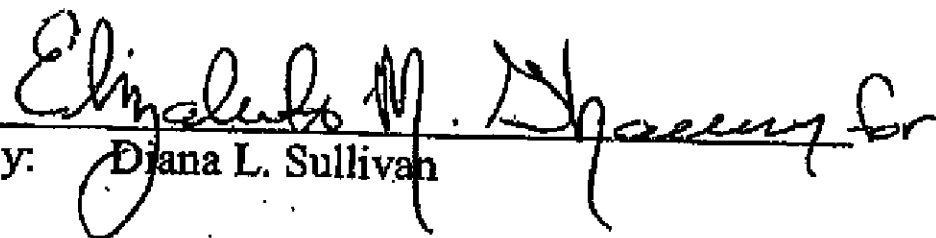


Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

**GHANEM & SULLIVAN, LLP**

  
By: Diana L. Sullivan

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

April 26, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

***Re: Claim for Refund – Nevada Tax on Live Entertainment***  
***Taxpayer: K-Kel, Inc.***  
***Tax Period: March 2004***

Dear Ms. Jacobs:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of One Hundred Forty-Seven Thousand Six Hundred Twelve and 55/100 Dollars (\$147,612.55) via check number 5602 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

- 1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

8861 WEST SAHARA AVENUE, SUITE 120 ♦ LAS VEGAS, NV ♦ 89117  
PHONE: (702) 862-4450 ♦ FAX: (702) 862-4422

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . .") (emphasis added); *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). *See also Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (*see S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, ¶ 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). *See also Schad*, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

- Any boxing contest or exhibition governed by the provisions of Chapter 467
- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- Live entertainment that is provided at a trade show (g)
- Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- Live entertainment provided in the common area of a shopping mall (j)
- Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of an admission charge or the purchase of any food, refreshments or merchandise (m)
- An outdoor concert (n)
- Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
  - Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)

- Performances in certain areas of certain licensed gaming establishments “which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables” (4)
- Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. § 368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm’r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a “use tax” levied against paper and ink used by newspapers. Noting the “[d]ifferential taxation of the press,” the Court commented that it could not “countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation.” *Id.* at 586 (emphasis added). Then, in Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that “. . . the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end.” (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are “*presumed unconstitutional*.” Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (“A statute is *presumptively inconsistent*

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the “least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert “a counterbalancing interest of compelling importance that it cannot achieve without differential taxation”). Nevada cannot do that here.

with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." *Id.* at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*" *Id.* at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." *Id.* at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. *Id.* at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." *Id.* at 632. See also American Target Advertising, Inc. v. Giant, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." *Id.* at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." *Id.* at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. Id. This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. *See, generally, American Multi-Cinema, Inc. v. City of Warrenville*, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers,

499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

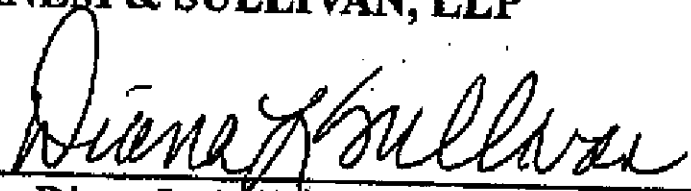
3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general. Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan



# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

April 26, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

**RECEIVED**

APR 27 2007

STATE OF NEVADA  
DEPARTMENT OF TAXATION

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: The Power Company, Inc.**  
**Tax Period: March 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents The Power Company, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

According to our records, the Taxpayer paid a total of One Hundred Eleven Thousand Two Hundred Twenty-Nine and 07/100 Dollars (\$111,229.07) via check number 8097 for this reporting period, and demand is hereby made for full refund of that amount.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

1. ***Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by

radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. . .”) (emphasis added); Winters v. New York, 333 U.S.507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) (“. . .entertainment itself can be important news.”). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“the First Amendment affords protection to symbolic or expressive conduct as well as actual speech”). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to “live entertainment.”<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is “live”) – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of “live entertainment” is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)
- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- Live entertainment that is provided at a trade show (g)

<sup>1</sup> Because the Federal Constitution represents the “floor” level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, § 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap’s A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 (“Nor may an entertainment program be prohibited solely because it displays the nude human figure. ‘[N]udity alone’ does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation”).

- Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- Live entertainment provided in the common area of a shopping mall (j)
- Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)
- An outdoor concert (n)
- Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
  - Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
  - Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
- Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. §

368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that "...the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*" Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech. . . [must be] available to all, not merely to those who can pay their own way.' Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Glani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general.

Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan

# GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem  
eghanem@gs-lawyers.com

Diana L. Sullivan  
dsullivan@gs-lawyers.com

April 26, 2007

**VIA FACSIMILE (775-684-2020)**  
**AND OVERNIGHT COURIER**

Nevada Department of Taxation  
Attn: Michelle Jacobs  
1550 College Parkway  
Carson City, Nevada 89706

**Re: Claim for Refund – Nevada Tax on Live Entertainment**  
**Taxpayer: D.I. Food & Beverage of Las Vegas, LLC**  
**Tax Period: March 2004**

Dear Ms. Jacobs:

Please be advised that the undersigned represents D.I. Food & Beverage of Las Vegas, LLC ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid under the State of Nevada's Tax on Live Entertainment (N.R.S. §§ 368A.010 *et seq.*, and sometimes referred to herein as "Chapter 368A"). This letter is being sent pursuant to directions from Deputy Attorney General Dennis Belcourt, who is representing the State and the applicable agencies in pending legal actions concerning the Tax on Live Entertainment.

Pursuant hereto, the Taxpayer hereby demands a full refund of any and all Live Entertainment Taxes paid for the reporting period of March 2004, together with the statutory interest provided for by N.R.S. § 368A.270.

This claim for refund is made on two grounds. First, the Nevada Tax on Live Entertainment is unconstitutional. Second, the Taxpayer is exempt from paying this tax pursuant to the provisions of N.R.S. § 368A.200(5)(a). These matters are discussed in detail below.

***1. Nevada's Live Entertainment Tax is a Facially Unconstitutional Direct Tax on the Exercise of Constitutional Freedoms.***

Chapter 368A imposes a direct tax specifically upon "live entertainment." And, "live entertainment" is protected expression under the First Amendment. *See, e.g., Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment*, such as musical and dramatic works, fall within the

8861 WEST SAHARA AVENUE, SUITE 120 ♦ LAS VEGAS, NV ♦ 89117  
PHONE: (702) 862-4450 ♦ FAX: (702) 862-4422



First Amendment guarantee. . .") (emphasis added); Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed.2d 840 (1948) (mere entertainment, in-and-of itself, is considered protected expression under the First Amendment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) (nude dancing); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (rock music) and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) (human cannonball performance) ("...entertainment itself can be important news."). See also Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("the First Amendment affords protection to symbolic or expressive conduct as well as actual speech"). Consequently, Chapter 368A imposes a tax *directly and specifically* upon activity protected by the First Amendment.<sup>1</sup>

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.<sup>2</sup> Accordingly, the claims of this Taxpayer can be grounded – in the first instance – on the fact that the tax at issue applies *generally* to "live entertainment."<sup>3</sup> But there is far more that demonstrates the invalidity of Chapter 368A.

While the statute is a selective tax only upon protected expression – and at that only upon one form of entertainment (applying only to that which is "live") – it does not even tax that particular mode of expression in a unified and even fashion. This is because a wide variety of "live entertainment" is specifically and statutorily exempted from the scope of tax. The exemptions as contained in N.R.S. § 368A.200(5), include but are not limited to the following:

- Any boxing contest or exhibition governed by the provisions of Chapter 467 of the Nevada Revised Statutes (c)
- Live entertainment in a non-gaming facility with a maximum seating capacity of less than 200 (d)
- Live entertainment that is provided at a trade show (g)

<sup>1</sup> Because the Federal Constitution represents the "floor" level of protections that can be afforded under the State Constitution (see S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2004)), Chapter 368A also imposes a direct tax upon expression protected under Article I, § 7, of the Nevada Constitution.

<sup>2</sup> The burden on protected activity here is, indeed, far-reaching, and includes music, vocals, dancing, acting, drama, and comedy. N.R.S. § 368A.090.

<sup>3</sup> Nevertheless, the particular expression presented by the Taxpayer also receives constitutional protections. The Taxpayer presents exotic dancing at its establishment, which is a form of expression that falls within the scope of the liberties afforded by the First Amendment. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing receives protections under the Constitution); City of Erie v. Pap's A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (same). See also Schad, 452 U.S. at 65-66 ("Nor may an entertainment program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . Furthermore, . . . nude dancing is not without its First Amendment protections from official regulation").

- Music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons (h)
- Live entertainment provided in the common area of a shopping mall (j)
- Live entertainment that is incidental to an amusement ride, emotion simulator or similar digital, electronic mechanical or electromechanical attraction (l)
- Live entertainment that is provided to the public in an outdoor area, without any requirements for the payment of and admission charge or the purchase of any food, refreshments or merchandise (m)
- An outdoor concert (n)
- Race events at a racetrack in the state is part of the NASCAR Nextel Cup Series, or its successor racing series, and all races associated therewith (o)
- Live entertainment provided in a restaurant which is incidental to any other activities conducted in the restaurant or which only serves as ambiance so long as there is no charge to the patrons for that entertainment (p).
- Those are not, however, all of the exemptions. The definition of "live entertainment" under N.R.S. § 368A.090(b) excludes, among other things:
  - Instrumental or vocal music in a restaurant, lounge or similar area if the music does not routinely rise to the volume that interferes with casual conversation and if such music would not generally cause patrons to watch as well as listen (1)
  - Performances at certain licensed gaming establishments where the "performers stroll continuously throughout the facility" (3)
  - Performances in certain areas of certain licensed gaming establishments "which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables" (4)
  - Entertainment provided by patrons. (6)

And, of course, even the amount of the tax is not consistently assessed against those forms of entertainment that do not fall within one of the numerous exceptions. There is a higher rate of tax assessed against those establishments with a seating capacity of less than 7,500 persons, than applies to facilities with seating capacities over that number. N.R.S. §

368A.200(1). For all of these reasons, Chapter 368A clearly represents a *differential* tax upon expressive activities.

With these various factors in mind, the unconstitutionality of Chapter 368A is preordained by established Supreme Court precedent. In Minneapolis Star v. Minnesota Comm'r of Rev., 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the High Court was asked to consider the constitutionality of a "use tax" levied against paper and ink used by newspapers. Noting the "[d]ifferential taxation of the press," the Court commented that it could not "countenance such treatment unless the State asserts a counterbalancing interest of *compelling importance* that it cannot achieve without differential taxation." *Id.* at 586 (emphasis added). Then, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court, in invalidating a discriminatory tax upon certain magazines, observed that ". . . the State must show that its regulation is *necessary to serve a compelling State interest* and is *narrowly drawn* to achieve that end." (Emphasis added). And, under strict scrutiny, narrow tailoring requires that the government choose the least restrictive (of First Amendment expression) means possible to effectuate the governmental interest involved.<sup>4</sup>

Most importantly, is the simple fact that such differential taxes upon First Amendment activities are "*presumed unconstitutional*." Minneapolis Star, 460 U.S. at 586 (emphasis added). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) ("A statute is *presumptively inconsistent* with the First Amendment if it imposes a financial burden on speakers because of the content of their speech") (emphasis added).

Utilizing these standards, it is clear that Chapter 368A is blatantly, and *facially*, unconstitutional under the First Amendment.

The Supreme Court dealt with the issue of taxing First Amendment rights in the case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case dealt with a city ordinance that required those who wished to canvas or solicit to pay a license fee of \$1.50 per day or \$7.00 for one week. *Id.* at 106. The Supreme Court stated that, in regard to First Amendment freedoms, "it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax proposed by this ordinance is in substance just that." *Id.* at 108. In the case of the Nevada Tax on Live Entertainment, there is

<sup>4</sup> See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (narrow tailoring requires that the government choose the "least restrictive means to further the articulated interest). We assume that the governmental interest is raising taxes, which the State previously had accomplished without infringing on First Amendment constitutional rights of expression when the tax was directed against gambling casinos. See also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816-17, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. . . . [T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction . . . . The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . . (citations deleted)). See also Minneapolis Star, 460 U.S. at 585 (the government must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"). Nevada cannot do that here.

not even the pretext of a license involved, as it is merely a direct imposition of a tax on First Amendment freedoms.

The Supreme Court noted in Murdock that freedom of speech is "available to all, not merely to those who can pay their own way," and that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . those who can tax the exercise of this [First Amendment freedom] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Id. at 111-12. The Court flatly stated that "*a state may not impose a charge for the enjoyment of a right granted by the federal constitution.*" Id. at 112 (emphasis added). This is because "the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down." Id. at 113. These principles were reaffirmed in the cases of Minneapolis Star and Ragland.<sup>5</sup>

2. *Nevada's Live Entertainment Tax is an Unconstitutional Differential Tax on First Amendment Freedoms.*

Chapter 268A is also unconstitutional because it treats certain live entertainment facilities differently than other amusements and other providers of live entertainment. Nevada is unable to assert an overriding government interest for this disparate treatment, and the statute must, therefore, fail.

The Supreme Court has plainly stated "that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), citing Minneapolis Star, 460 U.S. at 585; and Grosjean v. American Press Co., 297 U.S. 233, 244-249, 56 S.Ct. 444, 80 L.Ed. 660 (1936). This is because selective taxation is a "powerful weapon" to suppress the speaker or viewpoint selected. Minneapolis Star, 460 U.S. at 585, citing Railway Express Agency v. New York, 336 U.S. 106, 112-113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

<sup>5</sup> While Supreme Court precedent clearly establishes the invalidity of the Live Entertainment Tax, lower court decisions further exemplify this point. In the case of Fernandes v. Limmer, 663 F.2d 619 (5<sup>th</sup> Cir. 1981), the Court there was dealing with a \$6.00 daily fee required of anyone exercising First Amendment rights in the Dallas/Ft. Worth airport. Id. at 632. The court noted that "exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. . . were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets are not so deep. '[F]reedom of speech . . . [must be] available to all, not merely to those who can pay their own way.'" Murdock v. Pennsylvania 319 U.S. 105, at 111." Id. at 632. See also American Target Advertising, Inc. v. Glani, 199 F.3d 1241 (10<sup>th</sup> Cir. 2000), where the court there examined a statute that required the posting of a bond in the amount of \$25,000.00 before persons or entities could engage in First Amendment activities. The court upheld a \$250.00 annual registration fee because it determined that "the fee does no more than defray reasonable administrative costs." Id. at 1249. But in terms of the requirement of posting a bond in the amount of \$25,000.00, the court determined that this "imposes a sizeable price tag upon the enjoyment of a guaranteed freedom. . . the chilling financial reality of the bond 'unnecessarily interfer[es] with First Amendment freedoms,' . . . and is therefore unconstitutional. . . ." Id. at 1249. (internal cite omitted); and Joelner v. Village of Washington Park, Ill., 378 F.3d 613, 628 (7<sup>th</sup> Cir. 2004).

As stated above, Chapter 368A not only singles out live entertainment, but also discriminates among providers of live entertainment. First, it discriminates on the basis of the size of the facility. It excludes small facilities with a maximum occupancy of less than two hundred (200) persons. N.R.S. §§ 368A.200(5)(d)(e). Those not excluded on the basis of size are then taxed at different rates according to their size, with the smaller venues paying the higher rate. N.R.S. § 368A.200(1). The smaller venues are further taxed on their food, refreshment, and merchandise sales, while the larger venues are not. *Id.* This scheme, like that in Minneapolis Star, impermissibly discriminates among businesses on the basis of their size. Minneapolis Star, 460 U.S. at 591-92. The statute offers no rationale to justify this disparate treatment.

Second, the statute discriminates among *types* of live entertainment. Most notably, the statute exempts certain sporting venues such as boxing and NASCAR races. N.R.S. §§ 368A.200(5)(c) and (o). These exemptions impermissibly discriminate among speakers on the basis of the content of the entertainment. It demonstrates a preference for family entertainment, which is clearly evident from the legislative history: "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." ASSEMBLY COMMITTEE ON COMMERCE AND LABOR OF NEVADA, 73d Sess. 17-18 (2005).

For obvious reasons, taxes such as this, which discriminate on the basis of the content of the speech, trigger heightened scrutiny under the First Amendment. Leathers, 499 U.S. at 447. Further, the fact that Chapter 368A singles out live entertainment venues and discriminates among them distinguishes Chapter 368A from a generally applicable amusement tax. See, generally, American Multi-Cinema, Inc. v. City of Warrenville, 748 N.E.2d 746, 321 Ill.App.3d 349 (2001).

These modes of discrimination among taxpayers are presumptively invalid and, to sustain constitutional muster, require a compelling governmental justification. Leathers, 499 U.S. at 446-47; Minneapolis Star, 460 U.S. at 592-93. The government's interest in collecting revenues cannot sustain Chapter 368A, because the State must show that the tax is necessary to serve a compelling state interest which could not be achieved without differential taxation. Minneapolis Star, 460 U.S. at 586. Defendants cannot assert a compelling reason for taxing live entertainment differently from other forms of entertainment or for the differential taxation of live entertainment based on the size of the facility or whether the facility meets Defendants' unilateral designation of "family-oriented." Therefore, Chapter 368A is unconstitutional.

3. *The Taxpayer is exempt from taxation pursuant to the provisions of N.R.S. § 368A.200(5).*

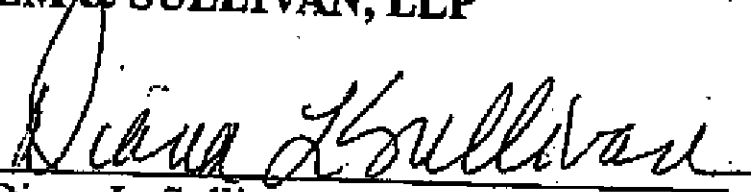
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the reasons as set forth in the two subsections immediately above, the State of Nevada is, in fact, precluded from directly taxing "live entertainment" in general.

Accordingly, the Taxpayer is exempt for having to pay the Live Entertainment tax pursuant to the exemption as set forth in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer is entitled to a total refund of all Live Entertainment Taxes paid, together with appropriate interest, and requests immediate payment of the same. If there is any further information that you need in order to be able to complete the processing of this Claim for Refund, please do not hesitate to contact me directly.

Sincerely,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan

envelope is for use with the following services:

UPS Next Day Air®  
UPS Worldwide Express™  
UPS 2nd Day Air®

Call 1-800-PICK-UPS® (1-800-742-5877) or visit [UPS.com](http://UPS.com)®.

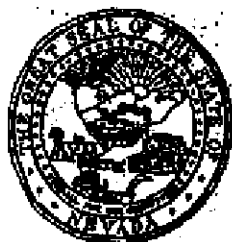
\* For UPS Next Day Air services, there is no weight limit for envelopes containing correspondence, urgent documents, and electronic media. When a UPS Next Day Air service is selected, UPS Express Envelopes containing items other than those listed above are subject to the corresponding rates for the applicable weight.

Apply shipping documents on this side

Do not use this envelope for:

UPS Ground  
UPS Standard  
UPS 3 Day Select™  
UPS Worldwide Expedited™

<b>UPS</b> UPS Next Day Air® UPS Worldwide Express™ Shipping Document		WEIGHT LTR		WEIGHT	DIMENSIONAL WEIGHT	LARGE AIR PACKAGE <input type="checkbox"/>	SHIPPER RELEASE <input type="checkbox"/>
SHIPMENT FROM UPS ACCOUNT NO. 3 Y 8 1 5 W REFERENCE NUMBER		SHIPMENT TO MICHELLE JACOBS 775 688-1225 Nevada Department of Taxation 1550 College Parkway CARSON CITY, NV 89706		SATURDAY DELIVERY <input type="checkbox"/>		EXPRESS (INTL) <input type="checkbox"/> DOCUMENTS ONLY <input type="checkbox"/>	
Diana Sullivan 702-862-4450 GHANEM & SULLIVAN 8861 W SAHARA AVE RM STE 120 LAS VEGAS NV 89117 5850		MICHELLE JACOBS 775 688-1225 Nevada Department of Taxation 1550 College Parkway CARSON CITY, NV 89706		12 3Y8 15W 22 1000 078 3		12 3Y8 15W 22 1000 078 3	
SHIPMENT FROM UPS ACCOUNT NO. 3 Y 8 1 5 W REFERENCE NUMBER		SHIPMENT TO MICHELLE JACOBS 775 688-1225 Nevada Department of Taxation 1550 College Parkway CARSON CITY, NV 89706		12 3Y8 15W 22 1000 078 3		12 3Y8 15W 22 1000 078 3	
SHIPMENT FROM UPS ACCOUNT NO. 3 Y 8 1 5 W REFERENCE NUMBER		SHIPMENT TO MICHELLE JACOBS 775 688-1225 Nevada Department of Taxation 1550 College Parkway CARSON CITY, NV 89706		12 3Y8 15W 22 1000 078 3		12 3Y8 15W 22 1000 078 3	



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>

1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 488-2300 Fax: (702) 488-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 488-2300  
Fax: (702) 488-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5433

April 30, 2007

D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC  
JAGUARS  
3355 PROCYON ST  
LAS VEGAS NV 89102

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by D.I. Food & Beverage of Las Vegas, LLC for the period ending March, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, D.I. Food & Beverage of Las Vegas, LLC falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude D.I. Food & Beverage of Las Vegas, LLC, DBA Jaguars, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP





JIM GIBBONS  
Governor  
THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

STATE OF NEVADA  
DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4800 Kietzke Lane  
Building L, Suite 238  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5440

April 30, 2007

THE POWER COMPANY INC  
CRAZY HORSE TOO  
2476 INDUSTRIAL RD  
LAS VEGAS NV 89102

Dear Mr. Rizzolo:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by The Power Company, Inc. for the period ending March 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, The Power Company, Inc. falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude The Power Company, Inc., DBA Crazy Horse Too, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor

THOMAS R. SHEETS  
Chair, Nevada Tax Commission

DINO DI CIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
655 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 488-2300 Fax: (702) 488-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 488-2300  
Fax: (702) 488-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5402

April 30, 2007

K-KEL INC  
SPEARMINT RHINO  
15423 E VALLEY BLVD  
CITY OF INDUSTRY CA 91746

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending March, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, K-Kel, Inc. falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude K-Kel, Inc., DBA Spearmint Rhino, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor  
THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89705-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 488-2300 Fax: (702) 488-2373

RENO OFFICE  
4800 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1285  
Fax: (775) 688-1303

HENDERSON OFFICE  
2560 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5457

May 1, 2007

D. WESTWOOD INC  
TREASURES  
2801 WESTWOOD DR  
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund


I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by D. Westwood, Inc. for the period ending March, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, D. Westwood, Inc. falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude D. Westwood, Inc., DBA Treasures, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

  
Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor  
THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
555 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5426

May 1, 2007

PETER ELIADES & OG ELIADES LLC  
OLYMPIC GARDEN  
1531 LAS VEGAS BLVD S  
LAS VEGAS NV 89104

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by Olympus Garden, Inc. for the period ending March, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, Olympus Garden, Inc. falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude Olympus Garden, Inc, DBA Olympic Garden, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP



JIM GIBBONS  
Governor  
THOMAS R. SHEETS  
Chair, Nevada Tax Commission  
DINO DICIANNO  
Executive Director

# STATE OF NEVADA DEPARTMENT OF TAXATION

Web Site: <http://tax.state.nv.us>  
1550 College Parkway, Suite 115  
Carson City, Nevada 89706-7937  
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE  
Grant Sawyer Office Building, Suite 1300  
565 E. Washington Avenue  
Las Vegas, Nevada, 89101  
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE  
4600 Kietzke Lane  
Building L, Suite 235  
Reno, Nevada 89502  
Phone: (775) 688-1295  
Fax: (775) 688-1303

HENDERSON OFFICE  
2550 Paseo Verde Parkway Suite 180  
Henderson, Nevada 89074  
Phone: (702) 486-2300  
Fax: (702) 486-3377

CERTIFIED MAIL: 7006 2150 0000 6989 5419

May 1, 2007

SHAC LLC  
SAPPHIRE  
3025 INDUSTRIAL RD  
LAS VEGAS NV 89109

Dear Sir:

Re: Live Entertainment Tax Claim for Refund

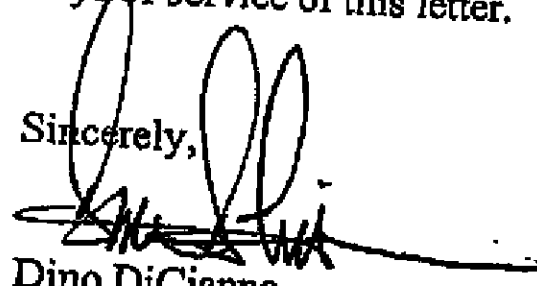
I am in receipt of a letter from Ghanem & Sullivan, Attorneys at Law, dated April 26, 2007, requesting a refund of Live Entertainment Taxes paid by SHAC LLC, for the period ending March, 2004.

Nevada Revised Statutes (NRS) Chapter 368A requires a business to pay an excise tax on admission to any facility in this State where live entertainment is provided. NRS 368A.060 defines a facility and NRS 368A.090 defines live entertainment. Based on the Department's interpretation of the law as it currently exists, SHAC LLC falls within the purview of this statute and is required to pay the live entertainment tax.

As I find no basis in law that would preclude SHAC LLC, DBA Sapphire, from its obligation to pay this tax, I must deny your request for refund.

After reviewing the enclosed information, should you disagree with this decision, you may appeal it to the Nevada Tax Commission, pursuant to NRS 360.245, by filing a written notice of appeal with the Department within thirty days of service of this letter.

Sincerely,

  
Dino DiCianno  
Executive Director

Enclosures: NRS 360.245

cc: Ghanem & Sullivan, LLP