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Electronically Filed
Oct 27 2016 04:31 p.m.
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SUPREME COURT
OF THE STATE OF NEVADA

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

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Respondents.

Supreme Court Docket: 69886

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

Appellants' Appendix

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

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June 4, 2007

CERTIFIED MAIL: 7006 2150 0000 6989 5068

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 May 30, 2007, requesting a refund of Live Entertainment Taxes paid by D. Westwood, Inc. for the period ending April, 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
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Henderson, Nevada 89074
Phone:(702) 486-2300
Fax: (702) 486-3377

June 4, 2007

CERTIFIED MAIL: 7006 2150 0000 6989 5341

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 May 30, 2007, requesting a refund of Live Entertainment Taxes paid by K-KEL Inc. for the period ending April, 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 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

June 4, 2007

CERTIFIED MAIL: 7006 2150 0000 6989 5358

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 May 30, 2007, requesting a refund of Live Entertainment Taxes paid by SHAC LLC, for the period ending April, 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

JIM GIBBONS
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Henderson, Nevada 89074
Phone:(702) 486-2300
Fax: (702) 486-3377

June 4, 2007

CERTIFIED MAIL: 7006 2150 0000 6989 5372

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 May 30, 2007, requesting a refund of Live Entertainment Taxes paid by Olympus Garden, Inc. for the period ending April, 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

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HENDERSON OFFICE
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Henderson, Nevada 89074
Phone:(702) 486-2300
Fax: (702) 486-3377

June 4, 2007

CERTIFIED MAIL: 7006 2150 0000 6989 5389

THE POWER COMPANY INC
CRAZY HORSE TOO
2476 INDUSTIAL RD
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 may 30, 2007, requesting a refund of Live Entertainment Taxes paid by The Power Company, Inc. for the period ending April 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 DICIANNO
Executive Director

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

June 4, 2007

CERTIFIED MAIL: 7006 2150 0000 6989 5365

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 May 30, 2007, requesting a refund of Live Entertainment Taxes paid by D.I. Food & Beverage of Las Vegas, LLC for the period ending April, 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

GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem
eghanem@gs-lawyers.com

Diana L. Sullivan
dsullivan@gs-lawyers.com

May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

RECEIVED
MAY 02 2007
STATE OF NEVADA
DEPARTMENT OF TAXATION

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

Dear Director DiCianno:

Please be advised that the undersigned represents D. Westwood, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for February 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

---

[1] 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.

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

[3] 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.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.[4]

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).

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[4] *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.

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**.[5]

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

---

[5] 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 (5th 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 (10th 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 (7th 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).***

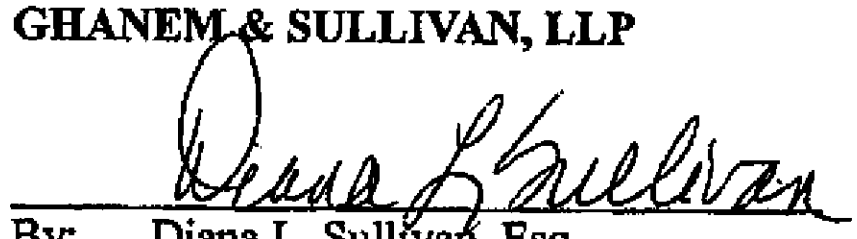
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan, Esq.
8861 W. Sahara Ave., Suite 120
Las Vegas, Nevada 89117
Telephone: (702) 862-4450
Facsimile: (702) 862-4422

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GHANEM SULLIVAN

Attorneys At Law

Elizabeth M. Ghanem
eghanem@gs-lawyers.com

Diana L. Sullivan
dsullivan@gs-lawyers.com

May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

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

Dear Director DiCianno:

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 notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for February 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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)

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- 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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

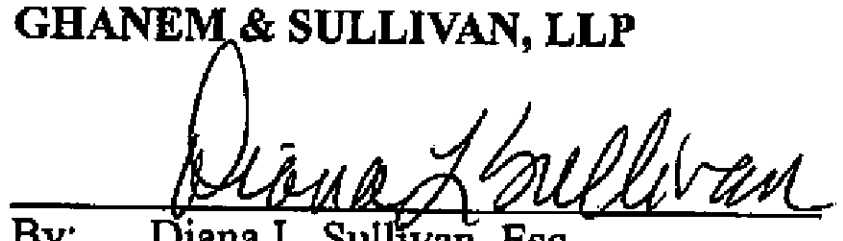
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

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

Dear Director DiCianno:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for February 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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

[3] 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").

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

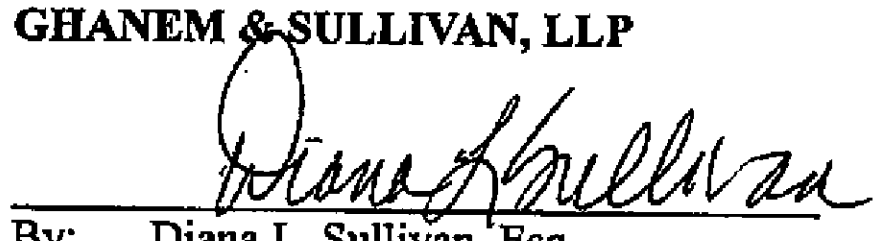
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: ***Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment***
Taxpayer: K-Kel, Inc.
Tax Period: January 2004

Dear Director DiCianno:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for January 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

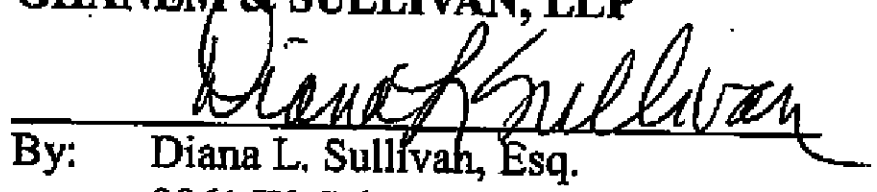
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: Olympus Garden, Inc.
Tax Period: January 2004

Dear Director DiCianno:

Please be advised that the undersigned represents Olympus Garden, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for January 2004 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").

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Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

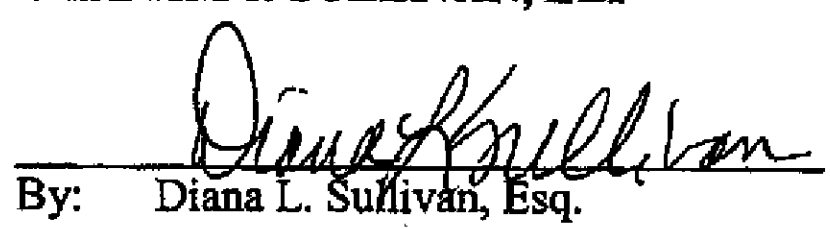
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

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

Dear Director DiCianno:

Please be advised that the undersigned represents Olympus Garden, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for February 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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").

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

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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.

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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).***

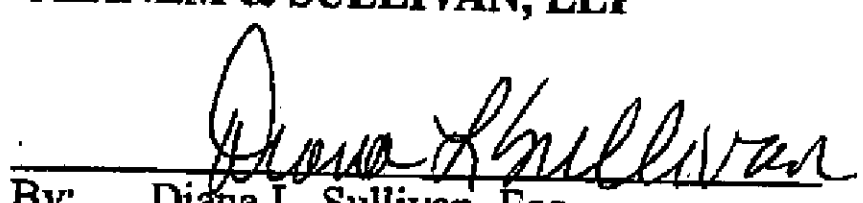
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: SHAC, LLC
Tax Period: February 2004

Dear Director DiCianno:

Please be advised that the undersigned represents SHAC, LLC ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for February 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

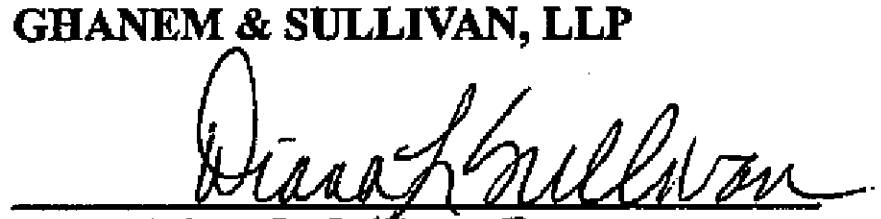
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: SHAC, LLC
Tax Period: January 2004

Dear Director DiCianno:

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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.[1]

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

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[1] 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.

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

[3] 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").

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- 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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

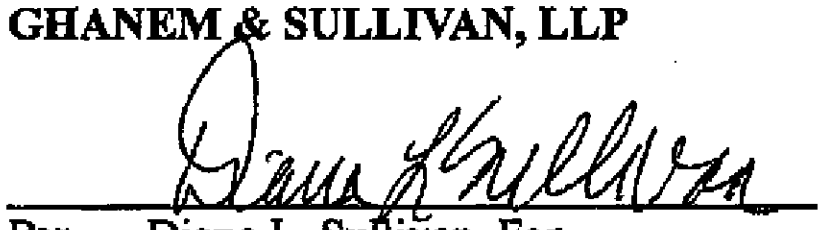
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of February 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: The Power Company, Inc.
Tax Period: January 2004

Dear Director DiCianno:

Please be advised that the undersigned represents The Power Company, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for January 2004 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 notice is being sent to you pursuant to instructions in your April 3, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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).

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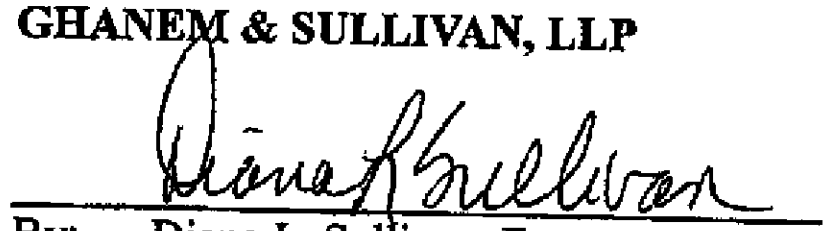
None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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May 1, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

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

Dear Director DiCianno:

Please be advised that the undersigned represents The Power Company, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for February 2004 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").

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The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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).

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[4] *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.

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**.[5]

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

---

[5] 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 (5th 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 (10th 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 (7th 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).***

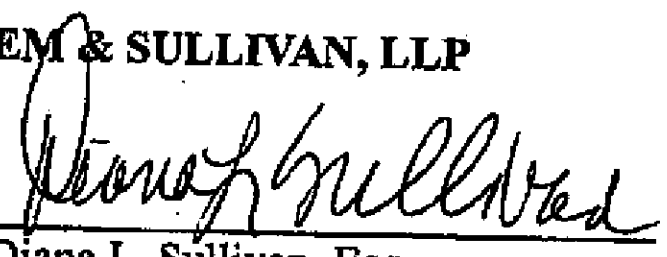
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of January 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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FAX COVER SHEET

Name:	Mr. Christopher G. Nielsen
Fax:	775-684-2020
From:	Bradley J. Shafer
Date:	June 19, 2007
Pages:	(3), including this cover
Comments:	If there are any problems with this transmittal, please contact Brooke at (517) 886-6560.

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BRADLEY J. SHAFER
ALSO MEMBER, AZ BAR

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ANDREA E. PRITZLAFF

June 19, 2007

VIA FACSIMILE
Mr. Christopher G. Nielsen
Deputy Executive Director
State of Nevada
Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937

VIA U.S. MAIL
Nevada Tax Commission
Department of Taxation
Grant Sawyer Office Building
555 E. Washington Ave., Suite 1300
Las Vegas, Nevada 89101

Re: *K-Kel, Inc., dba Spearmint Rhino Gentlemen's Club, TID 1001371216;*
D. Westwood, Inc., dba Treasures, TID 1000987183;
SHAC, LLC, Olympus Garden, Inc., dba Sapphire, TID 100989160;
D.I. Food & Beverage of Las Vegas, LLC, dba Jaguars, TID 1000843335;
Olympus Garden, Inc., dba Olympic Garden, TID 1003227104;
The Power Company, Inc., dba Crazy Horse Too Gentlemen's Club, TID 1000774937

Gentlemen:

The purpose of this letter is to briefly comment on Mr. Nielsen's "amended" notice of hearing in the above referenced consolidated matters, dated June 8, 2007. In that document, Mr. Nielsen states that the agreed-upon briefing schedule was that the Department was to file its "opening" brief by June 15, 2007, and the taxpayers will then have until June 25, 2007, to file a reply brief. This statement does not, however, acknowledge the fact that, pursuant to the conversations that I've had with Messers Pope and Belcourt, the taxpayers' initial briefs in this matter will be considered to be the legal arguments that were included in the various Notice of Appeals filed on May 9, 2007, by attorney Diana L. Sullivan, directed to Mr. Dino DiCianno, Executive Director of the Nevada Department of Taxation.

The Department's brief, which was timely filed on June 15, 2007, is, in fact, a response to those documents. I simply want to be sure that the briefing as contained in those Notices of Appeal will be before, and will be considered by, the Nevada Tax Commission at the hearing scheduled for July 9, 2007. If I am in error in this regard, please notify me as quickly as possible, as our brief that we intend to file before June 25, 2007, will be ***only*** a reply to the Department's memorandum unless we hear from you to the contrary. We do not intend to reiterate in our reply the materials set forth in Notices of Appeal filed on May 9.

LAW OFFICES
SHAFER & ASSOCIATES, P.C.

Finally, please be advised that my notice of appearance letter dated June 8, 2007, directed to the Nevada Tax Commission, is applicable to the above referenced appeals, even though the "Re" on my correspondence referred to the " Deja Vu Showgirls of Las Vegas, LLC , et al., Appeal on Refund Request." As I explained in that correspondence, in speaking to Messers Pope and Belcourt, it was my understanding that, up until that time, the caption for these appeals was generally as I had set forth in my letter of June 8. That correspondence should, however, serve as my notice of appearance in the above referenced matters.

Thank you for your consideration in this matter.

Sincerely,

SHAFER & ASSOCIATES, P.C.

By: Bradley J. Shafer

BJS/bsa
cc: Erin Fierro, *via facsimile*
Dennis Belcourt, *via facsimile*
David Pope, *via facsimile*
Diana Sullivan, *via facsimile*

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June 8, 2007

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D. Westwood, Inc., dba Treasures, TID 1000987183;
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Olympus Garden, Inc., dba Olympic Garden, TID 1003227104
The Power Company., Inc., dba Crazy Horse Too Gentlemen's Club, TID 1000774937

NEVADA TAX COMMISSION
"AMENDED" NOTICE OF HEARING

The Taxpayers' request to the Nevada Tax Commission regarding the Appeal of Denial of Claim for Refund – Tax on Live Entertainment – for the periods of January 2004 through April 2004 has been placed on the agenda of the Nevada Tax Commission meeting, which is to be held on Monday, July 9, 2007. The appeals will be heard on a consolidated basis. The meeting will be a videoconference held at the Legislative Counsel Bureau, Grant Sawyer State Office Building, 555 E. Washington Avenue, Room 4412, Las Vegas, Nevada and the Nevada Legislative Building, 401 S. Carson Street, Room 3138, Carson City, Nevada, commencing at 9:00 a.m. You may appear at either location. A copy of the posted agenda will be sent to you as soon as it is available.

This matter is an appeal to the Nevada Tax Commission. NRS 360.247 , as amended by AB 433 (2007), a hearing on an appeal to the Nevada Tax Commission may be closed at the taxpayer's request to receive, what the Nevada Tax Commission determines, in its discretion, to be proprietary or confidential information.

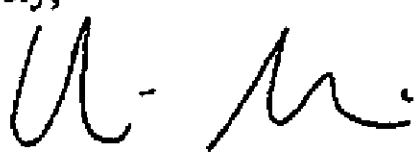
If a transcript of any hearing held before the Commission is desired by the petitioner, they may request a copy of the transcript from the Department or the Commission's court reporter. Additionally, in accordance with NAC 360.175, oral argument on behalf of the petitioner as well as the Department shall be limited to a period of time not to exceed 20 minutes for each, unless extended by the Commission.

While the Commission requires that any materials in the support of an appeal be received in the office of the Department at least 1 week prior to the scheduled meeting to allow the Department and the Commission an opportunity for review, the parties – on or about June 4, 2007 – agreed to the following briefing schedule: The

Department will have until June 15, 2007 to file an opening brief. The Taxpayers will then have until June 25, 2007 to file a reply brief. Please send us any material you wish considered as soon as possible.

If you have any questions, please contact Erin Fierro at (775) 684-2096.

Sincerely,



Christopher G. Nielsen,
Deputy Executive Director

cc: Nevada Tax Commission
David Pope, Senior Deputy Attorney General
Dennis Belcourt, Deputy Attorney General

JIM GIBBONS
Governor
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COMPANY/AGENCY: **Shafer & Associates PC**

NAME: **Bradley J. Shafer Esq.**

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FROM: DEPARTMENT OF TAXATION - **CARSON CITY**

NAME: **Erin Fierro, Executive Assistant**

DIVISION: **Taxation - Executive**

TELEPHONE NUMBER: **775-684-2096**

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SPECIAL INSTRUCTIONS: **Nevada Tax Commission notice for July 9, 2007. A notice was sent out certified yesterday. The notice attached is an amended notice. Thank you.**

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COMPANY/AGENCY: **Ghanem & Sullivan LLP**

NAME: **Elizabeth M. Ghanem Esq.**

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TELEPHONE NUMBER: **775-684-2096**

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SPECIAL INSTRUCTIONS: **Nevada Tax Commission notice for July 9, 2007. A notice was sent out certified yesterday. The notice attached is an amended notice. Thank you.**

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

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June 7, 2007

Bradley J. Shafer, Esq.
Shafer & Associates, P.C.
3800 Capital City Blvd., Suite #2
Lansing, MI 48906

CERTIFIED MAIL 7005 1820 0003 8673 2660

and

Elizabeth M. Ghanem, Esq.
Ghanem & Sullivan, LLP
8861 W. Sahara Avenue, Suite 120
Las Vegas, NV 89117

CERTIFIED MAIL 7005 1820 0003 8673 2653

Re: K-Kel, Inc., dba Spearmint Rhino Gentlemen's Club, TID 1001371216;
D. Westwood, Inc., dba Treasures, TID 1000987183;
SHAC, LLC, Olympus Garden, Inc., dba Sapphire, TID 100989160;
D.I. Food & Beverage of Las Vegas LLC, dba Jaguars, TID 1000843335;
Olympus Garden, Inc., dba Olympic Garden, TID 1003227104
The Power Company., Inc., dba Crazy Horse Too Gentlemen's Club, TID 1000774937

NEVADA TAX COMMISSION
NOTICE OF HEARING

The Taxpayers' request to the Nevada Tax Commission regarding the Appeal of Denial of Claim for Refund – Tax on Live Entertainment – for the periods of January 2004 through April 2004 has been placed on the agenda of the Nevada Tax Commission meeting, which is to be held on Monday, July 9, 2007. The appeals will be heard on a consolidated basis. The meeting will be a videoconference held at the Legislative Counsel Bureau, Grant Sawyer State Office Building, 555 E. Washington Avenue, Room 4412, Las Vegas, Nevada and the Nevada Legislative Building, 401 S. Carson Street, Room 3138, Carson City, Nevada, commencing at 9:00 a.m. You may appear at either location. A copy of the posted agenda will be sent to you as soon as it is available.

At this meeting the Commission will not address the merits of your appeal but will limit its inquiry to the facts and circumstances surrounding the untimely filing of your appeal. This matter is an appeal to the Nevada Tax Commission. NRS 360.247 provides that "[a] hearing on such an appeal may be closed to the public if the taxpayer requests that it be closed." If you request that the hearing in this matter be closed and the Commission grants that request, the Commission may continue the hearing to a later date to allow the Commission to receive guidance and establish procedures concerning the conduct of a closed hearing in relation to the requirements of the Open Meeting Law (NRS Chapter 241). If no request for a closed hearing is received or if the Commission, in its discretion, denies the request, discussion of and decision on this matter will take place in public session.

If a transcript of any hearing held before the Commission is desired by the petitioner, they may request a copy of the transcript from the Department or the Commission's court reporter. Additionally, in accordance with NAC 360.175, oral argument on behalf of the petitioner as well as the Department shall be limited to a period of time not to exceed 20 minutes for each, unless extended by the Commission.

While the Commission requires that any materials in the support of an appeal be received in the office of the Department at least 1 week prior to the scheduled meeting to allow the Department and the Commission an opportunity for review, the parties – on or about June 4, 2007 – agreed to the following briefing schedule: The Department will have until June 15, 2007 to file an opening brief. The Taxpayers will then have until June 25, 2007 to file a reply brief. Please send us any material you wish considered as soon as possible.

If you have any questions, please contact Erin Fierro at (775) 684-2096.

Sincerely,

Christopher G. Nielsen,
Deputy Executive Director

cc: Nevada Tax Commission
David Pope, Senior Deputy Attorney General
Dennis Belcourt, Deputy Attorney General

ST OF NV DEPT TAXATION Fax:7756842020

** Transmit Conf. Report **

P.1

Jun 8 2007 16:42

Fax/Phone Number	Mode	Start	Time	Page	Result	Note
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FAX COVER SHEET

DATE: June 8, 2007 FAX NO: 702-862-4422

TOTAL NUMBER OF PAGES: 3 (Including cover sheet)

COMPANY/AGENCY: Ghanem & Sullivan LLP

NAME: Elizabeth M. Ghanem Esq.

****

FROM: DEPARTMENT OF TAXATION - CARSON CITY

NAME: Erin Flerra, Executive Assistant

DIVISION: Taxation - Executive

TELEPHONE NUMBER: 775-684-2096

****

SPECIAL INSTRUCTIONS: Nevada Tax Commission notice for July 9, 2007. A notice was sent out certified yesterday. The notice attached is an amended notice. Thank you.

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FAX COVER SHEET 1.2

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P.1

Jun 8 2007 16:42

Fax/Phone Number	Mode	Start	Time	Page	Result	Note
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FAX COVER SHEET

DATE: **June 8, 2007** FAX NO.: **517-886-6565**

TOTAL NUMBER OF PAGES: 3 (Including cover sheet)

COMPANY/AGENCY: **Shafer & Associates PC**

NAME: **Bradley J. Shafer Esq.**

****

FROM: DEPARTMENT OF TAXATION - CARSON CITY

NAME: **Erin Fierro, Executive Assistant**

DIVISION: **Taxation - Executive**

TELEPHONE NUMBER: **775-684-2096**

****

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FAX COVER SHEET 1.2

LAW OFFICES
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FAX: 517-886-6565

BRADLEY J. SHAFER
ALSO MEMBER, AZ BAR

ANDREA E. PRITZLAFF

June 8, 2007

VIA U.S. MAIL
Nevada Tax Commission
Department of Taxation
Grant Sawyer Office Building
555 E. Washington Ave., Suite 1300
Las Vegas, Nevada 89101

RE: Deja Vu Showgirls of Las Vegas, LLC, et al.
Appeal on Refund Requests

Ladies and Gentlemen:

Pursuant to NAC 360.085, this letter should serve as my formal appearance on behalf of the taxpayers in the consolidated appeals referenced above. In speaking to Senior Deputy Attorney General David Pope and Deputy Attorney General Dennis Belcourt, it is my understanding that the caption of these matters will be changing (since Deja Vu Showgirls of Las Vegas, LLC, has not yet filed a request for refund), but that this caption is appropriate to use at this point for the filing of this notice of appearance.

As I am not licensed to practice law in Nevada, pursuant to NAC 360.085(3), I will associate with attorney Diana L. Sullivan, whose address is 8861 West Sahara Avenue, Suite 120, Las Vegas, Nevada 89117, whose Nevada Bar Number is 4701, and who is admitted to practice and is in good standing before the Supreme Court of Nevada.

The regulations also require that I be admitted to practice before the highest court in another state and be good standing. To satisfy this requirement, I am licensed to practice law, and am in good standing, in Arizona (admitted Jan. 13, 1986; Bar No. 010452) and in Michigan (admitted Nov. 6, 1984; Bar No. 36604). In both Michigan and Arizona, being admitted to the State Bar allows one to practice before the highest court in the state.

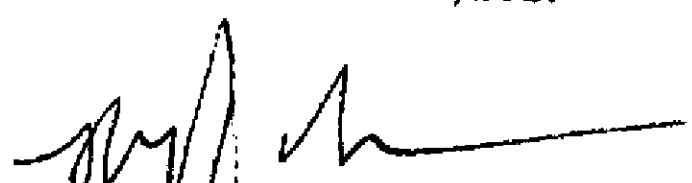
I have also been admitted to practice before a number of other courts, I have practiced in those courts, and I am a member in good standing in the bars of those courts. They include: The United States Supreme Court (Nov. 6, 1989), the Sixth Circuit U.S. Court of Appeals (Jan. 7, 1988), the Seventh Circuit U.S. Court of Appeals (Feb. 10, 1989), the Fourth Circuit U.S. Court of Appeals (June 12, 1991), the Ninth Circuit U.S. Court of Appeals (Aug. 7, 1998), and the Eighth Circuit U.S. Court of Appeals (June 16, 2005). In addition, I have been admitted as counsel pro hac vice in the past to appear before the state district court in Las Vegas as well as before the Nevada Supreme Court, and I am currently admitted as counsel pro hac vice to represent these taxpayers, and others, in a matter pending in the Clark County District Court, arising out of the same matters that are at issue in these proceedings.

Finally, it is my understanding that these matters will be heard by the Commission, on a consolidated basis, on July 9, 2007, at 9:00 a.m. in Las Vegas.

Thank you for your consideration in this matter.

Sincerely,

SHAFER & ASSOCIATES, P.C.



By: Bradley J. Shafer

BJS:MJH

cc: Dennis Belcourt, *via facsimile and U.S. Mail*
David Pope, *via facsimile and U.S. Mail*
Diana Sullivan, *via facsimile and U.S. Mail*

GHANEM & SULLIVAN
Attorneys At Law

Elizabeth M. Ghanem
eghanem@gs-lawyers.com

Diana L. Sullivan
dsullivan@gs-lawyers.com

June 21, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

RECEIVED
JUN 22 2007
STATE OF NEVADA
DEPARTMENT OF TAXATION

Re: ***Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment***
Taxpayer: K-Kel, Inc.
Tax Period: April 2004

Dear Director DiCianno:

Please be advised that the undersigned represents K-Kel, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for April 2004 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 notice is being sent to you pursuant to instructions in your June 4, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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***

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[4] *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**.[5]

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[5] 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 (5th 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 (10th 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 (7th Cir. 2004).

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.

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).***

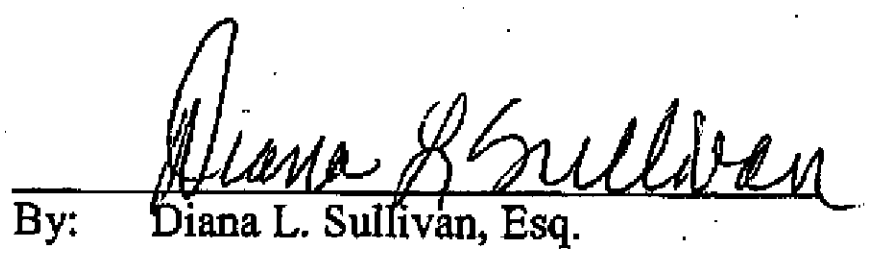
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of April 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan, Esq.

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June 21, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: The Power Company, Inc.
Tax Period: April 2004

Dear Director DiCianno:

Please be advised that the undersigned represents The Power Company, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for April 2004 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 notice is being sent to you pursuant to instructions in your June 4, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

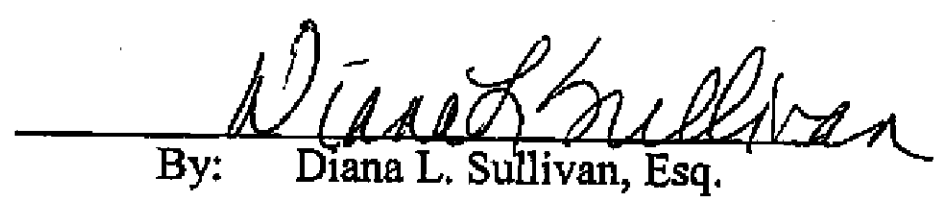
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of April 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan, Esq.

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June 21, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment
Taxpayer: SHAC, LLC
Tax Period: April 2004

Dear Director DiCianno:

Please be advised that the undersigned represents SHAC, LLC ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for April 2004 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").

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The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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:

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

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[1] 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.

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

[3] 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)

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- 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.[4]

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***

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[4] *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**.[5]

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[5] 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 (5th 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 (10th 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 (7th Cir. 2004).

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.

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).***

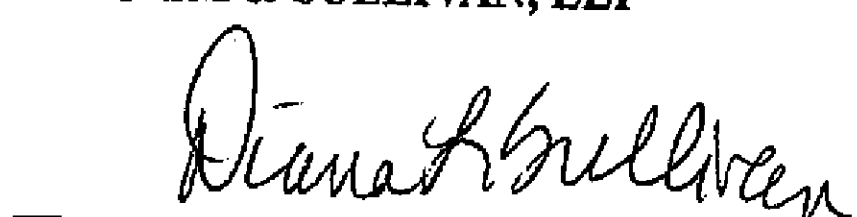
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of April 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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June 21, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: ***Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment***
Taxpayer: D. Westwood, Inc.
Tax Period: April 2004

Dear Director DiCianno:

Please be advised that the undersigned represents D. Westwood, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for April 2004 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 notice is being sent to you pursuant to instructions in your June 4, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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***

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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.

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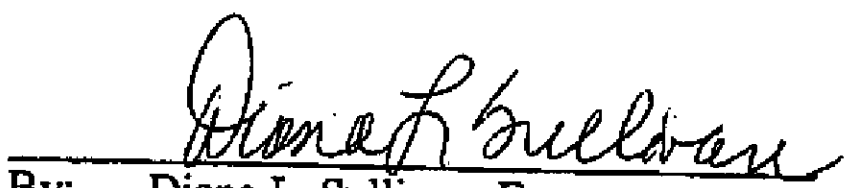
None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of April 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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June 21, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

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

Dear Director DiCianno:

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 notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for April 2004 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").

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The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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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.[1]

Moreover, the Taxpayer asserts that the Nevada Tax on Live Entertainment is facially unconstitutional.[2] 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."[3] 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)

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[1] 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.

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

[3] 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.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.[4]

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).

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[4] *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.

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**.[5]

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

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[5] 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 (5th 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 (10th 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 (7th 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).***

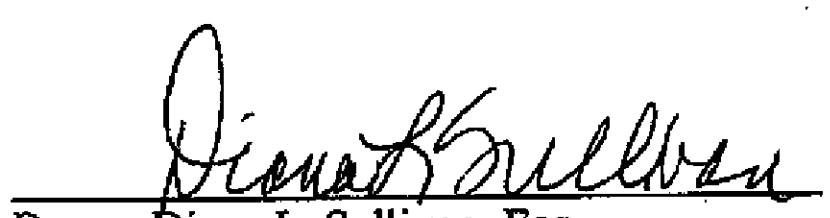
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of April 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



By: Diana L. Sullivan, Esq.

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June 21, 2007

VIA OVERNIGHT COURIER
Mr. Dino DiCianno
Executive Director
Nevada Department of Taxation
1550 College Parkway, Suite 115
Carson City, Nevada 89706

Re: ***Notice of Appeal of Denial of Claim for Refund – Nevada Tax on Live Entertainment***
Taxpayer: Olympus Garden, Inc.
Tax Period: April 2004

Dear Director DiCianno:

Please be advised that the undersigned represents Olympus Garden, Inc. ("Taxpayer"), and this correspondence should be considered as the Taxpayer's formal notice of appeal of the Department of Taxation's denial of the Taxpayer's claim for refund pursuant to N.R.S. § 368A.260 regarding taxes paid for April 2004 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 notice is being sent to you pursuant to instructions in your June 4, 2007, letter denying the Taxpayer's claim for refund, and pursuant to directions from Ruth Jones of the Department of Taxation.

The Taxpayer appeals the denial of its claim for refund for the following reasons, which were not addressed in the letter of denial:

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

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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:

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

[3] 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").

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

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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.

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[5] 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 (5th 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 (10th 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 (7th Cir. 2004).

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.

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).***

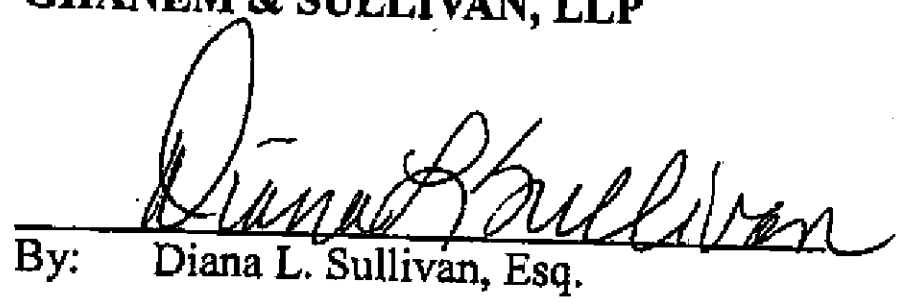
As stated above, Chapter 368A contains numerous exemptions to the Live Entertainment Tax, one of which involves "live entertainment that the State is prohibited from taxing under the Constitution, laws or treatises of the United States or Nevada Constitutions." N.R.S. § 368A.200(5)(a). Here, for the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

None of the three reasons (or the caselaw supporting each) discussed above were addressed by the Department of Taxation in its denial of the Taxpayer's claim for refund. The Department simply cited the definitional provisions (§ 368A.060 and § 368A.090) and failed to even address the exemptions listed in N.R.S. § 368A.200(5)(a).

For the reasons that I have set forth above, the Taxpayer respectfully requests that the Department of Taxation's decision denying the Taxpayer's claim for refund of any and all Live Entertainment Taxes paid for the reporting period of April 2004, be reversed. 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.

Very Truly Yours,

GHANEM & SULLIVAN, LLP



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