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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

APPELLANTS' APPENDIX
VOLUME 6, PAGES 1217 – 1455

INDEX TO APPELLANTS' APPENDIX

<table>
<tr><th>Filing Date</th><th>Description</th><th>Vol.</th><th>Page</th></tr>
<tr><td></td><td><table>
<tr><td>Waiver of Notice, dated 11/22/13</td><td>3637</td></tr>
<tr><td>Transcript of Nevada Tax Commission (only the portions of Nevada Tax Commission relevant to this matter), 12/09/13</td><td>3638-3642</td></tr>
<tr><td>Nevada Tax Commission’s Decision, 02/12/14</td><td>3643-3718</td></tr>
</table></td><td>18
18

18</td><td>3776
3777-3781

3782-3857</td></tr>
<tr><td>12/09/2011</td><td>Minutes</td><td>1</td><td>48-49</td></tr>
<tr><td>12/16/2011</td><td>Minutes</td><td>1</td><td>50-51</td></tr>
<tr><td>06/08/2012</td><td>Minutes</td><td>1</td><td>84-85</td></tr>
<tr><td>09/22/2015</td><td>Minutes</td><td>18</td><td>3867-3868</td></tr>
<tr><td>10/27/2015</td><td>Minutes</td><td>18</td><td>3877-3878</td></tr>
<tr><td>11/24/2015</td><td>Minutes</td><td>18</td><td>3907-3909</td></tr>
<tr><td>10/15/2013</td><td>Minutes – Status Check</td><td>1</td><td>95-96</td></tr>
<tr><td>02/26/2016</td><td>Notice of Appeal</td><td>18</td><td>3934-4006</td></tr>
<tr><td>06/24/2016</td><td>Notice of Entry of Amended Order Denying Judicial Review of Administrative Decision</td><td>19</td><td>4027-4035</td></tr>
<tr><td>10/26/2011</td><td>Notice of Entry of Order</td><td>1</td><td>19-23</td></tr>
<tr><td>11/21/2011</td><td>Notice of Entry of Order</td><td>1</td><td>28-33</td></tr>
<tr><td>02/02/2012</td><td>Notice of Entry of Order</td><td>1</td><td>54-59</td></tr>
<tr><td>06/22/2012</td><td>Notice of Entry of Order</td><td>1</td><td>88-93</td></tr>
<tr><td>3/28/2014</td><td>Notice of Entry of Order</td><td>1</td><td>119-126</td></tr>
</table>

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

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

U.S. v. Eichman
U.S.Dist.Col.,1990.

Supreme Court of the United States
UNITED STATES, Appellant,
v.
Shawn D. EICHMAN, David Gerald Blalock and Scott W. Tyler.
UNITED STATES, Appellant,
v.
Mark John HAGGERTY, Carlos Garza, Jennifer Proctor Campbell and Darius Allen Strong.
Nos. 89-1433, 89-1434.

Argued May 14, 1990.
Decided June 11, 1990.

Defendants charged with violating **Flag** Protection Act filed motion to dismiss. The United States District Court for the District of Columbia, June L. Green, J., 731 F.Supp. 1123, dismissed. In unrelated case, other defendants charged with violating **Flag** Protection Act also filed motion to dismiss. The United States District Court for the Western District of Washington, Barbara J. Rothstein, Chief Judge, 731 F.Supp. 415, granted motion. United States appealed both decisions directly to the Supreme Court, which noted probable jurisdiction and consolidated cases. The Supreme Court, Justice Brennan, held that **Flag Burning** Act was subject to most exacting scrutiny and could not be upheld under First Amendment.

Judgments affirmed.

Justice Stevens, with whom Chief Justice Rehnquist , and Justices White and O'Connor, joined, filed dissenting opinion.

West Headnotes

[1] Constitutional Law 92 ⇐1866

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(L) Challenging or Resisting Government
92k1866 k. Flag Desecration or Disrespect. Most Cited Cases
(Formerly 92k90.1(2))

Flag-burning as mode of expression, unlike obscenity or fighting words, enjoys full protection of First Amendment. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⇐1866

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(L) Challenging or Resisting Government
92k1866 k. Flag Desecration or Disrespect. Most Cited Cases
(Formerly 92k90.1(1))

United States 393 ⇐5.5

393 United States
393I Government in General
393k5.5 k. Seal, Arms, Flag and Other Insignia. Most Cited Cases
(Formerly 92k90.1(1))

Although **Flag** Protection Act contains no explicit content-based limitation on scope of prohibited conduct, precise language of Act's prohibition confirms Congress' interest in communicative impact of **flag** destruction; thus, Act would be subjected to most exacting scrutiny and could not be upheld under First Amendment. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⇐1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General

92k1490 k. In General. Most Cited Cases
(Formerly 92k90.1(1))
For purposes of determining constitutionality of congressional enactment, any suggestion that Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to First Amendment. U.S.C.A. Const.Amend. 1.
West CodenotesHeld Unconstitutional18 U.S.C.A. § 700 *310 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

After this Court held, in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342, that a Texas statute—criminalizing desecration of the United States **flag** in a way that the actor knew would seriously offend onlookers was unconstitutional as applied to an individual who had **burned a flag** during a political protest, Congress passed the **Flag** Protection Act of 1989. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, **burns**, maintains on the floor or ground, or tramples upon" a United States **flag**, except conduct related to the disposal of a " worn or soiled" **flag**. Subsequently, appellees were prosecuted in the District Courts for violating the Act: some for knowingly **burning** several **flags** while protesting various aspects of the Government's policies, and others, in a separate incident, for knowingly **burning** a **flag** while protesting the Act's passage. In each case, appellees moved to dismiss the charges on the ground that the Act violates the First Amendment. Both District Courts, following *Johnson, supra,* held the Act unconstitutional as applied and dismissed the charges.

Held: Appellees' prosecution for **burning** a **flag** in violation of the Act is inconsistent with the First Amendment. The Government concedes, as it must, that appellees' **flag burning** constituted expressive conduct, and this Court declines to reconsider its rejection in *Johnson* of the claim that **flag burning** as a mode of expression does not enjoy the First Amendment's full protection. It is true that this Act, unlike the Texas law, contains no explicit content-based limitation on the scope of prohibited conduct. Nevertheless, it is clear that the Government's asserted *interest* in protecting the "physical integrity" of a privately owned **flag** in order to preserve the **flag**'s status as a symbol of the Nation and certain national ideals is related to the suppression, and concerned with the content, of free expression. The mere destruction or disfigurement of a symbol's physical manifestation does not diminish or otherwise affect the symbol itself. The Government's interest is implicated only when a person's treatment of the **flag** communicates a message to others that is inconsistent with the identified ideals. The precise language of the Act's *311 prohibitions confirms Congress' interest in the communicative impact of **flag** destruction, since each of the specified terms-with the possible exception of "**burns**"-unmistakably connotes disrespectful treatment of the **flag** and suggests a focus on those acts likely to damage the **flag**'s **2406 symbolic value, and since the explicit exemption for disposal of "worn or soiled" **flags** protects certain acts traditionally associated with patriotic respect for the **flag**. Thus, the Act suffers from the same fundamental flaw as the Texas law, and its restriction on expression cannot " 'be justified without reference to the content of the regulated speech,' " *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333. It must therefore be subjected to "the most exacting scrutiny," *id.*, at 321, 108 S.Ct., at 1164, and, for the reasons stated in *Johnson, supra,* 491 U.S., at 413-415, 109 S.Ct., at 2544-2545, the Government's interest cannot justify its infringement on First Amendment rights. This conclusion will not be reassessed in light of Congress' recent recognition of a purported " national consensus" favoring a prohibition on **flag burning**, since any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment. While **flag** desecration-like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures-is deeply offensive to

many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Pp. 2307-2410.

No. 89-1433, 731 F.Supp. 1123 (DDC 1990); No. 89-1434, 731 F.Supp. 415, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C.J., and WHITE and O'CONNOR, JJ., joined, *post,* p. 2410.

Solicitor General Starr argued the cause for the United States. With him on the briefs were *Assistant Attorney General Dennis, Deputy Solicitor General Roberts,* and *Michael R. Lazerwitz*

William M. Kunstler argued the cause for appellees in both cases. With him on the brief in both cases were *Ronald L. Kuby, David D. Cole, Nina Kraut,* and *Kevin Peck. Charles S. Hamilton III,* by appointment of the Court, 495 U.S. 902, filed a brief in No. 89-1434 for appellee Strong.†>

† Briefs of *amici curiae* urging reversal were filed for the United States Senate by *Michael Davidson, Ken U. Benjamin, Jr.,* and *Morgan J. Frankel;* for Senator Joseph R. Biden, Jr., by *Kenneth S. Geller, Andrew J. Pincus,* and *Roy T. Englert, Jr.,* for Governor Mario M. Cuomo by *Evan A. Davis;* and for the Southeastern Legal Foundation, Inc., by *Robert L. Barr, Jr.,* and *G. Stephen Parker.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Charles Fried, Kathleen M. Sullivan, Norman Dorsen,* and *Steven R. Shapiro;* for the Association of Art Museum Directors et al. by *James C. Goodale ;* for the National Association for the Advancement of Colored People by *Charles E. Carter;* for People for the American Way et al. by *Timothy B. Dyk, Glen D. Nager,* and *Elliot M. Mineberg;* and for Jasper Johns et al. by *Robert G. Sugarman* and *Gloria C. Phares.*

Briefs of *amici curiae* were filed for the Speaker and Leadership Group of the United States House of Representatives by *Steven R. Ross, Charles Tiefer , Michael L. Murray, Janina Jaruzelski,* and *Robert Michael Long;* and for the American Bar Association by *Stanley Chauvin, Jr., Randolph W. Thrower,* and *Robert B. McKay.*

*312 Justice BRENNAN delivered the opinion of the Court.

In these consolidated appeals, we consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the First Amendment. Applying our recent decision in *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), the District Courts held that the Act cannot constitutionally be applied to appellees. We affirm.

I

In No. 89-1433, the United States prosecuted certain appellees for violating the Flag Protection Act of 1989, 103 Stat. 777, 18 U.S.C. § 700 (1988 ed. and Supp. I), by knowingly setting fire to several United States flags on the steps of the United States Capitol while protesting various aspects of the Government's domestic and foreign policy. In No. 89-1434, the United States prosecuted other appellees for violating the Act by knowingly setting fire to a United States flag in Seattle while protesting the Act's passage. In each case, the respective appellees moved to dismiss the flag-burning charge on the ground that the Act, both on its face and as applied, violates the First Amendment. Both the *313 United States District Court for the Western District of Washington, 731 F.Supp. 415 (1990), and the United States District Court for the District of Columbia, 731 F.Supp. 1123 (1990), following *Johnson, supra,* held the Act unconstitutional as applied to appellees and dismissed the charges.[FN1] The United States appealed both decisions directly to this Court pursuant to **2407 18 U.S.C. § 700(d) (1982 ed., Supp. I).[FN2] We noted probable jurisdiction and consolidated the two cases. 494 U.S. 1063, 110 S.Ct. 1779, 108 L.Ed.2d 780 (1990).

FN1. The Seattle appellees were also charged with causing willful injury to federal property in violation of 18 U.S.C. §

§ 1361 and 1362. This charge remains pending before the District Court, and nothing in today's decision affects the constitutionality of this prosecution. See n. 5, *infra*.

FN2. "(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).
"(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible." 18 U.S.C. § 700(d) (1988 ed., Supp. I).

II

Last Term in *Johnson*, we held that a Texas statute criminalizing the desecration of venerated objects, including the United States flag, was unconstitutional as applied to an individual who had set such a flag on fire during a political demonstration. The Texas statute provided that " [a] person commits an offense if he intentionally or knowingly desecrates ... [a] national flag," where " desecrate" meant to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09 (1989). We first held that Johnson's flag-burning was "conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." 491 U.S., at 406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (citation omitted). We next considered and rejected the State's contention that, under *314*United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), we ought to apply the deferential standard with which we have reviewed Government regulations of conduct containing both speech and nonspeech elements where "the governmental interest is unrelated to the suppression of free expression." *Id.*, at 377, 88 S.Ct., at 1679. We reasoned that the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest " related 'to the suppression of free expression' within the meaning of *O'Brien* " because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message." *Johnson, supra,* at 410, 109 S.Ct., at 2543. We therefore subjected the statute to " 'the most exacting scrutiny,' " 491 U.S., at 412, 109 S.Ct., at 2543, quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988), and we concluded that the State's asserted interests could not justify the infringement on the demonstrator's First Amendment rights.

After our decision in *Johnson*, Congress passed the Flag Protection Act of 1989.[FN3] The Act provides in relevant part:

FN3. The Act replaced the then-existing federal flag-burning statute, which Congress perceived might be unconstitutional in light of *Johnson*. Former 18 U.S.C. § 700(a) prohibited " knowingly cast[ing] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."

"(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
"(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
"(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." 18 U.S.C. § 700 (1988 ed., Supp. I).

*315 [1] The Government concedes in these cases, as it must, that appellees' flag burning constituted expressive conduct, Brief for United States 28; see *Johnson*, 491 U.S., at 405-406, 109 S.Ct., at 2540, but invites us to reconsider our rejection in *Johnson*

of the claim that flag burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First **2408 Amendment. Cf. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942). This we decline to do.[FN4] The only remaining question is whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees' expressive conduct.

FN4. We deal here with concededly political speech and have no occasion to pass on the validity of laws regulating commercial exploitation of the image of the United States flag. See *Texas v. Johnson,* 491 U.S. 397, 415-416, n. 10, 109 S.Ct. 2533, 2546 n. 10, 105 L.Ed.2d 342 (1989); cf. *Halter v. Nebraska,* 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696 (1907).

The Government contends that the Flag Protection Act is constitutional because, unlike the statute addressed in *Johnson,* the Act does not target expressive conduct on the basis of the content of its message. The Government asserts an interest in " protect[ing] the physical integrity of the flag under all circumstances" in order to safeguard the flag's identity " 'as the unique and unalloyed symbol of the Nation.' " Brief for United States 28, 29. The Act proscribes conduct (other than disposal) that damages or mistreats a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers. By contrast, the Texas statute expressly prohibited only those acts of physical flag desecration "that the actor knows will seriously offend" onlookers, and the former federal statute prohibited only those acts of desecration that "cas[t] contempt upon" the flag.

Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "related 'to the suppression of free expression,' " 491 U.S., at 410, 109 S.Ct., at 2543, and concerned with the content of such expression. The Government's interest in protecting the "physical integrity" *316 of a privately owned flag [FN5] rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.[FN6] *Ibid.*

FN5. Today's decision does not affect the extent to which the Government's interest in protecting publicly owned flags might justify special measures on their behalf. See *Spence v. Washington,* 418 U.S. 405, 408-409, 94 S.Ct. 2727, 2729-30, 41 L.Ed.2d 842 (1974); *Johnson, supra,* at 412-413, n. 8, 109 S.Ct., at 2544, n. 8.

FN6. Aside from the flag's association with particular ideals, at some irreducible level the flag is emblematic of the Nation as a sovereign entity. The Government's *amici* assert that it has a legitimate nonspeech-related interest in safeguarding this "eminently practical legal aspect of the flag, as an incident of sovereignty." Brief for the Speaker and Leadership Group of the U.S. House of Representatives as *Amicus Curiae* 25. This interest has firm historical roots: "While the symbolic role of the flag is now well-established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation's founders first determined to adopt a national flag, they intended to serve specific functions relating to our status as a sovereign nation." *Id.,* at 9; see *id.,* at 5 (noting "flag's 'historic function' for such sovereign purposes as marking 'our national presence in schools, public buildings, battleships and airplanes' ")

(citation omitted).
We concede that the Government has a legitimate interest in preserving the flag's function as an "incident of sovereignty," though we need not address today the extent to which this interest may justify any laws regulating conduct that would thwart this core function, as might a commercial or like appropriation of the image of the United States flag. *Amici* do not, and cannot, explain how a statute that penalizes anyone who knowingly burns, mutilates, or defiles any American flag is designed to advance this asserted interest in maintaining the association between the flag and the Nation. Burning a flag does not threaten to interfere with this association in any way; indeed, the flag burner's message depends in part on the viewer's ability to make this very association.

**2409 *317 Moreover, the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who " knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." 18 U.S.C. § 700(a)(1) (1988 ed., Supp. I). Each of the specified terms-with the possible exception of "burns" -unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value.[FN7] And the explicit exemption in § 700(a)(2) for disposal of " worn or soiled" flags protects certain acts traditionally associated with patriotic respect for the flag.[FN8]

FN7. For example, "defile" is defined as " to make filthy; to corrupt the purity or perfection of; to rob of chastity; to make ceremonially unclean; tarnish, dishonor." Webster's Third New International Dictionary 592 (1976). "Trample" is defined as "to tread heavily so as to bruise, crush, or injure; to inflict injury or destruction: have a contemptuous or ruthless attitude." *Id.*, at 2425.

FN8. The Act also does not prohibit flying a flag in a storm or other conduct that threatens the physical integrity of the flag, albeit in an indirect manner unlikely to communicate disrespect.

[2][3] As we explained in *Johnson, supra,* at 416-417, 109 S.Ct., at 2546: "[I]f we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role-as where, for example, a person ceremoniously burns a dirty flag-we would be ... permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity." Although Congress cast the Flag Protection Act of 1989 in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: It suppresses expression out of concern for its likely communicative impact. Despite the Act's wider scope, *318 its restriction on expression cannot be " 'justified without reference to the content of the regulated speech.' " *Boos,* 485 U.S., at 320, 108 S.Ct., at 1163 (emphasis omitted) (citation omitted); see *Spence v. Washington,* 418 U.S. 405, 414, nn. 8, 9, 94 S.Ct. 2727, 2732 nn. 8, 9, 41 L.Ed.2d 842 (1974) (State's interest in protecting flag's symbolic value is directly related to suppression of expression and thus *O'Brien* test is inapplicable even where statute declared "simply ... that *nothing* may be affixed to or superimposed on a United States flag"). The Act therefore must be subjected to "the most exacting scrutiny," *Boos, supra,* at 321, 108 S.Ct., at 1164, and for the reasons stated in *Johnson,* 491 U.S., at 413-415, 109 S.Ct., at 2543, the Government's interest cannot justify its infringement on First Amendment rights. We decline the Government's invitation to reassess this conclusion in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag burning. Brief for United States 27. Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as

popular opposition to that speech grows is foreign to the First Amendment.

III

" 'National unity as an end which officials may foster by persuasion and example is not in question.' " *Johnson, supra,* at 418, 109 S.Ct., at 2547, quoting *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 640, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943). Government may create national symbols, promote them, and encourage their respectful treatment.[FN9] But the Flag Protection Act of 1989 goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

FN9. See, *e.g.,* 36 U.S.C. §§ 173-177 (suggesting manner in which flag ought to be displayed).

**2410 We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, see *Terminiello v. Chicago,* 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), vulgar repudiations of the draft, see *319 *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), and scurrilous caricatures, see *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson, supra,* at 414, 109 S.Ct., at 2545. Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering. The judgments of the District Courts are

Affirmed.

Justice STEVENS, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join, dissenting.

The Court's opinion ends where proper analysis of the issue should begin. Of course "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Ante,* at 2410. None of us disagrees with that proposition. But it is equally well settled that certain methods of expression may be prohibited if (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.

Contrary to the position taken by counsel for the flag burners in *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), it is now conceded that the Federal Government has a legitimate interest in protecting the symbolic value of the American flag. Obviously that value cannot be measured, or even described, with any precision. It has at least these two components: In times of national crisis, it inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance; at all times, it serves as a reminder*320 of the paramount importance of pursuing the ideals that characterize our society.

The first question the Court should consider is whether the interest in preserving the value of that symbol is unrelated to suppression of the ideas that flag burners are trying to express. In my judgment the answer depends, at least in part, on what those ideas are. A flag burner might intend various messages. The flag burner may wish simply to convey hatred, contempt, or sheer opposition directed at the United States. This might be the case if the flag were burned by an enemy during time of war. A flag burner may also, or instead, seek to convey the depth of his personal conviction about some issue, by willingly provoking the use of force against himself. In so doing, he says that "my disagreement with certain policies is so strong that I am prepared to risk physical harm (and perhaps imprisonment) in order to call attention to my views." This second

possibility apparently describes the expressive conduct of the flag burners in these cases. Like the protesters who dramatized their opposition to our engagement in Vietnam by publicly burning their draft cards-and who were punished for doing so-their expressive conduct is consistent with affection for this country and respect for the ideals that the flag symbolizes. There is at least one further possibility: A flag burner may intend to make an accusation against the integrity of the American people who disagree with him. By burning the embodiment of America's collective commitment to freedom and equality, the flag burner charges that the majority has forsaken that commitment-that continued respect for **2411 the flag is nothing more than hypocrisy. Such a charge may be made even if the flag burner loves the country and zealously pursues the ideals that the country claims to honor.

The idea expressed by a particular act of flag burning is necessarily dependent on the temporal and political context in which it occurs. In the 1960's it may have expressed opposition to the country's Vietnam policies, or at least to the *321 compulsory draft. In *Texas v. Johnson,* it apparently expressed opposition to the platform of the Republican Party. In these cases, the appellees have explained that it expressed their opposition to racial discrimination, to the failure to care for the homeless, and of course to statutory prohibitions of flag burning. In any of these examples, the protesters may wish both to say that their own position is the only one faithful to liberty and equality, and to accuse their fellow citizens of hypocritical indifference to-or even of a selfish departure from-the ideals which the flag is supposed to symbolize. The ideas expressed by flag burners are thus various and often ambiguous.

The Government's legitimate interest in preserving the symbolic value of the flag is, however, essentially the same regardless of which of many different ideas may have motivated a particular act of flag burning. As I explained in my dissent in *Johnson,* 491 U.S., at 436-439, 109 S.Ct., at 2549, the flag uniquely symbolizes the ideas of liberty, equality, and tolerance-ideas that Americans have passionately defended and debated throughout our history. The flag embodies the spirit of our national commitment to those ideals. The message thereby transmitted does not take a stand upon our disagreements, except to say that those disagreements are best regarded as competing interpretations of shared ideals. It does not judge particular policies, except to say that they command respect when they are enlightened by the spirit of liberty and equality. To the world, the flag is our promise that we will continue to strive for these ideals. To us, the flag is a reminder both that the struggle for liberty and equality is unceasing, and that our obligation of tolerance and respect for all of our fellow citizens encompasses those who disagree with us-indeed, even those whose ideas are disagreeable or offensive.

Thus, the Government may-indeed, it should-protect the symbolic value of the flag without regard to the specific content of the flag burners' speech. The prosecution in these *322 cases does not depend upon the object of the defendants' protest. It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation.

These cases therefore come down to a question of judgment. Does the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh the societal interest in preserving the symbolic value of the flag ? This question, in turn, involves three different judgments: (1) The importance of the individual interest in selecting the preferred means of communication; (2) the importance of the national symbol; and (3) the question whether tolerance of flag burning will enhance or tarnish that value. The opinions in *Texas v. Johnson* demonstrate that reasonable judges may differ with respect to each of

these judgments.

The individual interest is unquestionably a matter of great importance. Indeed, it is one of the critical components of the idea of liberty that the flag itself is intended to **2412 symbolize. Moreover, it is buttressed by the societal interest in being alerted to the need for thoughtful response to voices that might otherwise go unheard. The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas, but also the right to communicate them effectively. That right, however, is not absolute-the communicative value of a well-placed bomb in the Capitol does not entitle it to the protection of the First Amendment.

*323 Burning a flag is not, of course, equivalent to burning a public building. Assuming that the protester is burning his own flag, it causes no physical harm to other persons or to their property. The impact is purely symbolic, and it is apparent that some thoughtful persons believe that impact; far from depreciating the value of the symbol, will actually enhance its meaning. I most respectfully disagree. Indeed, what makes these cases particularly difficult for me is what I regard as the damage to the symbol that has already occurred as a result of this Court's decision to place its stamp of approval on the act of flag burning. A formerly dramatic expression of protest is now rather commonplace. In today's marketplace of ideas, the public burning of a Vietnam draft card is probably less provocative than lighting a cigarette. Tomorrow flag burning may produce a similar reaction. There is surely a direct relationship between the communicative value of the act of flag burning and the symbolic value of the object being burned.

The symbolic value of the American flag is not the same today as it was yesterday. Events during the last three decades have altered the country's image in the eyes of numerous Americans, and some now have difficulty understanding the message that the flag conveyed to their parents and grandparents-whether born abroad and naturalized or native born. Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends. And, as I have suggested, the residual value of the symbol after this Court's decision in *Texas v. Johnson* is surely not the same as it was a year ago.

Given all these considerations, plus the fact that the Court today is really doing nothing more than reconfirming what it has already decided, it might be appropriate to defer to the judgment of the majority and merely apply the doctrine of *324 *stare decisis* to the cases at hand. That action, however, would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake. I remain persuaded that the considerations identified in my opinion in *Texas v. Johnson* are of controlling importance in these cases as well.

Accordingly, I respectfully dissent.

U.S.Dist.Col.,1990.
U.S. v. Eichman
496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287, 58 USLW 4744

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III. NV TAX DEPT. POWERPOINT CASES

667 A.2d 21
(Cite as: 667 A.2d 21)

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Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg
Pa.Cmwlth.,1995.

Commonwealth Court of Pennsylvania.
ADAMS OUTDOOR ADVERTISING, LTD., a limited partnership, by its general partners, Adams Outdoor Advertising, Inc. and Stephen Adams, Pocono Outdoor Advertising Co., FKM Advertising Co., FKM Properties, John W. Wallace, James Ballard, Jerry Rubin, Elmer M. Rinehart, Seymour Katz, Lawrence T. Simon, Robert Stofflett and Shirley Stofflett, His Wife, Appellants,
v.
BOROUGH OF STROUDSBURG and Jeffrey B. Wilkins.
Argued Sept. 14, 1995.
Decided Oct. 20, 1995.
Reargument Denied Dec. 7, 1995.

Sign owners filed suit to both declare invalid and enjoin borough from enforcing borough ordinance which taxed and required annual license fee for off-premises signs. The Court of Common Pleas, Monroe County, No. 3196 Civil 1993, O'Brien J., granted summary judgment to borough, and sign owners appealed. The Commonwealth Court, No. 205 C.D. 1995,Pellegrini, J., held that: (1) ordinance did not violate equal protection or uniformity clauses; (2) ordinance did not violate sign owners' First Amendment rights; and (3) ordinance was not unconstitutional taking.

Affirmed.

West Headnotes

[1] Taxation 371 ⇐2002

371 Taxation
371I In General
371k2002 k. Distinguishing "Tax" and " License" or "Fee". Most Cited Cases
(Formerly 371k1)
Unlike license fee, purpose of which is to offset costs of regulation, tax is imposed for purpose of raising revenue.

[2] Taxation 371 ⇐2001

371 Taxation
371I In General
371k2001 k. Nature of Taxes. Most Cited Cases
(Formerly 371k1)

Taxation 371 ⇐2010

371 Taxation
371I In General
371k2009 Public Purpose
371k2010 k. In General. Most Cited Cases
(Formerly 371k1)
Even though imposition of or exemption from tax may advance other governmental concerns, such as manufacturing exemption from state taxation which serves to encourage manufacturing within state, primary purpose of taxes is always to raise money for taxing authority.

[3] Taxation 371 ⇐2013

371 Taxation
371I In General
371k2013 k. Power of Legislature in General. Most Cited Cases
(Formerly 371k25)

Taxation 371 ⇐2121

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))

667 A.2d 21
(Cite as: 667 A.2d 21)

Taxing authority possesses wide discretion regarding matters of taxation, with this discretion being limited by requirements of equal protection and uniformity clauses of Federal and State Constitutions. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[4] Constitutional Law 92 ⚿1012

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1012 k. Taxation and Revenue Legislation. Most Cited Cases
(Formerly 92k48(4.1))

Constitutional Law 92 ⚿1033

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1033 k. In General. Most Cited Cases
(Formerly 92k48(4.1))
Legislation that imposes tax is presumed to be constitutional, and taxpayer challenging that legislation bears burden of proving that it clearly, palpably and plainly violates Constitution.

[5] Constitutional Law 92 ⚿1012

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1012 k. Taxation and Revenue Legislation. Most Cited Cases
(Formerly 92k48(4.1))
Any doubts regarding constitutionality of tax legislation should be resolved in favor of upholding its constitutionality.

[6] Licenses 238 ⚿7(9)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(9) k. Reasonableness of Fees. Most Cited Cases

Municipal Corporations 268 ⚿957(3)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases
In determining whether ordinance is constitutional, argument that ordinance-mandated payment to borough exceeds reasonable costs of administration of ordinance does not apply to tax legislation, but instead, applies only to challenges to license fees.

[7] Constitutional Law 92 ⚿3562

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3561 Property Taxes
92k3562 k. In General. Most Cited Cases
(Formerly 92k228.5)

Municipal Corporations 268 ⚿957(3)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and

667 A.2d 21
(Cite as: 667 A.2d 21)

Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

Taxation 371 ⚿2135

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))
Differences between off-premises signs and on-premises signs provided reasonable and nonarbitrary basis for borough to tax only off-premises signs, and therefore tax classification did not violate equal protection or uniformity clauses, where off-premises signs were larger, had capacity to generate income, bore no direct relation to property on which they were posted, and changed messages relatively frequently. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[8] Constitutional Law 92 ⚿3560

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

Taxation 371 ⚿2121

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))
For purpose of constitutional challenges to taxation scheme, both equal protection clause and uniformity clause require same analysis. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[9] Constitutional Law 92 ⚿3560

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

Taxation 371 ⚿2121

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))
In context of tax legislation, equal protection and uniformity clauses do not require absolute equality and perfect uniformity in imposition of tax, but legislation cannot treat similarly situated entities differently. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[10] Constitutional Law 92 ⚿3560

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

Taxation 371 ⚿2135

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))
Under equal protection and uniformity clauses, if tax is imposed only when entity falls within certain class, legislative body must have reasonable basis for singling out that category; i.e., classification must be nonarbitrary, as well as reasonable and just. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[11] Constitutional Law 92 ⚖3560

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

Taxation 371 ⚖2135

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))
Absent real distinction between classes in tax legislation, legislation will be deemed unconstitutional under equal protection and uniformity clauses. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[12] Constitutional Law 92 ⚖1655

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1655 k. In General. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 ⚖957(3)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases
Borough ordinance taxing off-premises signs, but not on-premises signs, did not violate sign owners' right to freedom of press by penalizing select members of print media, where nothing suggested that tax was directed at suppressing any particular ideas or that it was likely to stifle free exchange of opinions, and ordinance did not single out one small group of off-premise signs for tax while exempting others. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚖1655

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1655 k. In General. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 ⚖957(3)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or

Amount, or Property or Persons Taxable. Most Cited Cases
Borough's ordinance which imposed tax on all off-premises signs regardless of their content did not violate sign owners' right to free speech, where ordinance exempted on-premises activities, including expression of opinions or political beliefs, zoning officer mechanically applied tax to all off-premises signs and to no on-premises signs, and, in adopting ordinance, borough considered increases in traffic and concomitant costs that benefit owners of off-premises signs, as well as aesthetics and vehicular safety, but not messages conveyed on such signs. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ⚿1572

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))

Constitutional Law 92 ⚿1545

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1545 k. In General. Most Cited Cases
(Formerly 92k90.1(1))
Tax or fee on speech, amount of which depends upon content of that speech, is constitutionally suspect and will be found to be constitutional only if government shows that it is necessary to serve compelling interest and that it is narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ⚿1655

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1655 k. In General. Most Cited Cases
(Formerly 92k90.3)
Under First Amendment, if regulation taxing signs is "content neutral," i.e., it does not consider content of message in determining whether sign is to be taxed, then government need only prove that ordinance is narrowly tailored to serve significant governmental interest, and that it leaves open ample alternative channels for communication. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⚿1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases
(Formerly 92k90(3))

Constitutional Law 92 ⚿1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90(3))
In determining whether governmental regulation of speech is content based, courts' principal inquiry is whether government adopted regulation because of its disagreement with message to be conveyed by speech; government's purpose in enacting legislation is courts' controlling consideration, and if that purpose is unrelated to content of speech, then regulation will be deemed to be content neutral. U.S.C.A. Const.Amend. 1.

667 A.2d 21
667 A.2d 21
(Cite as: 667 A.2d 21)

[17] Constitutional Law 92 ⇐1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In General. Most Cited Cases
(Formerly 92k90(3))

Constitutional Law 92 ⇐1518

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases
(Formerly 92k90(3))
If purpose behind governmental regulation is related to content of speech, or if, in determining whether regulation applies, one must look to content of speech, then, absent compelling reason offered by government, it will be found to be unconstitutional. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 ⇐1662

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1662 k. Off-Premises Signs. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 ⇐957(3)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases
Borough ordinance taxing off-premises signs regardless of content of signs was not unconstitutional burden on noncommercial speech, where borough did not seek complete ban on off-premises signs, and borough provided content-neutral reasons for tax, including offsetting costs of increased traffic, improving aesthetics, and improving vehicle safety. U.S.C.A. Const.Amend. 1

[19] Constitutional Law 92 ⇐4076

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4075 Eminent Domain
92k4076 k. In General. Most Cited Cases
(Formerly 92k227)

Municipal Corporations 268 ⇐957(3)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases
Ordinance taxing off-premises signs was within borough's taxing authority and, therefore, could not be struck down under due process clause as taking without just compensation. U.S.C.A. Const.Amend. 14.

David H. Moskowitz, for appellants.
Ralph A. Matergia, for appellees.

667 A.2d 21
(Cite as: 667 A.2d 21)

Before PELLEGRINI and KELLEY, JJ., and RODGERS, Senior Judge.
PELLEGRINI, Judge.
Adams Outdoor Advertising, Inc., Stephen Adams, Pocono Outdoor Advertising Company, FKM Advertising Company, FKM Properties, John W. Wallace, James Ballard, Jerry Rubin, Elmer M. Rinehart, Seymour Katz, Lawrence T. Simon, Robert Stofflett, and Shirley Stofflett (Sign Owners), appeal a decision of the Court of Common Pleas of Monroe County (trial court) granting summary judgment in favor of the Borough of Stroudsburg (Borough) and Jeffrey B. Wilkins.

*24 On August 7, 1991, the Stroudsburg Borough Council (Council) enacted Ordinance No. 706 (Ordinance), which provided for the payment of an annual tax for off-premises signs [FN1] located within the Borough. More specifically, the Ordinance required that property owners obtain an annual license for off-premises signs located on their property and pay an annual tax calculated at a rate of $2.00 per every square foot of the face of the sign. The Ordinance expressly exempted business signs, construction signs, directory signs, real estate signs, and political signs [FN2] from the licensing and taxing requirements.

FN1. Section 401 of the Ordinance defines off-premises signs as:
A sign visible from a public way that directs attention to a business, commodity, service, entertainment, attraction, or subject sold, offered, or existing elsewhere than upon the same lot where such sign is displayed. The term off-premises sign shall include an outdoor advertising sign (billboard) on which space is leased or rented by the owner thereof to others for the purpose of conveying a commercial or non-commercial message.

FN2. The definitions of these signs set forth in the Ordinance indicate that they are all on-premises signs, i.e., they contain information pertaining to the activity located on the premises where the signs are posted. Further, in construing the Ordinance, the Borough considers activities on the premises to include the expression of opinions and political views. *See* Affidavit of Harold A. Bentzoni.

The preamble to the Ordinance sets forth its purpose, indicating that, as a result of an increase in the volume of traffic, the Borough's costs for police, street, fire, and emergency management services have also increased. The preamble further specified that the tax was being imposed because the owners of off-premises signs, through leasing and rental fees, benefit from this increase in traffic volume.[FN3]

FN3. The preamble also indicated that off-premises signs are not assessed for purposes of real property taxes.

The Sign Owners subsequently filed a complaint for declaratory relief in the trial court, contending that the Ordinance is invalid and requesting the trial court to enjoin the Borough from imposing the licensing fee and tax upon the signs. After the Borough filed an answer to the complaint, both parties filed cross-motions for summary judgment. Based upon the affidavits, depositions, and pleadings before it, the trial court found that the Ordinance was not unconstitutional and entered judgment in favor of the Borough and against the Sign Owners. The Sign Owners then filed this appeal.

[1][2][3][4][5][6] We begin by observing that, unlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue. *Talley v. Commonwealth*, 123 Pa.Cmwlth. 313, 553 A.2d 518 (1989). Even though the imposition of or exemption from a tax may advance other governmental concerns, e.g., the manufacturing exemption from state taxation serves to encourage manufacturing within Pennsylvania, the primary purpose of taxes is always to raise money for the taxing authority. *White v. Medical Professional Liability Catastrophe Loss Fund*, 131 Pa.Cmwlth. 567, 571 A.2d 9 (1990). Moreover, the taxing authority possesses wide discretion regarding

matters of taxation, with this discretion being limited by the requirements of the Equal Protection and Uniformity Clauses of the United States and Pennsylvania Constitutions. *Leventhal v. City of Philadelphia*, 518 Pa. 233, 542 A.2d 1328 (1988). Legislation that imposes a tax is presumed to be constitutional, and the taxpayer challenging that legislation bears the burden of proving that it clearly, palpably and plainly violates the constitution. *Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349 (1985); *Brown v. Department of Revenue*, 155 Pa.Cmwlth. 197, 624 A.2d 795 (1993), *aff'd*, 536 Pa. 543, 640 A.2d 412 (1994). Any doubts regarding the constitutionality of tax legislation should be resolved in favor of upholding its constitutionality. *Id.* In the instant case, because the parties admitted during oral argument that this is a tax and not a license fee, the only issues before us are whether the tax is uniform and whether it is an unlawful infringement upon the Sign Owners' First Amendment rights.[FN4]

FN4. Because the Sign Owners have conceded that this is a tax, and not a fee, we need not address their argument that it exceeds the reasonable costs of administration of the Ordinance. This argument is not applicable to tax legislation, but instead, applies only to challenges to license fees. *See White v. Medical Professional Liability Catastrophe Loss Fund*, 131 Pa.Cmwlth. 567, 571 A.2d 9 (1990).

*25 I.

[7][8] The Sign Owners' primary contention is that the tax imposed by the Ordinance violates the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Pennsylvania Constitution. [FN5] The Sign Owners argue that, since the tax is imposed on off-premises signs but is not imposed upon on-premises signs or other types of structures, it affects only a small group of taxpayers and is, therefore, unconstitutional.

FN5. For purposes of constitutional challenges to a taxation scheme, both the Equal Protection Clause and the Uniformity Clause require the same analysis. *Brown v. Department of Revenue*, 155 Pa.Cmwlth. 197, 624 A.2d 795 (1993), *aff'd*, 536 Pa. 543, 640 A.2d 412 (1994). Hence, the discussion set forth in this Opinion addresses the Sign Owners' challenges under both of these clauses.

[9][10][11] In the context of tax legislation, equal protection and uniformity do not require absolute equality and perfect uniformity in the imposition of a tax. *City of Pittsburgh v. Commonwealth*, 522 Pa. 20, 559 A.2d 513 (1989). However, the legislation cannot treat similarly situated entities differently. *Leventhal v. City of Philadelphia*, 518 Pa. 233, 542 A.2d 1328 (1988). If a tax is imposed only when an entity falls within a certain class, the legislative body must have a reasonable basis for singling out that category; i.e., the classification must be non-arbitrary, as well as reasonable and just. *Brown v. Department of Revenue*, 155 Pa.Cmwlth. 197, 624 A.2d 795 (1993), *aff'd*, 536 Pa. 543, 640 A.2d 412 (1994); *City of Pittsburgh v. Commonwealth*, 522 Pa. 20, 559 A.2d 513 (1989). Absent a real distinction between the classes in tax legislation, it will be deemed unconstitutional. *Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349 (1985).

Here, there is a real and non-arbitrary distinction between off-premises and on-premises signs that would permit the Borough to classify the two differently for taxation purposes. An off-premises sign, which is classified as a billboard, is of considerable size and bears no direct relationship to the activities on the property on which it is located. The messages contained on off-premises signs generally change on a relatively frequent basis depending upon the company leasing the sign for advertising purposes. Additionally, off-premises signs, through leasing and rental fees, have the capacity to generate income, and as such, are a business in and of themselves. On the other hand, on-premises signs are generally smaller in size and bear some direct relationship to the property on which they are posted. They generally are of a more permanent duration, changing only with the

status of the activity located on the property. Finally, unlike off-premises signs, on-premises signs do not, by themselves, generate income. Just as we held in *Magazine Publishers of America v. Department of Revenue*, 151 Pa.Cmwlth. 592, 618 A.2d 1056 (1992), *aff'd*, 539 Pa. 563, 654 A.2d 519 (1995), that there was a reasonable distinction between newspapers and magazines based upon format and frequency of publication, as well as ability of newspapers to carry legal advertising, the differences between off-premises and on-premises signs are, if anything, more substantial and provide a reasonable and non-arbitrary basis for the Borough's drawing of a distinction between the two in the Ordinance.

[12] Even if there is a reasonable distinction between off-premises and on-premises signs, thus making the Ordinance constitutional under the Equal Protection and Uniformity Clauses, the Sign Owners argue the tax nevertheless violates their First Amendment right to freedom and of the press. Citing to *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the Sign Owners argue that the Ordinance unconstitutionally penalizes select members of the print media, i.e., off-premises signs, and as such, violates the First Amendment.

*26 In *Arkansas Writers' Project*, the Supreme Court held that a state tax, which was imposed upon some magazines and not upon others, infringed upon rights protected by the First Amendment.[FN6] As such, the Supreme Court reasoned, the state was required to prove that it had an overriding compelling interest to justify that discrimination, and that the tax was narrowly drawn to achieve that interest. Concluding that the state did not meet this burden of proof, the Supreme Court found the tax to be unconstitutional.[FN7] Similarly, in *Minneapolis Star*, the Supreme Court held that a use tax on the cost of paper and ink used for publications, for which there was a $100,000.00 annual exemption, was unconstitutional under the First Amendment.[FN8] In so doing, the Court reasoned that the tax singled out the press and also targeted a small group of newspapers, thus resembling a penalty for certain newspapers.

FN6. The Supreme Court noted that the First Amendment claims were obviously intertwined with interests arising under the Equal Protection Clause. Because the tax directly implicated freedom of the press, the Supreme Court analyzed it primarily in First Amendment terms. *Arkansas Writers' Project*, 481 U.S. at 227 n. 3, 107 S.Ct. at 1727 n. 3.

FN7. The Supreme Court also found the tax to be unconstitutional because it was content based.

FN8. As in *Arkansas Writers' Project*, the Supreme Court did not consider Equal Protection violations.

The Supreme Court, however, addressed this issue again in *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), in which it considered the constitutionality of a sales tax that was imposed only upon cable television and no other media. Discussing *Arkansas Writers' Project* and *Minneapolis Star*, the Supreme Court noted that those cases "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Id.* at 477. Observing that there was nothing in the case to indicate that the tax was directed at suppressing particular ideas or that the tax was likely to stifle the free exchange of opinions, the Supreme Court upheld the tax as constitutional. *Id.*

The reasoning of *Leathers* was subsequently applied by this Court in *Magazine Publishers of America v. Department of Revenue, supra*. In that case, which involved a challenge to a statute that taxed magazines but not newspapers, we rejected the argument that such a taxation scheme infringed upon the magazine publishers' First Amendment rights. In so doing, we observed that the tax "does not reflect any interest by the General Assembly in censoring [the publishers'] activities or stifling the

free exchange of ideas." *Id.* 618 A.2d at 1061.

Here, there is nothing in the record or in the Ordinance suggesting that the tax was directed at suppressing any particular ideas or that it is likely to stifle the free exchange of opinions.[FN9] In fact, the reasons advanced by the Borough for the Ordinance are to the contrary: to off-set the costs associated with increased traffic, to enhance aesthetic values, and to improve vehicular safety. Moreover, because that tax was imposed upon all off-premises signs, it does not single out one small group of off-premises signs while exempting others from taxation. Under the reasoning of *Leathers*, therefore, the tax cannot be deemed to be unconstitutional.[FN10]

FN9. This conclusion is further supported by the fact that the Ordinance does not prohibit off-premises advertising in the Borough. Moreover, under the Ordinance, there is no tax imposed, and consequently, no infringement upon other forms of media that would foster the exchange of ideas.

FN10. To hold otherwise would be absurd in light of several other Supreme Court cases that have found that a municipality's banning of off-premises outdoor advertising is constitutional. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

II.

[13] The Sign Owners also argue that the tax imposed by the Borough is unconstitutional because it violates their rights to free speech. The Sign Owners contend that the Borough Zoning Officer, in determining whether the sign is exempt from the tax, *27 must look to its content and determine whether it relates to the activity that occurs on the premises. As such, the Sign Owners argue, the Ordinance unconstitutionally imposes a content based tax.

[14][15] As the Sign Owners correctly argue in their brief, a tax or fee on speech, the amount of which depends upon the content of that speech, is constitutionally suspect. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Such a tax or fee will be found to be constitutional only if the government shows that it is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). However, if the regulation is content neutral, i.e., it does not consider the content of the message in determining whether the sign is to be taxed, then the government need only prove that the ordinance is narrowly tailored to serve a significant governmental interest, and that it leaves open ample alternative channels for communication. *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 66, *rehearing den'd,* 492 U.S. 937, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989).[FN11]

FN11. While neither party argues that the Borough does not have a significant interest or that the Ordinance does not leave ample avenues for communication, we note that these conditions have clearly been met by the reasons proffered by the Borough for the Ordinance and by the fact that opinions and political views may be expressed via on-premises signs.

[16][17] In determining whether a governmental regulation of speech is content based, our principal inquiry is whether the government adopted the regulation because of its disagreement with the message to be conveyed by the speech. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). In other words, the government's purpose in enacting the legislation is the Court's controlling consideration, and if that purpose is unrelated to the content of the speech, then the regulation will be deemed to be content neutral. *Ward, supra.* If, on the other hand, the purpose behind the regulation is

related to the content of the speech, or if, in determining whether the regulation applies, one must look to the content of the speech, then, absent a compelling reason offered by the government, it will be found to be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987).

In the present case, the Ordinance imposes the tax on all off-premises signs regardless of their content. Moreover, in adopting the Ordinance, the Borough Council considered the increase in traffic and concomitant costs that benefit the owners of off-premises signs, as well as aesthetics and vehicular safety. The Borough Council did not adopt the Ordinance because it disagreed with the messages conveyed on off-premises signs. Furthermore, because the exemption for activity occurring on-premises includes the expression of opinions or political beliefs, and because the Borough Zoning Officer mechanically applies the tax to all off-premises signs and to no on-premises signs,[FN12] the Ordinance is content neutral. *See Rappa v. New Castle County,* 18 F.3d 1043, 1067 (3d Cir.1994) (holding that tax exemption for signs advertising activities conducted on-premises is not content based).

FN12. Although neither of these facts are expressly stated in the Ordinance, the affidavits adduced in support of the motions for summary judgment indicated that this is how the Ordinance is applied. In considering the constitutionality of the Ordinance, we can examine the Borough's construction thereof, including its interpretation and implementation of the Ordinance. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

III.

[18] The Sign Owners contend that the Ordinance is unconstitutional because it disadvantages non-commercial speech. Citing to *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Sign Owners contend that, because the Ordinance imposes a tax on non-commercial signs, i.e., off-premises signs with non-commercial messages, while it exempts various types of commercial speech, i.e., on-*28 premises signs, it infringes on their right to free speech under the First Amendment.

In *Metromedia, Inc.,* the Supreme Court, recognizing that non-commercial speech is afforded a greater degree of protection under the First Amendment than commercial speech, invalidated a portion of the city ordinance that expressly banned all non-commercial messages, both on-site and off-site, while permitting on-site commercial advertising. In so doing, the Supreme Court held that the city had failed to offer any compelling reasons for its ban of all non-commercial messages. However, also in that case, the Supreme Court did uphold a portion of the ordinance banning all off-site advertising signs while permitting on-site billboards. Noting that the total ban on all off-site signs was directly related to the objectives of traffic safety and aesthetics, and deferring to the City's judgment that its interests in those objectives should yield to the greater interest of on-site commercial advertising, the Supreme Court upheld as constitutional that portion of the ordinance. *Id.*

Despite the Sign Owners' contention, *Metromedia* is simply inapplicable to the present case. First, it involved the regulation of billboards via the prohibition of off-premises signs, not, as here, the imposition of a tax on such signs.[FN13] Also, unlike in *Metromedia,* the Borough in the instant case does not seek to ban off-premises signs. Even if we were to assume that *Metromedia* did apply to the facts of this case, its holding that the city's ban of all off-premises signs was constitutional would be supportive of the Borough's actions and contrary to the Sign Owners' position. The reasons proffered by the Borough for imposing the tax, i.e., to offset the costs on increased traffic, to improve aesthetics, and to improve vehicular safety, were found by the Supreme Court to be sufficient to support a municipality's ban of all off-premises signs.[FN14]

FN13. This distinction is also significant

667 A.2d 21
(Cite as: 667 A.2d 21)

with respect to the Sign Owners' argument that the Ordinance unconstitutionally favors one type of commercial speech over another. In making this argument, the Sign Owners cite to *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). In that case, however, the Supreme Court struck down a city ordinance that banned all commercial handbills, stating that there must be a reasonable fit between the City's regulation of commercial advertising and its stated purpose. Here, there is no ban, and in fact, no regulation of commercial advertising in the Borough. Instead, there is only a tax on all off-premises signs, both commercial and non-commercial. As such, *Discovery Network* likewise is not applicable here.

FN14. Using this reasoning, and in light of the fact that on-premises signs can convey political messages, we reach the same conclusion with respect to the Sign Owners' contention that the tax improperly burdens political messages. Therefore, we will not address that contention in depth in this Opinion.

IV.

[19] Finally, the Sign Owners contend that the tax is invalid because it violates their rights to due process by taking their property without providing them with just compensation. Citing to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in which the Supreme Court held that a regulation that denies a landowner all economically beneficial or productive use of his or her land will be considered to be a taking for which compensation is warranted, the Sign Owners argue that the tax would prevent some of them from leasing to off-premises signs at a profit. This, the Sign Owners argue, constitutes a taking of property without just compensation.

In making this argument, the Sign Owners fail to realize that *Lucas* involves a regulation, and the instant case involves a tax. As the Supreme Court observed in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974), courts have consistently refused to entertain a due process claim that a tax is so excessive or unreasonable so as to cause a business to become unprofitable, and therefore, constitutes a taking. In *Alco Parking*, the operators of off-street parking facilities challenged the constitutionality of a Pittsburgh City Ordinance that imposed a twenty percent tax on the operators' gross receipts, contending that the tax was unreasonably high and constituted a taking without compensation. The Supreme Court refused to analyze the tax under*29 the operators' takings argument, stating that, so long as the tax is within the power of the taxing authority, it will not be struck down as violative of due process under the Fifth Amendment. *Id.*[FN15]

FN15. The Sign Owners also argue that the tax operates as a prior restraint on speech because it would tax non-commercial on-premises signs. This argument, however, disregards the fact that the Ordinance, as interpreted and applied by the Borough, does not tax on-premises signs which express opinions and political views. *See* note 13, *supra*.

Accordingly, the decision of the trial court granting summary judgment in favor of the Borough and against the Sign Owners is affirmed.[FN16]

FN16. Given our disposition of this case, we need not address the Borough's contention that several of the Sign Owners do not have standing to challenge the Ordinance.

ORDER

AND NOW, this 20th day of October, 1995, the order of the Court of Common Pleas of Monroe County at No. 3196 Civil 1993, dated December 22, 1994, is affirmed.

Pa.Cmwlth.,1995.
Adams Outdoor Advertising, Ltd. v. Borough of

667 A.2d 21

667 A.2d 21
(Cite as: 667 A.2d 21)

Stroudsburg
667 A.2d 21

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785 P.2d 431

113 Wash.2d 929, 785 P.2d 431
(Cite as: 113 Wash.2d 929, 785 P.2d 431)

Forbes v. City of Seattle
Wash.,1990.

Supreme Court of Washington,En Banc.
Roger FORBES, Appellant,
v.
CITY OF SEATTLE, Respondent.
No. 56367-5.

Jan. 18, 1990.
Reconsideration Denied March 28, 1990.

Operator of motion picture theaters brought action challenging city ordinance levying admission tax upon patrons of motion picture theaters and exempting patrons of nonprofit tax-exempt organizations. The Superior Court, King County, Charles V. Johnson, J., upheld ordinance, and operator appealed. The Supreme Court, Durham, J., held that: (1) tax did not impose prior restraint in violation of First Amendment, and (2) tax did not violate equal protection.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⇐2455

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2455 k. Protection of Constitutional Rights. Most Cited Cases
(Formerly 92k82(1))
When party alleges violation of rights protected under State and Federal Constitutions, Supreme Court first interprets and applies Washington State Constitution; however, whenever claim of right is made under Washington Constitution, Court must first decide if asserted right is more broadly protected under State Constitution than it is under federal constitutional law.

[2] Constitutional Law 92 ⇐967

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k967 k. Particular Claims. Most Cited Cases
(Formerly 92k46(2))
Theater operator's challenge to city admissions tax ordinance under both State and Federal Constitutions would be decided under federal constitutional law, where operators failed to discuss minimum criteria essential for state constitutional analysis.

[3] Constitutional Law 92 ⇐1892

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1892 k. Motion Pictures and Videos. Most Cited Cases
(Formerly 92k90.1(6))

Public Amusement and Entertainment 315T⇐8

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk8 k. Taxes and Fees. Most Cited Cases
(Formerly 376k3.20 Theaters and Shows)
City's admissions tax imposed upon patrons of for-profit motion picture theaters was not a prior restraint in violation of First Amendment; tax did not vary according to content of particular motion picture and did not restrain, in advance, exhibition

of any motion picture. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚿1892

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1892 k. Motion Pictures and Videos. Most Cited Cases
(Formerly 92k90.1(6))

Public Amusement and Entertainment 315T⚿8

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk8 k. Taxes and Fees. Most Cited Cases
(Formerly 376k3.20 Theaters and Shows)
City's admissions tax imposed upon patrons at for-profit motion picture theaters was not discriminatory and did not impermissibly infringe First Amendment free speech guarantees; tax treated for-profit theaters same as any other business which charged patrons admission, and revenues raised from tax and admissions to movie theaters supplied only one fifth of admission tax revenue. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿3580

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3580 k. Other Particular Issues and Applications. Most Cited Cases
(Formerly 92k228.5)

Public Amusement and Entertainment 315T⚿8

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk8 k. Taxes and Fees. Most Cited Cases
(Formerly 376k3.20 Theaters and Shows)
City admissions tax imposed upon patrons of for-profit motion picture theaters did not violate equal protection by exempting patrons paying admission charge to artistic or cultural activities of college or university and nonprofit tax-exempt organizations. U.S.C.A. Const.Amends. 5, 14.

[6] Constitutional Law 92 ⚿3051

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3051 k. Differing Levels Set Forth or Compared. Most Cited Cases
(Formerly 92k213.1(1))
Under equal protection analysis, governmental action which either burdens fundamental right or employs suspect classification is subject to strict scrutiny; on other hand, statutes and ordinances which do not burden fundamental rights nor employ suspect classifications are generally subject to minimum scrutiny and will be upheld unless they rest on grounds wholly irrelevant to achievement of legitimate government objective. U.S.C.A. Const.Amends. 5, 14.

[7] Constitutional Law 92 ⚿3072

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3072 k. Alien Status. Most Cited Cases
(Formerly 92k213.1(1))

Constitutional Law 92 ⚿3078

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes

92k3078 k. Race, National Origin, or Ethnicity. Most Cited Cases
(Formerly 92k213.1(1))
Under equal protection analysis, "fundamental rights" are those explicitly or implicitly guaranteed by Constitution, while examples of "suspect classifications" include those based on race, nationality, or alienage. U.S.C.A. Const.Amends. 5, 14.

[8] Constitutional Law 92 ⚿1021

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1021 k. Equal Protection. Most Cited Cases
(Formerly 92k48(6))

Constitutional Law 92 ⚿1040

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1040 k. Equal Protection. Most Cited Cases
(Formerly 92k48(6))
When classification is subject to minimum scrutiny under equal protection analysis, party challenging classification has heavy burden of overcoming presumption of its constitutionality; furthermore, under minimum scrutiny, ordinance generally will not be declared to be unconstitutional unless it appears unconstitutional beyond reasonable doubt. U.S.C.A. Const.Amends. 5, 14.

[9] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))
For purposes of equal protection analysis, minimum scrutiny consists of three-step analysis which considers: whether legislation applies alike to all persons within designated class, whether there is reasonable grounds to distinguish between those who fall within class and those who do not, and whether classification has rational relationship to purpose of legislation. U.S.C.A. Const.Amends. 5, 14.

[10] Constitutional Law 92 ⚿3039

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3039 k. In General. Most Cited Cases
(Formerly 92k211(2))
Where persons of different classes are treated differently, there is no equal protection violation; only where members of same class are treated differently may person proceed with equal protection claim. U.S.C.A. Const.Amends. 5, 14.

[11] Constitutional Law 92 ⚿3580

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3580 k. Other Particular Issues and Applications. Most Cited Cases
(Formerly 92k228.5)

Public Amusement and Entertainment 315T ⚿6

315T Public Amusement and Entertainment

315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk6 k. Motion Pictures in General. Most Cited Cases
(Formerly 92k228.5)
Patrons attending for-profit motion picture theaters and patrons attending nonprofit, tax-exempt organization, were two distinct classes, for purposes of determining whether city's admissions tax which exempted patrons at nonprofit motion picture theaters violated equal protection. U.S.C.A. Const.Amends. 5, 14.

[12] Constitutional Law 92 ⇐1021

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1021 k. Equal Protection. Most Cited Cases
(Formerly 92k48(6))
When classification is challenged on equal protection grounds, facts are presumed sufficient to justify classification. U.S.C.A. Const.Amends. 5, 14.

[13] Constitutional Law 92 ⇐3065

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3063 Particular Rights
92k3065 k. Economic or Social Regulation in General. Most Cited Cases
(Formerly 92k228.5, 92k211(2))

Constitutional Law 92 ⇐3560

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)
Legislative bodies have very broad discretion in establishing classifications for economic and social legislation, in determining whether classification violates equal protection; furthermore, legislative body has even broader discretion and greater power in making classifications for purposes of taxation. U.S.C.A. Const.Amends. 5, 14.

[14] Constitutional Law 92 ⇐3043

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3043 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k211(2))
For purposes of reviewing equal protection challenges, city council has same powers of classification as Legislature. U.S.C.A. Const.Amends. 5, 14.

****432 *931** Jack R. Burns, Bellevue, for appellant.
Douglas N. Jewett, Seattle City Atty., Jorgen G. Bader, Asst., Seattle, for respondent.
DURHAM, Justice.
The present case tests the constitutionality of a Seattle municipal ordinance which levies an admission tax upon patrons of motion picture theaters, and exempts patrons of nonprofit, tax-exempt organizations from the tax. The trial court held the ordinance to be constitutional in all respects. We affirm.

The Seattle municipal ordinance at issue here was originally adopted March 31, 1943 and, as amended from time to time, has been in effect ever since. Seattle Municipal ***932** Code (SMC) 5.40. The ordinance, as authorized by RCW 35.21.280, levies an admission tax upon everyone who pays an admission charge. The admission tax is imposed at the rate of 5 percent of the admission charge. [FN1]

SMC 5.40.020(B). Although the admission tax applies to a wide range of events for which an admission charge is required, SMC 5.40.010(A)(1)-(6), there are several categories of exemptions from the admission tax. *See* SMC 5.40.025-5.40.028.

FN1. Under the ordinance, the person receiving payment for an admission charge is responsible for collecting and remitting the admission tax to the City. SMC 5.40.070.

In the present case, Roger Forbes challenges the constitutionality of the ordinance. Forbes operates the Embassy and Midtown theaters in Seattle. Both the Embassy and the Midtown theaters exhibit feature length video tape motion picture films. Under the ordinance, patrons of Forbes' theaters are not exempt from the **433 *admission tax*, and he has collected the admission tax accordingly.[FN2]

FN2. Movie tickets at the Embassy and Midtown theaters are $6 and the admission tax at 5 percent due from each patron is approximately 29 cents for each ticket.

On August 31, 1988, Forbes filed a civil action in King County Superior Court seeking a declaration that the admission tax violated rights guaranteed to his patrons by the first amendment to the United States Constitution and article 1, section 5 of the Washington State Constitution.[FN3] In addition, he alleged that exempting patrons attending artistic and cultural activities [FN4] of a college or university *933 and nonprofit, tax-exempt organizations, which meet certain requirements,[FN5] from the admission tax violates the equal protection guaranties of the fourteenth amendment to the United States Constitution and article 1, section 12 of the Washington State Constitution. The City filed a counterclaim against Forbes alleging that although he has collected admission taxes from persons paying an admission charge to the Midtown and Embassy theaters, he has failed to remit those funds to the Director of Licenses and Consumer Affairs since October 1987.

FN3. Appellant also sought a preliminary and permanent injunction to prohibit the City from acting pursuant to SMC 5.40 as well as a money judgment refunding all admission taxes heretofore paid to the City.

FN4. The exemption applies to "an opera, concert, dance recital or like musical entertainment, a play, puppet show or dramatic reading, an exhibition of painting, sculpture, or artistic or historical objects or to a museum, historic vessel or science center". SMC 5.40.026(A)(1).

FN5. *See* SMC 5.40.026(A)(1) and SMC 5.40.026(B)(1), (2).

The City subsequently moved for partial summary judgment and Forbes moved for summary judgment. On November 7, 1988, after considering the materials presented by the parties, and finding no genuine issue of material fact as to SMC 5.40 and the City's administration of its admission taxes, King County Superior Court Judge Charles V. Johnson granted partial summary judgment [FN6] in favor of the City of Seattle, finding the ordinance constitutional in all respects. On November 10, 1988, Forbes timely filed notice of appeal of the trial court's judgment to the Court of Appeals. We accepted certification.

FN6. The court reserved for later adjudication the City's counterclaim against Roger Forbes for an accounting for admission taxes, which were collected from patrons, and for judgment for such taxes.

We are asked to decide if SMC 5.40 abridges the guaranties of free speech or equal protection of the state and federal constitutions. Forbes' two constitutional challenges are addressed separately.

We first address Forbes' free speech challenges. He argues that SMC 5.40.020, as applied to patrons of his theaters, constitutes a prior restraint. In addition, Forbes contends that the admission tax is a discriminatory tax which violates the first

amendment to the United States Constitution and article I, section 5 of the Washington State Constitution. These claims are addressed seriatim.

*934 [1][2] When a party alleges a violation of rights protected under both the state and federal constitutions, we first interpret and apply the Washington State Constitution. *Seattle v. Mesiani,* 110 Wash.2d 454, 456, 755 P.2d 775 (1988); *O'Day v. King Cy.,* 109 Wash.2d 796, 801-02, 749 P.2d 142 (1988). However, whenever a claim of right is made under the Washington Constitution, we must first decide if the asserted right is more broadly protected under the state constitution than it is under federal constitutional law. *Bedford v. Sugarman,* 112 Wash.2d 500, 507, 772 P.2d 486 (1989). In *State v. Gunwall,* 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986), we enumerated several nonexclusive neutral criteria which must be met before this court considers state constitutional analysis. As a matter of policy, examination of the *Gunwall* criteria is essential in order for the process of state constitutional analysis to be " 'articulable, reasonable and reasoned.' " *Bedford v. Sugarman, supra* at 507, 772 P.2d 486 (quoting *State v. Gunwall, supra* at 63, 720 P.2d 808). Because Forbes has failed **434 to discuss the minimum criteria mentioned in *Gunwall,* we decline to undertake a separate analysis of Const. art. 1, § 5 at this time. *State v. Carver,* 113 Wash.2d 591, 598-99, 781 P.2d 1308 (1989); *State v. Long,* 113 Wash.2d 266, 271, 778 P.2d 1027 (1989); *State v. Jones,* 112 Wash.2d 488, 498, 772 P.2d 496 (1989) ; *State v. Worrell,* 111 Wash.2d 537, 539 n. 1, 761 P.2d 56 (1988); *State v. Wethered,* 110 Wash.2d 466, 472, 755 P.2d 797 (1988). Accordingly, Forbes' free speech claims will be decided under federal constitutional law.

PRIOR RESTRAINT

[3] Forbes maintains that SMC 5.40.020 constitutes a prior restraint because it imposes a governmental charge (admission tax) upon patrons who pay an admission charge to for-profit motion picture theaters.[FN7] He cites *State v. Coe,* 101 Wash.2d 364, 679 P.2d 353 (1984), to define the type of governmental action that constitutes a prior restraint. In *State *935 v. Coe, supra,* we explained that prior restraints are " 'official restrictions imposed upon speech or other forms of expression in advance of actual publication,' " *Coe,* at 372, 679 P.2d 353 (quoting *Seattle v. Bittner,* 81 Wash.2d 747, 756, 505 P.2d 126 (1973)). Forbes argues that the admission tax acts as a prior restraint because it imposes a condition upon the exercise of the constitutionally guaranteed right to view motion pictures. In addition, he maintains that the admission tax chills protected speech by deterring potential recipients.

FN7. Forbes does not argue that he, as operator of the two theaters, is burdened by a prior restraint.

The rudimentary question underlying Forbes' prior restraint claim is whether the limitation imposed by the admission tax constitutes an unconstitutional prior restraint. We begin our analysis by noting that governmental action which amounts to an unconstitutional prior restraint usually has two distinguishing features. First, the governmental decision to restrain the speech is based on the content of the speech. Second, the speech is restrained in advance of publication. In the present case, however, these characteristics are absent. The admission tax is content neutral; *i.e.,* the tax does not vary according to the type of speech involved. Moreover, the admission tax does not restrain, in advance, the exhibition of any motion picture. Thus, Forbes' argument that SMC 5.40.020 is a presumptively unconstitutional prior restraint is not well-founded.

The limitation imposed upon Forbes' patrons by the challenged tax does not constitute a prior restraint. The admission tax is not "imposed upon speech", rather, it is imposed upon an admission charge. Consequently, the tax does not satisfy the *State v. Coe* definition of a prior restraint ("official restrictions imposed upon speech"). In other words, viewing a motion picture does not trigger the tax; rather, payment of an admission charge to a nonexempt event triggers the tax.

Moreover, not all limitations on protected speech

constitute prior restraints. In the present case, the limitation is distinguishable from a prior restraint. In *936*Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), the Supreme Court distinguished a closure order (against a bookstore) from a prior restraint by noting two significant differences between ordinary limitations and those limitations which constitute prior restraints:

First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited-indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Arcara, at 705 n. 2, 106 S.Ct. at 3177 n. 2. *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 2207-08, 81 L.Ed.2d 17 (1984) ("an order prohibiting **435 dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny"). Similarly, the challenged ordinance here does not prohibit patrons of Forbes' theaters from viewing the motion pictures. Moreover, the admission tax does not depend on the content of a particular motion picture.

Finally, Forbes' claim that the admission tax chills recipients of protected speech is illusory. The record is devoid of any evidence that patrons of his theaters have in fact been deterred from viewing a film because of the admission tax.

In summary, a prior restraint is not a limitless label that attaches to any governmental action which impacts, no matter how indirectly or tangentially, First Amendment rights. A prior restraint occurs when the government engages in censorship; *i.e.*, when there is an official restriction imposed upon speech in advance of publication. Although SMC 5.40.020 places a limitation upon the ability of taxpayers to attend events where there is an admission charge, the admission tax does not constitute a prior restraint.

*937 DISCRIMINATORY TAX

[4] Forbes next argues that the challenged ordinance is a discriminatory tax that impermissibly infringes First Amendment guaranties of free speech.

Although it is well established that First Amendment activities may constitutionally be subject to genuinely nondiscriminatory taxation,[FN8] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987); *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936), the Supreme Court has recognized two forms of differential taxation which so burden the interests protected by the First Amendment that such treatment is impermissible unless the government demonstrates a counter-balancing interest of compelling importance that it cannot achieve without differential taxation. *Arkansas Writers' Project*, at 231, 107 S.Ct. at 1728; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 585, 103 S.Ct. 1365, 1371-72, 75 L.Ed.2d 295 (1983). The first situation is where the government singles out First Amendment activities as a whole for taxation. The second situation occurs where the government targets a subgroup of First Amendment activities (here, motion picture theaters) for taxation. *Arkansas Writers' Project*, at 228, 107 S.Ct. at 1727; *Minneapolis Star*, at 591, 103 S.Ct. at 1375. In this case, we are concerned only with the latter of these.

FN8. In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the Supreme Court explained the rationale for its approval of nondiscriminatory taxation by stating:

A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation

> if it must impose the same burden on the rest of its constituency.
> *Minneapolis Star,* at 585, 103 S.Ct. at 1371-72.

Whether the Seattle admission tax discriminatorily impacts motion picture theaters is a question of fact. *938 Forbes maintains that the admission tax has a disproportionate impact upon movie theaters. He argues that the tax is discriminatory because " [m]ovie theaters alone pay in excess of 20% of the admission taxes generated." Reply Brief of Appellant, at 3. This misstates the situation. Movie theaters do not pay any of the admission taxes; patrons of movie theaters pay the admission tax. SMC 5.40.020. Thus, the proper inquiry is whether the admission tax has a discriminatory impact upon patrons of movie theaters, and Forbes has not offered any evidence which demonstrates that.

Moreover, the record indicates that the Seattle admission tax has broad application. The tax applies to any nonexempt event where there is an admission charge. Admission charges for both protected First Amendment activities and other activities are subject to the tax. The general applicability of the admission tax is confirmed **436 by the fact that Forbes has not pointed to any paid admissions (excluding those which may be statutorily exempted) which are not taxed. In addition, the Seattle admission tax has much broader application than the taxes which were struck down in *Arkansas Writers' Project, Minneapolis Star,* and *Grosjean.* In each of those cases, the tax impacted *only* First Amendment activities.

Forbes, however, cites *Festival Enters., Inc. v. Pleasant Hill,* 182 Cal.App.3d 960, 227 Cal.Rptr. 601, *review denied* (1986) and *United Artists Communications, Inc. v. Montclair,* 209 Cal.App.3d 245, 257 Cal.Rptr. 124, *cert. denied,* 493 U.S. 918, 110 S.Ct. 280, 107 L.Ed.2d 260 (1989), as examples of admission tax ordinances " indistinguishable" from the present case, which were held to be unconstitutional, in part because they were not generally applicable taxes. These cases, however, are not instructive. The facts of both *Festival Enters.* and *United Artists* are substantially different from the present case.

In *Festival Enters.,* the admission tax ordinance, although broadly worded to apply to other forms of entertainment, affected *only* the plaintiff's theaters. *Festival Enters.,* 182 Cal.App.3d at 963. Moreover, the plaintiffs in *939 *Festival Enters.* were forced to bear the entire impact of the admissions tax not only at the time of enactment, but for the foreseeable future.[FN9] *Festival Enters.,* 182 Cal.App.3d at 964.

> FN9. The court stated, "We cannot ignore the minutes of the city council meeting which indicate that only plaintiffs' theatres were relied upon to pay the tax and that the council members had no other businesses in mind when it passed the ordinance." *Festival Enters.,* 182 Cal.App.3d at 965-66.

In *United Artists,* the admission tax ordinance, although neutral on its face, in reality disproportionately taxed certain admissions. In fact, *90 percent* of the admissions tax was borne by four businesses, all of which were engaged in protected speech.[FN10] *United Artists,* 209 Cal.App.3d at 252, 257 Cal.Rptr. at 128.

> FN10. The four businesses included two movie theaters and two adult book stores with viewing booths.

Thus, in both *Festival Enters.* and *United Artists,* just as in *Minneapolis Star,* the tax in question appeared to apply to a broad range of businesses, but in reality its burden fell disproportionately upon one to four businesses. By comparison, Seattle's admission tax treats for-profit theaters the same as any other business which charges its patrons an admission charge. In fact, the record indicates that Seattle has several hundred admission tax accounts, but only approximately two dozen movie theater accounts. Revenues raised from the tax on admissions to movie theaters supply only one-fifth of the admission tax revenues. Thus, we conclude that the City is not singling out patrons of movie

theaters for taxation. Unlike the admission tax in *Festival Enters.* and *United Artists,* the Seattle admission tax does not fall disproportionately upon persons engaged in protected speech activities.

Because we have determined that the admission tax does not discriminatorily impact First Amendment activities, it is not necessary to consider whether there is a compelling state interest for the tax.

In summary, the Seattle admission tax is a content-neutral tax that does not single out those engaged in First *940 Amendment activities for taxation. The tax is neither special nor unique and is generally applicable to all persons who pay admissions. In no way does the tax resemble a penalty directed at a few protected speech activities. We conclude that SMC 5.40.020 does not constitute a prior restraint or constitute discriminatory taxation of First Amendment activities.

EQUAL PROTECTION

[5] We are next asked to decide if the admission tax exemption, found in SMC 5.40.026, for patrons paying an admission charge to artistic or cultural activities of a college or university and nonprofit tax-exempt organizations denies equal protection to patrons of for-profit motion picture theaters who are required to pay the admission**437 tax. We conclude that there is no constitutional deprivation.

Although Forbes contends that the admission tax exemption violates the equal protection guaranties of both the state and federal constitutions, he has failed to discuss the *Gunwall* criteria, which is a condition precedent to our examination of whether the state constitution affords greater protection than the federal constitution. See discussion, *supra.* Consequently, we decline to address the state constitutional claim. However, we do reach the federal claim and follow federal equal protection analysis.

[6][7][8] We begin by identifying the appropriate standard of judicial scrutiny. *Financial Pac. Leasing, Inc. v. Tacoma,* 113 Wash.2d 143, 147, 776 P.2d 136 (1989); *Convention Ctr. Coalition v. Seattle,* 107 Wash.2d 370, 378, 730 P.2d 636 (1986); *Paulson v. County of Pierce,* 99 Wash.2d 645, 652, 664 P.2d 1202, *appeal dismissed,* 464 U.S. 957, 104 S.Ct. 386, 78 L.Ed.2d 331 (1983). Under equal protection analysis, governmental action which either burdens a fundamental right or employs a suspect classification [FN11] is subject to strict scrutiny. *941*Nielsen v. Washington State Bar Ass'n,* 90 Wash.2d 818, 820, 585 P.2d 1191 (1978). On the other hand, statutes and ordinances which do not burden fundamental rights nor employ suspect classifications are generally subject to minimum scrutiny and will be upheld unless they rest on grounds wholly irrelevant to the achievement of a legitimate government objective. [FN12] *Financial Pac. Leasing, Inc.,* 113 Wash.2d at 147, 776 P.2d 136; *Petersen v. State,* 100 Wash.2d 421, 444, 671 P.2d 230 (1983); *Paulson v. County of Pierce,* 99 Wash.2d at 652, 664 P.2d 1202. In the case before us, we are not presented with an ordinance which employs a suspect classification. Accordingly, unless the classification used to distinguish which patrons are exempt from the admission tax unduly burdens a fundamental right, the ordinance will be subject to minimum scrutiny.

FN11. "Fundamental rights" are those " explicitly or implicitly guaranteed by the Constitution", *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1973) , while examples of "suspect classifications " include those based on race, nationality, or alienage. *State v. Schaaf,* 109 Wash.2d 1, 18, 743 P.2d 240 (1987).

FN12. When a classification is subject to minimum scrutiny, the party challenging the classification has the heavy burden of overcoming the presumption of its constitutionality. *Convention Ctr. Coalition v. Seattle,* 107 Wash.2d at 378, 730 P.2d 636; *Bellevue Sch. Dist. 405 v. Brazier Constr. Co.,* 100 Wash.2d 776, 782, 675 P.2d 232 (1984). Furthermore, under minimum scrutiny, an ordinance

> generally will not be declared to be unconstitutional unless it appears unconstitutional beyond a reasonable doubt. *Haberman v. WPPSS,* 109 Wash.2d 107, 139, 744 P.2d 1032, 750 P.2d 254 (1987); *State v. Dixon,* 78 Wash.2d 796, 479 P.2d 931 (1971).

Forbes maintains that the admission tax exemption does burden a fundamental right. He argues that because the exhibition of motion pictures is a form of expression protected by the First Amendment, any governmental burden on the exhibition of motion pictures, such as requiring patrons to pay an admission tax, is subject to strict scrutiny. This reasoning, however, misses the mark. The question is not whether the imposition of the admission tax on Forbes' patrons burdens the First Amendment; rather, the question is whether the classification used to determine which individuals are exempt from the tax *942 unduly burdens the First Amendment and therefore violates the equal protection clause.[FN13] We conclude that the distinction between patrons of for-profit motion picture theaters and patrons of nonprofit, tax-exempt theaters does not unduly burden the First Amendment.

> FN13. Forbes appears to collapse his substantive First Amendment claim and his equal protection claim together. Such analysis is not instructive. Forbes' First Amendment claim is addressed *supra.* Here we consider the equal protection challenge, which looks to whether the government has made an improper classification. If a classification scheme is proper, the issue of which class a particular individual belongs in is not an equal protection matter. The equal protection clause itself applies only to the making of the classifications, not to the adjudication of the individual situations. J. Nowak, R. Rotunda & N. Young, *Constitutional Law* § 14.2 (3d ed. 1986). Simply stated, the equal protection clause guarantees that people who are similarly situated will be treated similarly.

**438 The classification between the two groups of patrons does not depend upon whether a patron attends an event at an organization which engages in free speech activities; rather, exemption from the tax depends solely upon whether a patron attends an event at an organization which meets specifically enumerated criteria. *See* SMC 5.40.026, 5.40.085.[FN14] Moreover, unlike the cases which have found an equal protection violation based upon an ordinance unduly burdening the First Amendment,[FN15] the classification in the present case does not hinge on the content of the speech the motion picture theater chooses to exhibit; rather, the classification is simply between patrons of for-profit theaters and patrons of nonprofit, tax-exempt theaters. In other words, the ordinance does not classify individuals based on the exercise of their First Amendment rights.

> FN14. The admission tax exemption in question applies generally to nonprofit, tax-exempt organizations which, among other activities, also exhibit motion pictures. The exemption is not limited in any way to organizations which engage only in free speech activities.

> FN15. *See Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Police Department v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

[9] Given the foregoing analysis, SMC 5.40.026 must satisfy only minimum scrutiny to pass constitutional muster. Minimum scrutiny consists of a 3-step analysis which *943 considers: (1) does the legislation apply alike to all persons within a designated class; (2) are there reasonable grounds to distinguish between those who fall within the class and those who do not, and (3) does the classification have a rational relationship to the purpose of the legislation. *Financial Pac. Leasing, Inc. v. Tacoma,* 113 Wash.2d 143, 147, 776 P.2d 136 (1989); *O'Day v. King Cy.,* 109 Wash.2d 796, 814, 749 P.2d 142 (1988); *Haberman v. WPPSS,* 109 Wash.2d 107, 139, 744 P.2d 1032, 750 P.2d 254 (1987); *United Parcel Serv., Inc. v. Department of Rev.,* 102 Wash.2d 355, 367, 687

P.2d 186 (1984); *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs,* 92 Wash.2d 831, 835-36, 601 P.2d 936 (1979), *appeal dismissed,* 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 835 (1980).

[10] Under minimum scrutiny, Forbes must first establish that the ordinance treats two similarly situated classes of people unequally. *Jones v. Helms,* 452 U.S. 412, 423, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981). Where persons of different classes are treated differently, there is no equal protection violation. *Financial Pac. Leasing, Inc. v. Tacoma, supra,* 113 Wash.2d at 147, 776 P.2d 136. Only where members of the same class are treated dissimilarly may a person proceed with an equal protection claim.

[11] Because patrons attending for-profit motion picture theaters and patrons attending nonprofit, tax-exempt organizations are two distinct classes, and the admission tax exemption applies equally to all members of the class it designates, there is no unequal treatment of members of the same class. *Convention Ctr. Coalition v. Seattle,* 107 Wash.2d 370, 379, 730 P.2d 636 (1986). Every patron who pays an admission charge to an event of a nonprofit, tax-exempt organization is exempt from the Seattle admission charge.

[12] Second, under minimum scrutiny, Forbes must demonstrate that there is no reasonable basis for the classification between the two groups. *United Parcel Serv., Inc. v. Department of Rev., supra,* 102 Wash.2d at 369, 687 P.2d 186. It is not our function to consider the propriety of the tax exemption, or to criticize the public policy which may have prompted adoption *944 of the ordinance. *State ex rel. Namer Inv. Corp. v. Williams,* 73 Wash.2d 1, 7, 435 P.2d 975 (1968). So long as the " 'classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' " *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527, 79 S.Ct. 437, 441, 3 L.Ed.2d 480 (1959) (quoting *Brown-Forman Co. v. Kentucky,* 217 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed. 883 (1909)); *State v. Hi-Lo Foods, Inc.,* 62 Wash.2d 534, 540, 383 P.2d 910 (1963). In addition, when a classification**439 is challenged, facts are presumed sufficient to justify the classification. *Brewer v. Copeland,* 86 Wash.2d 58, 61, 542 P.2d 445 (1975).

[13][14] It is well established that legislative bodies [FN16] have very broad discretion in establishing classifications for economic and social legislation. *Sonitrol Northwest, Inc. v. Seattle,* 84 Wash.2d 588, 590, 528 P.2d 474 (1974). Furthermore, a legislative body has even broader discretion and greater power in making classifications for purposes of taxation. *United Parcel Serv., Inc. v. Department of Rev., supra,* 102 Wash.2d at 368, 687 P.2d 186.[FN17] For example, in *945*Black v. State,* 67 Wash.2d 97, 406 P.2d 761 (1965), this court held that there was a sufficient difference between a floating hotel and a hotel constructed on land to justify the levying of an excise tax upon the leasing of one and exempting the other from the tax. In *Hemphill v. Tax Comm'n,* 65 Wash.2d 889, 400 P.2d 297 (1965), *appeal dismissed,* 383 U.S. 103, 86 S.Ct. 716, 15 L.Ed.2d 615 (1966), the court upheld a sales tax which was imposed on admission fees of amusement and recreation activities such as golf, ski lifts, skating, and billiards, but which exempted bowling. In *Boeing Co. v. State,* 74 Wash.2d 82, 442 P.2d 970 (1968), the court upheld a use tax imposed on bailments of personalty not involving consideration, even though leases of personalty were not taxed. The basis of the subject classification was simply the fact that lessees paid for the use of the personalty while bailees did not.

FN16. For purposes of reviewing equal protection challenges, a city council has the same powers of classification as the Legislature. *Austin v. Seattle,* 176 Wash. 654, 657, 30 P.2d 646, 93 A.L.R. 203 (1934).

FN17. *See also Sonitrol Northwest, Inc. v. Seattle,* 84 Wash.2d at 591, 528 P.2d 474; *Commonwealth Title Ins. Co. v. Tacoma,* 81 Wash.2d 391, 395, 502 P.2d 1024 (1972) ("[T]he legislative power is particularly broad in the area of taxation. It is inherent in the exercise of the power

> to tax that a state be free to select the objects or subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation."); *Oil Heat Inst. v. Mukilteo,* 81 Wash.2d 7, 11, 498 P.2d 864 (1972); *Boeing Co. v. State,* 74 Wash.2d 82, 86, 442 P.2d 970 (1968); *Hemphill v. Tax Comm'n,* 65 Wash.2d 889, 400 P.2d 297 (1965), *appeal dismissed,* 383 U.S. 103, 86 S.Ct. 716, 15 L.Ed.2d 615 (1966); *Bates v. McLeod,* 11 Wash.2d 648, 654-55, 120 P.2d 472 (1941) ("In the matter of classifying the subjects of taxation, the legislature has a very wide discretion.... the question of what persons shall constitute the class is one primarily for the legislature to determine, and its determination cannot be interfered with by the courts unless clearly arbitrary and without any reasonable basis.").

In the present case, the record indicates several reasonable grounds to distinguish between patrons paying an admission charge to a for-profit motion picture theater and patrons paying an admission charge to a nonprofit, tax-exempt organization exhibiting artistic performances.[FN18] *946 Nonprofit, tax-exempt organizations are in a functionally separate class from for-profit motion picture theaters. In any event, there is no doubt that a distinction does **440 exist, and Forbes has made no showing that the distinction is arbitrary or capricious. Consequently, he has not satisfied his burden of demonstrating that there is no reasonable basis for the admission tax exemption.

FN18. Diann Shope, former legislative assistant to City Council member Phyllis Lamphere, stated in her affidavit several reasons for the exemption:
[First,] [a]n arts organization sponsoring an event exempt from admission taxes sets its ticket prices at a rate affordable to the general public-far below the break-even price, let alone a price that will make a profit. Some tickets are kept even lower to encourage new audiences, and make it possible for students and senior citizens to attend. Adding an admission tax would either dissuade potential ticket buyers, or if the organization absorbed the tax, require them to raise more contributed income.
[Second, the exemption] sets an example that may assist the sponsoring organization in securing private donations and volunteers....
[Third, the exemption] ... serves to stimulate contributions from the private sector for artistic and cultural events....
[Finally,] Arts organizations with their own financial income and resources have less need for public funds through service contracts. If artistic or cultural events of nonprofit tax-exempt organizations were taxed, the Arts Commission and the art community would be pressing the City for a substantially larger appropriation to maintain the quality of artistic and cultural activities in the City. If the exemption of artistic and cultural events from the admission tax were to end, there would be a profound negative impact upon art and cultural activities in Seattle.
Clerk's Papers, at 46-47.

Third, under minimum scrutiny, Forbes must demonstrate that there is no rational relationship between the classification and the purpose of the ordinance. *United Parcel Serv., Inc. v. Department of Rev., supra,* 102 Wash.2d at 369, 687 P.2d 186. The test for reviewing the classification is merely whether "any state of facts reasonably can be conceived that would sustain [the classification]." *Allied Stores of Ohio, Inc. v. Bowers, supra,* 358 U.S. at 528, 79 S.Ct. at 441. Accordingly, Forbes must do more than merely question the wisdom and expediency of the ordinance. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs,* 92 Wash.2d 831, 836, 601 P.2d 936 (1979), *appeal dismissed,* 446 U.S. 979, 100 S.Ct. 2958, 64 L.Ed.2d 835 (1980). He must show conclusively that the classification is contrary to the purpose of the ordinance. *Yakima Cy. Deputy Sheriff's Ass'n,* 92 Wash.2d at 836, 601 P.2d 936.

Forbes argues that there is no correlation between the admission tax exemption for patrons of nonprofit, tax-exempt organizations and the articulated purpose of the ordinance, which is to " reduce the amount that the City would need to appropriate from the City's General Fund for maintenance and development of these activities." Shope Affidavit, Clerk's Papers, at 43. Even assuming that there is no correlation, this argument does not conclusively demonstrate that the classification is contrary to the purpose of the tax exemption. FN19 Although the admission tax exemption may not precisely satisfy the stated purpose of *947 the exemption, mere imprecision in the correlation between the means employed and the end desired is not enough to render a classification constitutionally infirm. *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970). Although Forbes has questioned the wisdom of the admission tax exemption, he has not satisfied his burden of demonstrating that the classification is contrary to the articulated purpose of the ordinance.

FN19. The record reveals that the City established the admission tax exemption in question as part of an overall program to further artistic and cultural activities. The City Council thought "that is was more efficient to let the sponsoring organization collect and keep the money than for the City to apply its tax, receive the money, and then appropriate it out again." Shope Affidavit, Clerk's Papers, at 43. There is no evidence that the exemption is contrary to that goal.

In summary, Forbes has failed to demonstrate that the admission tax exemption does not satisfy the 3-step minimum scrutiny inquiry. Accordingly, we affirm the trial court's decision that SMC 5.40.026 does not violate equal protection.

We hold that SMC 5.40 does not abridge either the First Amendment guaranty of free speech or the Fourteenth Amendment guaranty of equal protection. The decision of the trial court is affirmed.

CALLOW, C.J., UTTER, BRACHTENBACH, DORE, ANDERSEN, DOLLIVER and SMITH, JJ., and PEARSON, J. Pro Tem., concur.
Wash.,1990.
Forbes v. City of Seattle
113 Wash.2d 929, 785 P.2d 431

END OF DOCUMENT

IV. STATUTES, NEVADA

Westlaw.

N.R.S. 360.291

C

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

→360.291. Taxpayers' Bill of Rights

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

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

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

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

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

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

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

(1) An adjustment of an assessment;

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

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

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

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

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

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

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

N.R.S. 360.291

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

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

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

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

(1) The tax is paid;

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

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

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

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

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

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

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

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

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

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

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

3. The provisions of this section apply to any tax administered, regulated and collected by the Department pursuant to the provisions of this title and title 57 of NRS and NRS 244A.820, 244A.870, 482.313 and 482.315 and any regulations adopted by the Department relating thereto.

Added by Laws 1991, p. 1579. Amended by Laws 1997, pp. 2595, 2600; Laws 1999, pp. 577, 2482; Laws 2001, c. 331, § 2, eff. July 1, 2001; Laws 2005, c. 142, § 2, eff. Oct. 1, 2005; Laws 2005 (22nd ss), c. 9, § 8, eff. July 1,

N.R.S. 360.291

2005.

HISTORICAL AND STATUTORY NOTES

Laws 1997, c. 547, effective July 1, 1997, in subsec. 10 added the second sentence requiring the inclusion of an explanation.

Laws 1997, c. 549, effective July 1, 1997, in subsec. 12 substituted "release or reduction of a bond required by the department in accordance" for "release of a sales tax bond in accordance".

Laws 1999, c. 105, effective May 11, 1999, ratified technical corrections to sections of NRS and multiple amendments of sections of NRS, corrected certain effective dates, and made certain other corrections in statutes.

Laws 1999, c. 484, effective July 1, 1999, designated the existing section as subsec. 1, and redesignated former subsecs. 1 through 14 as pars. (a) through (n), and in par. (f), inserted subpar. (3), in subpar. (1) of par. (i), inserted ", agent" following "by an officer", in par. (l) inserted "or other form of security" following "bond" and inserted "to be furnished pursuant to the provisions of this Title" prior to "by the department", in par. (m), added "that are administered by the department" to the end of the sentence, and added par. (o); and added subsecs. (2) and (3).

2001 Legislation

Laws 2001, c. 331, § 2, amended the section by adding "Except as otherwise provided in NRS 361.485," at the beginning of Subsec. 1(g).

2005 Legislation

Technical corrections were made to conform with Legislative Counsel Bureau revisions (2005).

Laws 2005 (22nd ss), c. 9, § 8, amended the section by substituting "taxes" for "provisions of this title that are" following "directly related to the administration of the" in Subsec. 1(m); inserting ", NRS 244A.820, 244A.870, 482.313 and 482.315 and title 57 of NRS" following "The provisions of this title" in Subsec. 2; inserting "by the Department" following "any tax administered and collected" in Subsec. 3; and substituting ", NRS 244A.820, 244A.870, 482.313 and 482.315 and title 57 of NRS and any regulations adopted by the Department relating thereto." for "or any applicable regulations by the Department." at the end of Subsec. 3.

Laws 2005, c. 142, § 2, amended the section by inserting ", regulated" following "The provisions of this section apply to any tax administered" in Subsec. 3.

CROSS REFERENCES

Audits, notice to proprietor of enterprise, license tax, see NRS 364.220.

LAW REVIEW COMMENTARIES

Significant Tax Legislation in the 1999 Legislative Session. John S. Bartlett & Paul D. Bancroft. 8 Nev. Law. 16 (Aug. 1999).

LIBRARY REFERENCES

Taxation ⚿319(1), 336, 372, 514, 535, 544, 895(3), 902, 905(1), 1311, 1320, 1337.
Westlaw Key Number Searches: 371k319(1); 371k535; 371k336; 371k372; 371k514; 371k544;

N.R.S. 360.291

371k895(3); 371k902; 371k905(1); 371k1311; 371k1320; 371k1337.
C.J.S. Social Security and Public Welfare §§ 202 to 205, 207 to 208.
C.J.S. Taxation §§ 376, 380 to 381, 383, 395, 401, 422, 596, 631, 640 to 641, 1077, 1087 to 1088, 1196, 1214 to 1219, 1223, 1246, 1250 to 1251.

N. R. S. 360.291, NV ST 360.291

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006).

END OF DOCUMENT

Westlaw.

West's Nevada Revised Statutes Annotated Currentness
Title 32. Revenue and Taxation
➡ Chapter 368A. Tax on Live Entertainment
General Provisions

368A.010. Definitions

As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 368A.020 to 368A.115, inclusive, have the meanings ascribed to them in those sections.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.020. "Admission charge" defined

"Admission charge" means the total amount, expressed in terms of money, of consideration paid for the right or privilege to have access to a facility where live entertainment is provided. The term includes, without limitation, an entertainment fee, a cover charge, a table reservation fee, or a required minimum purchase of food, refreshments or merchandise.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.030. "Board" defined

"Board" means the State Gaming Control Board.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.040. "Business" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.050. "Business entity" defined

1. "Business entity" includes:

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

(b) A natural person engaging in a business if he is deemed to be a business entity pursuant to NRS 368A.120.

2. The term does not include a governmental entity.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.053. "Casual assemblage" defined

"Casual assemblage" includes, without limitation:

1. Participants in conventions, business meetings or tournaments governed by chapter 463 of NRS, and their guests; or

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

368A.055. "Commission" defined

"Commission" means the Nevada Gaming Commission.

368A.060. "Facility" defined

1. "Facility" means:

(a) Any area or premises where live entertainment is provided and for which consideration is collected for the right or privilege of entering that area or those premises if the live entertainment is provided at:

(1) An establishment that is not a licensed gaming establishment; or

(2) A licensed gaming establishment that is licensed for less than 51 slot machines, less than [six] 6 games, or any combination of slot machines and games within those respective limits.

(b) Any area or premises where live entertainment is provided if the live entertainment is provided at any other licensed gaming establishment.

2. "Facility" encompasses, if live entertainment is provided at a licensed gaming establishment that is licensed for:

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.070. "Game" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.080. "Licensed gaming establishment" defined

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.090. "Live entertainment" defined

1. "Live entertainment" means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present.

2. The term:

(a) Includes, without limitation, any one or more of the following activities:

(1) Music or vocals provided by one or more professional or amateur musicians or vocalists;

(2) Dancing performed by one or more professional or amateur dancers or performers;

(3) Acting or drama provided by one or more professional or amateur actors or players;

(4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;

(5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (7), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) Excludes, without limitation, any one or more of the following activities:

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

(2) Occasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than 6 games, or any combination of slot machines and games within those respective limits, which advance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons;

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research; and

(8) An occasional activity, including, without limitation, dancing, that:

(I) Does not constitute a performance;

(II) Is not advertised as entertainment to the public;

(III) Primarily serves to provide ambience to the facility; and

(IV) Is conducted by an employee whose primary job function is not that of an entertainer.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.097. "Shopping mall" defined

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

368A.100. "Slot machine" defined

"Slot machine" has the meaning ascribed to it in NRS 463.0191.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.110. "Taxpayer" defined

"Taxpayer" means:

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

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

3. If live entertainment that is taxable under this chapter is provided at a publicly owned facility or on public land, the person who collects the taxable receipts.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.115. "Trade show" defined

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

368A.120. Natural persons who are deemed to be business entities

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

[FN1] See Historical and Statutory Notes below for effective date information.

Administration

368A.130. Repealed

368A.140. Duties of Board, Commission and Department; applicability of chapters 360 and 463 of NRS

1. The Board shall collect the tax imposed by this chapter from taxpayers who are licensed gaming establishments. The Commission shall adopt such regulations as are necessary to carry out the provisions of this subsection. The regulations must be adopted in accordance with the provisions of chapter 233B of NRS and must be codified in the Nevada Administrative Code.

2. The Department shall:

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

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

3. For the purposes of:

(a) Subsection 1, the provisions of chapter 463 of NRS relating to the payment, collection, administration and enforcement of gaming license fees and taxes, including, without limitation, any provisions relating to the imposition of penalties and interest, shall be deemed to apply to the payment, collection, administration and enforcement of the taxes imposed by this chapter to the extent that those provisions do not conflict with the provisions of this chapter.

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

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

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

(b) Upon request, assist the other agencies in the collection of that tax.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.150. Establishment of amount of tax liability when Board or Department determines that taxpayer is acting with intent to defraud State or to evade payment of tax

1. If:

(a) The Board determines that a taxpayer who is a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Board shall establish an amount upon which the tax imposed by this chapter must be based.

(b) The Department determines that a taxpayer who is not a licensed gaming establishment is taking any action with intent to defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter, the Department shall establish an amount upon which the tax imposed by this chapter must be based.

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.160. Maintenance and availability of records for determining liability of taxpayer; liability to taxpayer of lessee, assignee or transferee of certain premises; penalty

1. Each person responsible for maintaining the records of a taxpayer shall:

(a) Keep such records as may be necessary to determine the amount of the liability of the taxpayer pursuant to the provisions of this chapter;

(b) Preserve those records for:

(1) At least 5 years if the taxpayer is a licensed gaming establishment or until any litigation or prosecution pursuant to this chapter is finally determined, whichever is longer; or

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

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

2. The Commission and the Department may adopt regulations pursuant to NRS 368A.140 specifying the types of records which must be kept to determine the amount of the liability of a taxpayer for the tax imposed by this chapter.

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.170. Examination of records by Board or Department; payment of expenses of Board or Department for examination of records outside State

1. To verify the accuracy of any report filed or, if no report is filed by a taxpayer, to determine the amount of tax required to be paid:

(a) The Board, or any person authorized in writing by the Board, may examine the books, papers and records of any licensed gaming establishment that may be liable for the tax imposed by this chapter.

(b) The Department, or any person authorized in writing by the Department, may examine the books, papers and records of any other person who may be liable for the tax imposed by this chapter.

2. Any person who may be liable for the tax imposed by this chapter and who keeps outside of this state any books, papers and records relating thereto shall pay to the Board or the Department an amount equal to the allowance provided for state officers and employees generally while traveling outside of the State for each day or fraction thereof during which an employee of the Board or the Department is engaged in examining those documents, plus any other actual expenses incurred by the employee while he is absent from his regular place of employment to examine those documents.

[FN1] See Historical and Statutory Notes below for effective date information.

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

1. Except as otherwise provided in this section and NRS 360.250, the records and files of the Board and the Department concerning the administration of this chapter are confidential and privileged. The Board, the Department and any employee of the Board or the Department engaged in the administration of this chapter or charged with the custody of any such records or files shall not disclose any information obtained from the records or files of the Board or the Department or from any examination, investigation or hearing authorized by the provisions of this chapter. The Board, the Department and any employee of the Board or the Department may not be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceeding.

2. The records and files of the Board and the Department concerning the administration of this chapter are not confidential and privileged in the following cases:

(a) Testimony by a member or employee of the Board or the Department and production of records, files and information on behalf of the Board or the Department or a taxpayer in any action or proceeding pursuant to the provisions of this chapter, if that testimony or the records, files or information, or the facts shown thereby, are directly involved in the action or proceeding.

(b) Delivery to a taxpayer or his authorized representative of a copy of any report or other document filed by the taxpayer pursuant to this chapter.

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

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

(e) Disclosure in confidence to the Governor or his agent in the exercise of the Governor's general supervisory powers, or to any person authorized to audit the accounts of the Board or the Department in pursuance of an audit, or to the Attorney General or other legal representative of the State in connection with an action or proceeding pursuant to this chapter, or to any agency of this or any other state charged with the administration or enforcement of laws relating to taxation.

[FN1] See Historical and Statutory Notes below for effective date information.

Imposition and Collection

368A.200. Imposition and amount of tax; liability and reimbursement for payment; ticket for live entertainment must indicate whether tax is included in price of ticket; exemptions from tax

1. Except as otherwise provided in this section, there is hereby imposed an excise tax on admission to any facility in this State where live entertainment is provided. If the live entertainment is provided at a facility with a maximum occupancy of:

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

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

2. Amounts paid for:

(a) Admission charges collected and retained by a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or by a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS, are not taxable pursuant to this section.

(b) Gratuities directly or indirectly remitted to persons employed at a facility where live entertainment is provided or for service charges, including those imposed in connection with the use of credit cards or debit cards, which are collected and retained by persons other than the taxpayer are not taxable pursuant to this section.

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

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

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

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

(b) Live entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c), or a nonprofit corporation organized or existing under the provisions of chapter 82 of NRS.

(c) Any boxing contest or exhibition governed by the provisions of chapter 467 of NRS.

(d) Live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

(e) Live entertainment that is provided at a licensed gaming establishment that is licensed for less than 51 slot machines, less than 15 games or any combination thereof that does not exceed those limits, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons.

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

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

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

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

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

(k) Food and product demonstrations provided at a shopping mall, a craft show or an establishment that sells grocery products, housewares, hardware or other supplies for the home.

(l) Live entertainment that is incidental to an amusement ride, a motion simulator or a similar digital, electronic,

mechanical or electromechanical attraction. For the purposes of this paragraph, live entertainment shall be deemed to be incidental to an amusement ride, a motion simulator or a similar digital, electronic, mechanical or electromechanical attraction if the live entertainment is:

(1) Not the predominant element of the attraction; and

(2) Not the primary purpose for which the public rides, attends or otherwise participates in the attraction.

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

(n) An outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.

(o) Beginning July 1, 2007, race events scheduled at a race track in this State as a part of the National Association for Stock Car Auto Racing Nextel Cup Series, or its successor racing series, and all races associated therewith.

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

6. The Commission may adopt regulations establishing a procedure whereby a taxpayer that is a licensed gaming establishment may request an exemption from the tax pursuant to paragraph (p) of subsection 5. The regulations must require the taxpayer to seek an administrative ruling from the Chairman of the Board, provide a procedure for appealing that ruling to the Commission and further describe the forms of incidental or ambient entertainment exempted pursuant to that paragraph.

7. As used in this section, "maximum occupancy" means, in the following order of priority:

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.210. Repealed

368A.220. Filing of reports and payment of tax; deposit of amounts received in State General Fund

1. Except as otherwise provided in this section:

(a) Each taxpayer who is a licensed gaming establishment shall file with the Board, on or before the 24th day of each month, a report showing the amount of all taxable receipts for the preceding month or the month in which the taxable events occurred. The report must be in a form prescribed by the Board.

(b) All other taxpayers shall file with the Department, on or before the last day of each month, a report showing the

amount of all taxable receipts for the preceding month. The report must be in a form prescribed by the Department.

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

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

4. The Board and the Department shall deposit all taxes, interest and penalties it receives pursuant to this chapter in the State Treasury for credit to the State General Fund.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.230. Extension of time for payment; payment of interest during period of extension

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.240. Credit for amount of tax paid on account of certain charges taxpayer is unable to collect; violations

1. If a taxpayer:

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

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

he is entitled to receive a credit for the amount of tax paid on account of that uncollected amount. The credit may be used against the amount of tax that the taxpayer is subsequently required to pay pursuant to this chapter.

2. If the Internal Revenue Service disallows a deduction described in paragraph (b) of subsection 1 and the taxpayer claimed a credit on a return for a previous reporting period pursuant to subsection 1, the taxpayer shall include the amount of that credit in the amount of taxes reported pursuant to this chapter in the first return filed with the Board or the Department after the deduction is disallowed.

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

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

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

in the first return filed with the Board or the Department after that collection.

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

(a) For the first return of any taxpayer that contains one or more violations, issue a letter of warning to the taxpayer which provides an explanation of the violation or violations contained in the return.Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

Overpayments and Refunds

368A.250. Certification of excess amount collected; credit and refund

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.260. Limitations on claims for refund or credit; form and contents of claim; failure to file claim constitutes waiver; service of notice of rejection of claim

1. Except as otherwise provided in NRS 360.235 and 360.395:

(a) No refund may be allowed unless a claim for it is filed with:

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

(2) The Department, if the taxpayer is not a licensed gaming establishment.

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

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

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.270. Interest on overpayments; disallowance of interest

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

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

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

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

3. If the Board or the Department determines that any overpayment has been made intentionally or by reason of carelessness, the Board or the Department shall not allow any interest on the overpayment.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.280. Injunction or other process to prevent collection of tax prohibited; filing of claim is condition precedent to maintaining action for refund

1. No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of the State to prevent or enjoin the collection under this chapter of the tax imposed by this chapter or any amount of tax, penalty or interest required to be collected.

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.290. Action for refund: Period for commencement; venue; waiver

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

(a) The Commission, the claimant may bring an action against the Board on the grounds set forth in the claim.

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

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.300. Rights of claimant upon failure of Board or Department to mail notice of action on claim; allocation of judgment for claimant

1. If the Board fails to mail notice of action on a claim within 6 months after the claim is filed, the claimant may consider the claim disallowed and file an appeal with the Commission within 30 days after the last day of the 6-month period.

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

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

(a) The Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(b) The Nevada Tax Commission rendered on appeal, the claimant may, within 90 days after the decision is rendered, bring an action against the Department on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment.

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

5. The balance of the judgment must be refunded to the plaintiff.

[FN1] See Historical and Statutory Notes below for effective date information.

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.320. Standing to recover

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.330. Action for recovery of erroneous refund: Jurisdiction; venue; prosecution

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

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

3. The Attorney General shall prosecute the action, and the provisions of NRS, the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.340. Cancellation of illegal determination

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

Miscellaneous Provisions

368A.350. Prohibited acts; penalty

1. A person shall not:

(a) Make, cause to be made or permit to be made any false or fraudulent return or declaration or false statement in any report or declaration, with intent to defraud the State or to evade payment of the tax or any part of the tax imposed by this chapter.

(b) Make, cause to be made or permit to be made any false entry in books, records or accounts with intent to

defraud the State or to evade the payment of the tax or any part of the tax imposed by this chapter.

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

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

[FN1] See Historical and Statutory Notes below for effective date information.

368A.360. Revocation of gaming license for failure to report, pay or truthfully account for tax

Any licensed gaming establishment liable for the payment of the tax imposed by NRS 368A.200 who willfully fails to report, pay or truthfully account for the tax is subject to the revocation of his gaming license by the Commission.

[FN1] See Historical and Statutory Notes below for effective date information.

368A.370. Remedies of State are cumulative

The remedies of the State provided for in this chapter are cumulative, and no action taken by the Commission, the Board, the Department or the Attorney General constitutes an election by the State to pursue any remedy to the exclusion of any other remedy for which provision is made in this chapter.

[FN1] See Historical and Statutory Notes below for effective date information.

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006).
END OF DOCUMENT

MINUTES OF THE
SENATE COMMITTEE ON TAXATION

Seventy-second Session
May 26, 2003

The Senate Committee on Taxation was called to order by Chairman Mike McGinness, at 5:32 p.m., on Monday, May 26, 2003, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mike McGinness, Chairman
Senator Dean A. Rhoads, Vice Chairman
Senator Randolph J. Townsend
Senator Ann O'Connell
Senator Sandra J. Tiffany
Senator Joseph Neal
Senator Bob Coffin

STAFF MEMBERS PRESENT:

Rick Combs, Fiscal Analyst
Ted Zuend, Deputy Fiscal Analyst
Mavis Scarff, Committee Manager
Gale Maynard, Committee Secretary

OTHERS PRESENT:

Birgit K. Baker, Administrator, Employment Security Division, Department of Employment, Training and Rehabilitation
Charles Chinnock, Executive Director, Department of Taxation
Carole A. Vilardo, Lobbyist, Nevada Taxpayers Association
Teresa Moiola, Assistant State Controller, Office of the State Controller

CHAIRMAN MCGINNESS:
We will open the meeting and consider Assembly amendments to four Senate bills.

SENATE BILL 370 (3rd Reprint): Reduces rate of basic governmental services tax and authorizes counties to impose additional tax on transfer of real property. (BDR 32-39)

SENATE BILL 470 (1st Reprint): Makes various changes concerning imposition, distribution and use of certain taxes on aviation fuel and fuel for jet or turbine-powered aircraft. (BDR 32-628)

SENATE BILL 475 (1st Reprint): Revises manner of assessing value of certain electric light and power companies. (BDR 32-1242)

SENATE BILL 489 (2nd Reprint): Makes various changes to provisions governing exemption from local school support tax for systems that use renewable energy to generate electricity. (BDR 32-

SENATOR COFFIN:
The reduction seems to be associated with the liquor tax increase, and I wonder if the two proposals are coupled.

SENATOR TOWNSEND:
These are just options I have put on the table. There is nothing coupled. I am looking at individual policies. You should look at each proposal as not being tied to one another.

SENATOR TOWNSEND MOVED TO APPROVE THE PROPOSAL TO REDUCE THE LIQUOR TAX ALLOWANCE TO ZERO.

SENATOR NEAL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR RHOADS VOTED NO.)

*****

CHAIRMAN MCGINNESS:
The next proposal is to reduce the liquor tax increase from 100 percent to 50 percent. The committee had doubled the tax on liquor, and Senator Townsend is proposing a decrease to 50 percent. It would be a loss of $10.1 million.

SENATOR TOWNSEND MOVED TO APPROVE THE PROPOSAL TO REDUCE THE LIQUOR TAX INCREASE FROM 100 PERCENT TO 50 PERCENT.

SENATOR COFFIN SECONDED THE MOTION.

THE MOTION FAILED. (SENATORS MCGINNESS, TIFFANY, NEAL, AND O'CONNELL VOTED NO.)

*****

RICK COMBS, FISCAL ANALYST:
The next proposal before the committee is the live entertainment tax. We took the number Senator Townsend generated when he first presented the proposal, and backed into the rate needed in order to generate $18.1 million the first year and $23.1 million the second year. The reason the number is not higher is because revenue currently being received by the casino entertainment tax must be backed out.

SENATOR O'CONNELL:
May I have clarification of what is in the live entertainment tax proposal?

SENATOR TOWNSEND:
We looked at the existing casino entertainment tax to see what was included. We found it was easier to describe what had been excluded, including drinks, food, and merchandise inside a defined arena. The result is to get rid of the exemptions, broaden the definition to all live entertainment, no matter where it takes place in the state, and to exclude movies and video rentals.

SENATOR O'CONNELL:
Will this capture tax on the gentlemen's clubs?

SENATOR TOWNSEND:

Yes, if an admission is charged. Then, the easy out might be to not charge admission. Speaker Perkins attempted to address this by suggesting the tax be applied to any liquor, food, or merchandise inside a club not charging admission and providing live entertainment. That idea has some appeal because it keeps people from ducking a tax we are trying to make broad-based.

SENATOR O'CONNELL:
I am asking the question because it seems like such a low amount.

MR. COMBS:
The Governor's proposal was to leave the casino entertainment tax as is at 10 percent. When the admissions and amusement tax was proposed, which is broader than a live entertainment tax, there was no offset to the amount of revenue brought in for the reduction in the casino entertainment tax collections.

CHAIRMAN MCGINNESS:
By using 8 percent you are lowering the casino entertainment tax by 2 percent, so there is a loss of revenue.

SENATOR O'CONNELL:
What is the current amount of tax the 10 percent is generating?

TED ZUEND, DEPUTY FISCAL ANALYST:
I believe the amount is a little over $70 million a year.

SENATOR O'CONNELL MOVED TO INDEFINITELY POSTPONE THE LIVE ENTERTAINMENT TAX PROPOSAL.

SENATOR NEAL:
Would the live entertainment tax be a substitute for the other tax we had relating to entertainment?

CHAIRMAN MCGINNESS:
I believe you are referring to an amusement tax to capture activities such as bowling and golf. This proposal would capture venues where there is live entertainment.

SENATOR NEAL:
I saw a televised show emanating from Las Vegas. How might this tax relate to that type of entertainment?

SENATOR TOWNSEND:
If the show occurs anywhere in the state, on or off a gaming property, and admission is charged, a tax would be applied to the admission. If there is no admission charged and it is by invitation only, there would be no tax.

SENATOR NEAL:
The adjective used to define entertainment in the work document (Exhibit C) is "live." How many entities that are not live would not be taxed?

MR. COMBS:
Currently there is no admission tax proposed on activities outside of a casino. Inside there are a number of exemptions not subject to the tax. An electronic or recorded music show would not be subject to the tax.

SENATOR NEAL:
Does a show with a mix of recorded music and a live singer qualify as live entertainment? In addition, would the tax be applied if a show originates outside the casino and is piped in through electronic means?

MR. COMBS:
It is my understanding that once there is a live entertainer in the performance, the entertainment tax is implemented. A show which originates outside the casino would not be subject to the casino entertainment tax.

SENATOR RHOADS:
As I understand it, the $18.1 million is in addition to the current 10 percent tax. Is that correct?

MR. COMBS:
Yes, that is the net of the proposals. You must back out the current estimated casino entertainment tax for the next biennium, and the net of that reduction is a gain of $18.1 million. This is the additional amount of revenue that will be received.

SENATOR O'CONNELL MOVED TO RESCIND HER PREVIOUS MOTION AND TO ADOPT THE PROPOSED LIVE ENTERTAINMENT TAX OF 8 PERCENT.

SENATOR RHOADS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIRMAN MCGINNESS:
The next proposal is the business surcharge.

MR. COMBS:
If the Employment Security Division (ESD) collects the proposed tax of 1 percent of taxable unemployment insurance wages, their system is already in place. If ESD collects the proposed tax, it would begin on October 1, 2003. If the committee prefers the Department of Taxation collect the proposed tax, it would begin January 1, 2004. It is difficult for the Department of Taxation to tell you when they can begin collecting a tax, because they need to have all of new taxes as a group to consider before they tell us when they can get those taxes onboard.

NEVADA 2003 SESSION LAWS
20TH SPECIAL SESSION

Additions are indicated by [redacted]; deletions by ~~Text~~. Changes in tables are made but not highlighted.

Ch. 5

S.B. No. 8

REVENUE AND TAXATION--STATE FINANCIAL ADMINISTRATION--EDUCATION

AN ACT relating to state financial administration; providing for the imposition and administration of certain excise taxes on financial institutions; providing for the imposition and administration of an excise tax on employers based on wages paid to their employees; replacing the casino entertainment tax with a tax on all live entertainment; eliminating the tax imposed on the privilege of conducting business in this state; revising the taxes on liquor and cigarettes; imposing a state tax on the transfer of real property and revising the provisions governing the existing tax; revising the fees charged for certain gaming licenses; establishing the Legislative Committee on Taxation, Public Revenue and Tax Policy; requiring the Legislative Auditor to conduct performance audits of certain school districts; requiring the Department of Education to prescribe a minimum amount of money that each school district must expend each year for textbooks, instructional supplies and instructional hardware; revising provisions governing the purchase of retirement credit for certain educational personnel; apportioning the State Distributive School Account in the State General Fund for the 2003-2005 biennium; making appropriations to the State Distributive School Account for purposes relating to class-size reduction; making various other changes relating to state financial administration; authorizing certain expenditures; making an additional appropriation; providing penalties; and providing other matters properly relating thereto.

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

Section 1.Title 32 of NRS is hereby amended by adding thereto a new chapter to consist of the provisions set forth as sections 2 to 24, inclusive, of this act.

Sec. 2.

[redacted]

Sec. 3.

[redacted]

[redacted]

Sec. 64. Title 32 of NRS is hereby amended by adding thereto a new chapter to consist of the provisions set forth as sections 65 to 100,inclusive, of this act.

Sec. 65. [redacted]

Sec. 66. [redacted]

Sec. 67. [redacted]

Sec. 68. [redacted]

Sec. 69. [redacted]

[redacted]

Sec. 70.

[redacted]

Sec. 71.

[redacted]

Sec. 72.

[redacted]

Sec. 73.

[redacted]

Sec. 74.

[redacted]

Sec. 75.

[redacted]

Sec. 76.

[redacted]

Sec. 77.

[redacted]

Sec. 78

[redacted]

[redacted]

Sec. 79.

[redacted]

Sec. 80.

[redacted]

[redacted]

Sec. 81.

[redacted]

NV LEGIS 5 (2003)
2003 Nevada Laws 20th. Sp. Sess. Ch. 5 (S.B. 8)
(Publication page references are not available for this document.)

[redacted]

Sec. 82.

[redacted]

Sec. 83.

[redacted]

[redacted]

Sec. 84.

[redacted]

[redacted]

[redacted]

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Sec. 85.

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Sec. 86.

[redacted]

Sec. 87.

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[redacted] 5-15 indicates page 5, line 15).

[redacted]

[redacted]

[redacted]

Sec. 88.

[redacted]

Sec. 89.

[redacted]

Sec. 90.

[redacted]

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Sec. 91.

[redacted]

Sec. 92.

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Sec. 93.

[redacted]

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Sec. 94.

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Sec. 95.

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Sec. 96.

[redacted]

Sec. 97.

[redacted]

Sec. 98.

[redacted]

Sec. 99.

[redacted]

Sec. 100.

[redacted]

[redacted]

Sec. 101. Chapter 360 of NRS is hereby amended by adding thereto the provisions set forth as sections 102 to 108, inclusive, of this act.

Sec. 102.

[redacted]

Sec. 103.

[redacted]

Sec. 104.

[redacted]

ensuing calendar quarter, from a licensee whose operation is continuing.

(b) In advance from a licensee who begins operation or puts additional slot machines into play during a calendar quarter.

3. Except as otherwise provided in NRS 463.386, no proration of the fee prescribed in subsection 1 may be allowed for any reason.

4. The operator of the location where slot machines are situated shall pay the fee prescribed in subsection 1 upon the total number of slot machines situated in that location, whether or not the machines are owned by one or more licensee-owners.

Sec. 171. NRS 463.401 is hereby amended to read as follows:

<< NV ST 463.401 >>

1. In addition to any other license fees and taxes imposed by this chapter, a casino entertainment tax equivalent to 10 percent of all amounts paid for admission, food, refreshments and merchandise is hereby levied, except as [redacted] provided in subsection 2, upon each licensed gaming establishment in this state where ~~music and dancing privileges or any other~~ [redacted] entertainment is provided to the patrons ~~in a cabaret, nightclub, cocktail lounge or casino showroom in connection with the serving or selling of food or refreshments or the selling of any merchandise.~~ [redacted] Amounts paid for gratuities directly or indirectly remitted to employees of the licensee or for service charges, including those imposed in connection with use of credit cards or debit cards, that are collected and retained by persons other than the licensee are not taxable pursuant to this section.

2. A licensed gaming establishment is not subject to tax pursuant to this section if:

(a) The establishment is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits ~~;~~

~~(b) The entertainment is presented in a facility that would not have been subject to taxation pursuant to 26 U.S.C. § 4231(6) as that provision existed in 1965;~~

~~(c) The entertainment is presented in a facility that would have been subject to taxation pursuant to 26 U.S.C. § 4231(1), (2), (3), (4) or (5) as those provisions existed in 1965; or~~

~~(d) In other cases, if:~~

~~(1) No distilled spirits, wine or beer is served or permitted to be consumed;~~

~~(2) Only light refreshments are served;~~

~~(3) Where space is provided for dancing, no charge is made for dancing; and~~

~~(4) Where music is provided or permitted, the music is provided without any charge to the owner, lessee or operator of the establishment or to any concessionaire.~~ [redacted]

[redacted]

3. The tax imposed by this section does not apply to ~~merchandise~~ [redacted]

[redacted] sold outside the facility in which the [redacted] entertainment is presented, unless the purchase of the merchandise entitles the purchaser to admission to the entertainment.

[redacted]

4. The tax imposed by this section must be paid by the licensee of the establishment.

[redacted]

Sec. 172. NRS 463.4055 is hereby amended to read as follows:

<< NV ST 463.4055 >>

Any ticket for admission to ~~a cabaret, nightclub, cocktail lounge or casino showroom~~ [redacted] must state whether the casino entertainment tax is included in the price of the ticket. If the ticket does not include such a statement, the licensed gaming establishment shall pay the casino entertainment tax on the face amount of the ticket.

Sec. 173. NRS 463.408 is hereby amended to read as follows:

Section 1. ~~1. There is hereby appropriated from the State General Fund to the Fund to Stabilize the Operation of State Government created by NRS 353.288 the sum of $30,000,000.~~

~~2.~~ Notwithstanding the provisions of NRS 353.235:

~~(a)~~ Upon receipt of the projections and estimates of the Economic Forum required by paragraph (d) of subsection 1 of NRS 353.228 to be reported on or before December 1, 2004, the Interim Finance Committee shall project the ending balance of the State General Fund for Fiscal Year 2004-2005, using all relevant information known to it.

~~(b)~~ Except as otherwise provided in ~~paragraph (c),~~ there is hereby contingently appropriated from the State General Fund to the Fund to Stabilize the Operation of State Government created by NRS 353.288 the amount, if any, by which the projection required by ~~paragraph (a)~~ exceeds the amount of the ending balance of the State General Fund for Fiscal Year 2004-2005 as estimated by the ~~2003 Legislature.~~

~~(c)~~

The amount of any appropriation pursuant to ~~paragraph (b)~~ must not exceed ~~$20,000,000.~~

<< Repealed: NV ST 364A.160 >>

<< NV ST 375.025 >>

<< NV ST 375.075 >>

<< NV ST 463.4001, 463.4002, 463.4004, 463.4006, 463.4008, 463.4009, 463.4015 >>

<< NV ST 364A.010, 364A.020, 364A.030, 364A.040, 364A.050, 364A.060, 364A.070, 364A.080, 364A.090, 364A.100, 364A.110, 364A.120, 364A.130, 364A.135, 364A.140, 364A.150, 364A.151, 364A.152, 364A.1525, 364A.170, 364A.175, 364A.180, 364A.190, 364A.230, 364A.240, 364A.250, 364A.260, 364A.270, 364A.280, 364A.290, 364A.300, 364A.310, 364A.320, 364A.330, 364A.340, 364A.350 >>

Sec. 186.

1. NRS 364A.160, 375.025 and 375.075 are hereby repealed.

2. NRS 463.4001, 463.4002, 463.4004, 463.4006, 463.4008, 463.4009 and 463.4015 are hereby repealed.

3. NRS 364A.010, 364A.020, 364A.030, 364A.040, 364A.050, 364A.060, 364A.070, 364A.080, 364A.090, 364A.100, 364A.110, 364A.120, 364A.130, 364A.135, 364A.140, 364A.150, 364A.151, 364A.152, 364A.1525, 364A.170, 364A.175, 364A.180, 364A.190, 364A.230, 364A.240, 364A.250, 364A.260, 364A.270, 364A.280, 364A.290, 364A.300, 364A.310, 364A.320, 364A.330, 364A.340 and 364A.350 are hereby repealed.

<< Repealed: NV ST 463.401 >>

4. NRS 463.401, 463.402, 463.403, 463.404, 463.4045, 463.405, 463.4055 and 463.406 are hereby repealed.

Sec. 187.

1. Notwithstanding the provisions of this act and any other provision of law to the contrary, a public utility or local government franchisee may increase its previously approved rates by an amount which is reasonably estimated to produce an amount of revenue equal to the amount of any tax liability incurred by the public utility or local government franchisee before January 1, 2005, as a result of the provisions of this act.

2. For the purposes of this section:

(a) "Local government franchisee" means a person to whom a local government has granted a franchise for the provision of services who is required to obtain the approval of a governmental entity to increase any of the rates it charges for those services.

(b) "Public utility" means a public utility that is required to obtain the approval of a governmental entity to increase any of the rates it charges for a utility service.

<< Note: NV ST 353.288 >>

Sec. 188.

Notwithstanding the provisions of NRS 353.288:

1. After the close of the 2003-2004 Fiscal Year and after the close of the 2004-2005 Fiscal Year, the Interim Finance Committee shall determine the amount, if any, by which the total revenue from all sources to the State General Fund, excluding reversions to the State General Fund, exceeds:

(a) One hundred seven percent of the total revenue from all sources to the State General Fund as projected by the Nevada Legislature for the applicable fiscal year; and

(b) The total amount of all applicable contingent appropriations enacted for the 2003-2004 Fiscal Year and the 2004-2005 Fiscal Year by the Nevada Legislature for which the conditions for the contingent appropriations were satisfied.

2. Any excess amount of revenue determined pursuant to subsection 1 must be used as follows:

(a) An amount estimated by the Interim Finance Committee to pay for expenditures that will occur in the next biennium for which the corresponding expenditures in the current biennium were paid or are to be paid from a source other than the State General Fund, but for which the alternative source of revenue likely will not be available or will not be received during the biennium, must be used to replace previously used nonrecurring revenue. This amount must be accounted for separately in the State General Fund.

Sec. 191.

1. The provisions of subsection 3 of section 186 of this act do not:

(a) Affect any rights, duties or liability of any person relating to any taxes imposed pursuant to chapter 364A of NRS for any period ending before October 1, 2003.

(b) Apply to the administration, collection and enforcement of any taxes imposed pursuant to chapter 364A of NRS for any period ending before October 1, 2003.

2. The provisions of subsection 4 of section 186 of this act do not:

(a) Affect any rights, duties or liability of any person relating to any taxes imposed pursuant to NRS 463.401 before January 1, 2004.

(b) Apply to the administration, collection and enforcement of any taxes imposed pursuant to NRS 463.401 before January 1, 2004.

Sec. 192.

The Legislative Committee on Taxation, Public Revenue and Tax Policy established by the provisions of section 156 of this act shall:

1. Review and study:

(a) The impact, if any, that the imposition of the tax on live entertainment imposed pursuant to section 78 of this act has had on revenue received by the state and local governments from special events conducted in this state.

(b) Whether promoters of special events are contracting with entities in other states to hold the special events in those other states as a result of the imposition of the tax.

(c) The loss of revenue, if any, from special events resulting from the imposition of the tax.

(d) The feasibility and need for exempting such special events from the tax.

(e) Standards and procedures that may be adopted for determining whether special events should be exempt from the tax and the qualifications for such an exemption.

2. Submit a report of the results of its review and any recommendations for legislation to the 73rd Session of the Nevada Legislature.

Sec. 192.3.

The State Controller shall, on or before January 1, 2004, adopt such regulations as are necessary to carry out section 164.38 of this act.

Sec. 192.5.

ADOPTED REGULATION OF THE

NEVADA TAX COMMISSION

LCB File No. R212-03

Effective December 4, 2003

EXPLANATION – Matter in *italics* is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: §§ 1-18, NRS 360.090 and sections 77 and 83 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at pages 147 and 150, respectively (NRS 368A.130 and 368A.160, respectively).

Section 1. Chapter 368A of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 18, inclusive, of this regulation.

Sec. 2. ***As used in sections 2 to 18, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 3 to 10, inclusive, of this regulation have the meanings ascribed to them in those sections.***

Sec. 3. ***"Board" means the State Gaming Control Board.***

Sec. 4. ***"Commission" means the Nevada Tax Commission.***

Sec. 5. ***"Department" means the State Department of Taxation.***

Sec. 6. ***"Executive Director" means the Executive Director of the Department.***

Sec. 7. ***"Live entertainment status" means that condition which renders the admission to a facility or the selling of food, refreshments or merchandise subject to the tax imposed by chapter 368A of NRS.***

Sec. 8. ***"Nonprofit organization" means any organization described in paragraph (b) of subsection 5 of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada***

Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.200).

Sec. 9. *"Patron" means a person who gains access to a facility where live entertainment is provided and who neither solicits nor receives, from any source, any payment, reimbursement, remuneration or other form of consideration for providing live entertainment at the facility.*

Sec. 10. *"Taxpayer" means any person described in section 75 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.110).*

Sec. 11. *For the purposes of sections 65 to 100, inclusive, of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at pages 146 to 155, inclusive (NRS 368A.010 to 368A.350, inclusive), the Commission will interpret the term:*

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

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

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

4. "Live entertainment":

(a) To include, without limitation, any one or more of the following activities:

(1) Music or vocals provided by one or more professional or amateur musicians or vocalists;

(2) Dancing performed by one or more professional or amateur dancers or performers;

(3) Acting or drama provided by one or more professional or amateur actors or players;

(4) Acrobatics or stunts provided by one or more professional or amateur acrobats, performers or stunt persons;

(5) Animal stunts or performances induced by one or more animal handlers or trainers, except as otherwise provided in subparagraph (7) of paragraph (b);

(6) Athletic or sporting contests, events or exhibitions provided by one or more professional or amateur athletes or sportsmen;

(7) Comedy or magic provided by one or more professional or amateur comedians, magicians, illusionists, entertainers or performers;

(8) A show or production involving any combination of the activities described in subparagraphs (1) to (8), inclusive; and

(9) A performance involving one or more of the activities described in this paragraph by a disc jockey who presents recorded music. For the purposes of this subsection, a disc jockey shall not be deemed to have engaged in a performance involving one or more of the activities described in this paragraph if the disc jockey generally limits his interaction with patrons to introducing the recorded music, making announcements of general interest to patrons, and explaining, encouraging or directing participatory activities between patrons.

(b) To exclude, without limitation, any one or more of the following activities:

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

(2) Occasional performances by employees whose primary job function is that of preparing or serving food, refreshments or beverages to patrons, if such performances are not advertised as entertainment to the public;

(3) Performances by performers of any type if the performance occurs in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, as long as the performers stroll continuously throughout the facility;

(4) Performances in areas other than in nightclubs, lounges, restaurants or showrooms, if the performances occur in a licensed gaming establishment other than a licensed gaming establishment that is licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, which enhance the theme of the establishment or attract patrons to the areas of the performances, as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables;

(5) Television, radio, closed circuit or Internet broadcasts of live entertainment;

(6) Entertainment provided by a patron or patrons, including, without limitation, singing by patrons or dancing by or between patrons and

(7) Animal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research.

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

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

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

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

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

Sec. 12. *1. For the purposes of paragraph (b) of subsection 5 of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.200), live entertainment is provided by or entirely for the benefit of a nonprofit organization if the proceeds of the admission charges to the facility where the live entertainment is provided become the property of the nonprofit organization. The proceeds of the admission charges do not become the property of a person other than a nonprofit organization as long as the person retains not more of the proceeds than is necessary to cover the direct, supportable costs of hosting, promoting or sponsoring the event at which the live entertainment is provided.*

2. Subject to the provisions of subsection 1, a nonprofit organization providing live entertainment, or a person providing live entertainment entirely for the benefit of a nonprofit

organization, incurs no liability for the excise tax on entertainment if the nonprofit organization or person contracts for goods or services with a person other than a nonprofit organization, even if the proceeds from the sale of food, refreshments or merchandise do not become the property of the nonprofit organization.

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

4. Unless live entertainment is provided by or entirely for the benefit of a nonprofit organization, and except as otherwise provided in this chapter or sections 65 to 100 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at pages 146 to 155, inclusive (NRS 368A.010 to 368A.350, inclusive), the Department shall assess and compute the excise tax in accordance with section 15 of this regulation.

Sec. 13. *Any person who claims to be a nonprofit organization exempt from the provisions of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.200), or any person who claims to provide live entertainment entirely for the benefit of such a nonprofit organization, shall, upon the request of the Department:*

1. If the person does not claim to be an exempt religious organization, provide to the Department a documentation from the Internal Revenue Service deemed appropriate by the

Department indicating that the person has qualified as a tax-exempt organization pursuant to 26 U.S.C. § 501(c); or

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

Sec. 14. *1. Live entertainment status commences when any patron is required to pay an admission charge before he is allowed to enter a facility, regardless of when the live entertainment actually commences.*

2. Live entertainment status ceases at the later of:

(a) The conclusion of the live entertainment; or

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

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

Sec. 15. *1. Pursuant to the provisions of subsection 4 of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, at page 147 (NRS 368A.200), the Department shall apply the tax rate to the total admission*

charge less the sum of any tax imposed by the United States upon or with respect to an admission charge to live entertainment, whether imposed upon the taxpayer or the patron.

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

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

Sec. 16. *For the purposes of paragraph (c) of subsection 6 of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.200), if there is no governmental permit designating the maximum occupancy of a facility where live entertainment is provided, the Department shall compute the tax rate on the presumption that the actual seating capacity of the facility is at least 300 and less than 7,500. To rebut this presumption, the taxpayer must establish, to the reasonable satisfaction of the Department, that the actual seating capacity of the facility is less than 300 or 7,500 or more. In determining whether the taxpayer has successfully rebutted the presumption, the Department shall consider all evidence provided by the taxpayer, including, without limitation, evidence of actual attendance, the number of*

tickets sold or offered for sale, the square footage of the facility, the physical needs or requirements of the patrons in relation to the nature of the live entertainment provided and any other evidence tending to establish the actual seating capacity of the facility.

Sec. 17. *1. As used in this section, "over-collection" means any amount collected as a tax on live entertainment that is exempt from taxation pursuant to subsection 5 of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.200), or any amount in excess of the amount of the applicable tax as computed in accordance with subsections 1 to 4, inclusive, of section 78 of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at page 147 (NRS 368A.200).*

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

3. A taxpayer shall:

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

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

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

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

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

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

Sec. 18. *1. If a taxpayer intends to provide live entertainment at a facility that is not a licensed gaming establishment the taxpayer shall register with the Department to collect the tax. The taxpayer shall thereafter collect and remit the tax to the Department in accordance the provisions of this chapter and sections 65 to 100, inclusive, of Senate Bill No. 8 of the 20th Special Session of the Nevada Legislature, chapter 5, Statutes of Nevada 2003, 20th Special Session, at pages 146 to 155, inclusive (NRS 368A.010 to 368A.350, inclusive).*

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

NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R212-03

The Nevada Tax Commission adopted regulation assigned LCB File No. R212-03, which pertain to chapter 368A of the Nevada Administrative Code on NOVEMBER 25, 2003.

Notice date: 10/24/2003
Hearing date: 11/25/2003

Date of adoption by agency: 11/25/2003
Filing date: 12/4/2003

INFORMATIONAL STATEMENT

1. A description of how public comment was solicited, a summary of public response, and an explanation of how other interested persons may obtain a copy of the summary.

Notices of hearing for the adoption and amendment of the proposed permanent regulation were posted at the following locations: Department of Taxation, 1550 East College Parkway, Carson City, Nevada; Nevada State Library, 100 Stewart Street, Carson City, Nevada; The Legislative Building, Capitol Complex, Carson City, Nevada; each County Main Public Library; Department of Taxation, 4600 Kietzke Lane, Building O, Suite 263, Reno, Nevada; Department of Taxation, 555 East Washington Avenue, Las Vegas, Nevada.

A copy of the notice of hearing and the proposed permanent regulation were placed on file at the State Library, 100 Stewart Street, Carson City, Nevada, for inspection by members of the public during business hours. Additional copies of the notice and the proposed regulation were also made available and placed on file at the Department of Taxation, 1550 East College Parkway, Carson City, Nevada; Department of Taxation, 4600 Kietzke Lane, Building O, Suite 263, Reno, Nevada; Department of Taxation, 555 East Washington Avenue, Suite 1300, Las Vegas, Nevada; Department of Taxation, 850 Elm Street, No. 2, Elko, Nevada; and in all counties in which an office of the Department of Taxation is not maintained, at the main public library, for inspection and copying by members of the public during business hours.

The hearing was held on November 25, 2003 video conferenced between the Desert Research Institute, 2215 Raggio Parkway, Conference Room A, Reno, Nevada and the Desert Research Institute, 755 E. Flamingo Road, Room 182, Las Vegas, Nevada. It appears that due to the primarily procedural nature of the proposed permanent regulation, only affected or interested persons and businesses as set forth in #3 below responded to the proposed permanent regulation and testified at the hearing. A copy of the transcript of the hearing, for which a reasonable fee may be charged, may be obtained by calling the Nevada Department of Taxation at (775) 687-4896, or by writing to the Nevada Department of Taxation at 1550 East College Parkway, Suite 115, Carson City, Nevada, 89706.

The proposed permanent regulation was submitted to the Legislative Counsel Bureau, which completed its review and minor revisions on November 24, 2003. Thus, the proposed permanent regulation, for practical purposes, was discussed at four workshops and has been heard and considered at one public hearing of the Nevada Tax Commission.

2. **The number of persons who:**

(a) Attended the hearing: 50

(b) Testified at the hearing: 3

(c) Submitted to the Tax Commission written comments: Written comments were submitted to, or received by, the Department of Taxation or the Nevada Tax Commission from the Nevada Resort Association, both the Nevada Gaming Commission and Gaming Control Board, various affected business establishments, the Fiscal & Legal Division's of the Legislative Counsel Bureau and the Nevada Taxpayers Association.

3. A description of how comment was solicited from affected businesses, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary.

Comments were solicited from affected and interested businesses and persons by the notices set forth in #1 above, by direct mail to all county assessors, and by direct mail to the approximately 250 interested businesses and persons on the Department of Taxation's mailing list.

4. If the permanent regulation was adopted without changing any part of the proposed permanent regulation, a summary of the reasons for adopting the regulation without change.

The proposed permanent regulation was not changed since no concerns were raised by the public, affected or interested businesses or persons, the Department of Taxation, the Attorney General or Tax Commission members, and the Tax Commission believed no changes other than those made at the workshops were necessary.

5. The estimated economic effect of the adopted permanent regulation on the business which it is to regulate and on the public. These must be stated separately, and each case must include: (a) Both adverse and beneficial effects; and (b) Both immediate and long-term effects.

(a) Adverse and beneficial effects.

The proposed permanent regulation presents no foreseeable or anticipated adverse economic effects to businesses or the public.

(b) Immediate and long-term effects.

Same as #5(a) above.

6. The estimated cost to the agency for enforcement of the adopted permanent regulation.

The proposed permanent regulation presents no significant foreseeable or anticipated cost for enforcement. There may be some initial administrative costs for the Department, which are not quantifiable at this time.

7. A description of any regulations of other state or governmental agencies which the permanent regulation overlaps or duplicates and a statement explaining why the duplication or overlap is necessary. If the permanent regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.

The proposed permanent regulation is particular to the Department of Taxation practices and procedures and does not appear to overlap or duplicate regulations of other state or local governmental agencies.

8. If the permanent regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions.

There are no known federal regulations pertaining to the live entertainment tax procedure, which are the subject of the proposed permanent regulation.

9. If the permanent regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.

The proposed permanent regulation does not provide a new fee or increase an existing fee.

AB 554 - 2005

Introduced on: Mar 29, 2005

By Commerce and Labor

Makes various changes to provisions governing taxation. (BDR 32-1344)

DECLARED EXEMPT

Fiscal Notes View Fiscal Notes

Effect on Local Government: *May have Fiscal Impact.*
Effect on State: *Yes.*

Most Recent History Action: Approved by the Governor. Chapter 484.
(See full list below)

Past Hearings

Assembly Commerce and Labor	Mar-29-2005	Discussed as BDR
Assembly Commerce and Labor	Apr-13-2005	Amend, and rerefer
Assembly Ways and Means	May-20-2005	No Action
Assembly Ways and Means	Jun-02-2005	Amend, and do pass as amended
Assembly Ways and Means	Jun-03-2005	Rescind
Assembly Ways and Means	Jun-03-2005	Amend, and do pass as amended
Senate Finance	Jun-04-2005	Mentioned No Jurisdiction
Senate Taxation	Jun-05-2005	No Action
Senate Taxation	Jun-05-2005	Amend, and do pass as amended
Senate Taxation	Jun-05-2005	Amend

Votes

Assembly Final Passage	Jun-05	Yea 42,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0
Senate Final Passage	Jun-06	Yea 21,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0

Bill Text (PDF) **As Introduced** **1st Reprint** **2nd Reprint** **3rd Reprint** **As Enrolled**
Statutes of Nevada 2005, Chapter 484 **As Enrolled**
Amendments (PDF) **Amend. No.558** **Amend. No.1181** **Amend. No.1216**

Bill History

Mar 29, 2005	Read first time. Referred to Committee on Commerce and Labor. To printer.
Mar 30, 2005	From printer. To committee.
Apr 14, 2005	Notice of eligibility for exemption.
Apr 15, 2005	Notice of exemption.
Apr 22, 2005	From committee: Amend, and rerefer to Committee on Ways and Means. Placed on Second Reading File. Read second time. Amended. (Amend. No. 558.) Rereferred to Committee on Ways and Means. To printer.
Apr 25, 2005	From printer. To engrossment. Engrossed. First reprint. To committee.
Jun 03, 2005	From committee: Amend, and do pass as amended. Placed on General File. Read third time. Taken from General File. Placed on Chief Clerk's desk.
Jun 04, 2005	Taken from Chief Clerk's desk. Placed on General File.

	Read third time. Amended. (Amend. No. 1181.) To printer.
Jun 05, 2005	From printer. To re-engrossment. Re-engrossed. Second reprint. Read third time. Passed, as amended. Title approved, as amended. (Yeas: 42, Nays: None.) To Senate. In Senate. Read first time. Referred to Committee on Taxation. To committee.
Jun 06, 2005	From committee: Amend, and do pass as amended. Placed on Second Reading File. Read second time. Amended. (Amend. No. 1216.) To printer. From printer. To reengrossment. Reengrossed. Third reprint. Declared an emergency measure under the Constitution. Read third time. Passed, as amended. Title approved, as amended. (Yeas: 21, Nays: None.) To Assembly. In Assembly.
Jun 07, 2005	Senate Amendment No. 1216 concurred in. To enrollment.
Jun 15, 2005	Enrolled and delivered to Governor.
Jun 17, 2005	Approved by the Governor. Chapter 484.

Section 37 effective June 17, 2005. Section 22 of this act: (a) Effective June 17, 2005, for the purpose of adopting regulations and July 1, 2005, for all other purposes; and (b) Expires by limitation on December 21, 2005. Sections 1 to 12, inclusive, 15, 16, 20 and subsection 1 of section 36 of this act effective July 1, 2005. Sections 25 to 35, inclusive, and subsection 3 of section 36 of this act effective October 1, 2005. Sections 13 and 23 of this act effective on January 1, 2006. Sections 14, 17, 21 and 24 of this act effective January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is approved by the voters at the General Election on November 7, 2006. Sections 18, 19 and subsection 2 of section 36 of this act effective January 1, 2007, only if the proposal submitted pursuant to sections 28 to 35, inclusive, of this act is not approved by the voters at the General Election on November 7, 2006.

PREPARED BY
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU
Nonpartisan Staff of the Nevada State Legislature

BILL SUMMARY
73rd REGULAR SESSION
OF THE NEVADA STATE LEGISLATURE

ASSEMBLY BILL 554
(Enrolled)

Topic

Assembly Bill 554 relates to taxation.

Summary

Assembly Bill 554 revises various provisions governing taxation. First, the bill clarifies the definition of "employer" to include a person who supplies a product or service, and not a person who only consumes a service. The bill also clarifies the definition of "live entertainment," and adds several exemptions from the tax, including:

- A nonprofit organization that is registered by the Secretary of State;
- Live entertainment that is incidental to an amusement ride;
- Live entertainment that is provided to the public in an outdoor area;
- An outdoor concert; and
- The National Association for Stock Car Auto Racing Nextel Cup Series race events beginning July 1, 2007.

In addition, property that is worth $100 or less and acquired free of charge at a convention, trade show, or other public event is exempt from the use tax. The measure also revises the real estate transfer tax for transfers between family members by modifying the exemption to apply to persons within the first degree of lineal consanguinity or affinity.

The measure clarifies provisions governing the administration of the exemption from the Sales and Use Tax Act of 1955 for certain farm equipment and for the trade-in value of a vehicle.

This measure further provides for the submission to the voters of the question of whether the Sales and Use Tax Act of 1955 should be amended to exempt from taxes the gross receipts from the sale, storage, use, or other consumption of farm machinery and equipment. The bill

also proposes a ballot question on an exemption from the Sales and Use Tax Act of 1955 for the trade-in value of a vehicle. If the ballot question on the exemption fails, then the bill provides for the discontinuation of the local sales tax allowance on December 31, 2006.

Effective Date

The sections of the bill pertaining to farm equipment and the trade-in value of a vehicle are effective on October 1, 2005. The sections pertaining to the ballot question are effective on January 1, 2007, only if approved by the voters. All other sections of the bill are effective on July 1, 2005.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Third Session
April 13, 2005

The Committee on Commerce and Labor was called to order at 12:26 p.m., on Wednesday, April 13, 2005. Chairwoman Barbara Buckley presided in Room 4100 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairwoman
Mr. John Oceguera, Vice Chairman
Ms. Francis Allen
Mr. Bernie Anderson
Mr. Morse Arberry Jr.
Mr. Marcus Conklin
Mrs. Heidi S. Gansert
Ms. Chris Giunchigliani
Mr. Lynn Hettrick
Ms. Kathy McClain
Mr. David Parks
Mr. Richard Perkins
Mr. Bob Seale
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Sheila Leslie, Assembly District No. 27, Washoe County
Assemblyman John Marvel, Assembly District No. 32, Humboldt County, Lander County, and Washoe County

Assemblywoman Weber:
The certification does come through the national organizations, which would be the American Association of Micropigmentation or the Society for Permanent Cosmetics Professionals.

Chairwoman Buckley:
I am sensing that the Committee members really want to do something in this area, but just aren't sure if this is the right approach. I will pull it from the work session unless people feel like we are ready, and give you the opportunity to talk to Committee members individually about their concerns.

Assemblyman Hettrick:
What was just said interested me. I mentioned earlier that my wife had had a permanent cosmetic procedure done. Clark County has some requirements but I don't know what the other counties have. Clearly my wife is not residing in Clark County, so I don't know what the requirement was for the person that performed this procedure. I don't know how they are checked in any way to make sure they are up to code on health and sanitation. Tattooing, if done improperly, can cause serious infections that are very hard to stop. I think one of the things that might help us would be to find out how the various counties regulate this, to see that every county has something on its books to regulate it in any fashion. I will bet that there are counties in this state that have no regulation with regard to permanent cosmetics. Maybe this step is farther than we want to go, but maybe it is a step that needs to be done simply for the training and the hours until something else comes along and we could change it. I still believe something should be done.

Assemblywoman Weber:
That is a very interesting point, because in doing research, we found that some states will not allow tattooing within one inch of the eye. There is a possible dangerous outcome of using a tattooing needle around the eye.

Chairwoman Buckley:
We will give you until Friday; I think it is on life support.

As for the work session bills, I don't know where we are going to go with taxes this session in terms of eliminating some of them. I don't know what is going to happen on the live entertainment tax. I don't have a good sense of it. On one hand, it has caused a lot of problems. On the other hand, we are getting $6 million from strip clubs. I would hate to give that back to them. There are a lot of problems. I don't have any problems with A.B. 554 in exempting the Star Trek show. I don't have any problems tinkering with it. We might end up radically changing it altogether. We have a number of Senate bills on the issue

coming over. I am not sure, if we pass the brothel issue, if we end up eliminating it altogether or restructuring it to be clearer, or if it is even worth bringing it up for discussion.

[Chairwoman Buckley, continued.] We may want to go ahead and move A.B. 554 and make the corrections with regard to Section 1, the domestic service, bringing that down to the other chapters, adding the amendment offered by Scott Scherer, adding the convention amendment, but clarifying that its value is under $100 so that Taxation is satisfied, clarifying the language on the real estate transfer tax to be more similar to the S.B. language. We still then would have to address the bank location fee in the rural areas, which is something we could do now and maybe process A.B. 554.

Assemblyman Perkins:
A.B. 554 needs to continue to exist as a vehicle; it will certainly end up in Ways and Means anyway, no matter what the form of the bill is. Now, the danger there is that this Committee loses the policy discussion end of it. It could be in its current form, with or without recommendation, or it could be changed and it will receive an exemption as it gets re-referred to Ways and Means. It still needs to exist as a vehicle, because I think there is plenty of appetite on this Committee to make some changes, reductions, and fix the inequities that we have found thus far. In any event, the bill has to be put forward in some fashion.

Chairwoman Buckley:
The big change that we would consider concerns the rural bank issue. Does anyone have any suggestions for what the bill would look like if we did approve the bill and move it on to Ways and Means?

Assemblyman Perkins:
As I look at that bank issue, I am not so sure that concern is narrowly tailored to rural communities. You can have a community bank in an urban area as well. Certainly, with the population thresholds, we would not be able to accomplish that as the bill is currently written. It would be my preference for us to capture some relief for community banks as a whole.

Assemblyman Arberry:
Quite a few members of this Committee are also on Ways and Means, so they would bring that flavor. That would be helpful.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON WAYS AND MEANS

Seventy-Third Session
May 20, 2005

The Committee on Ways and Means was called to order at 7:30 a.m., on Friday, May 20, 2005. Chairman Morse Arberry Jr. presided in Room 3137 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Morse Arberry Jr., Chairman
Ms. Chris Giunchigliani, Vice Chairwoman
Mr. Mo Denis
Mrs. Heidi S. Gansert
Mr. Lynn Hettrick
Mr. Joseph M. Hogan
Mrs. Ellen Koivisto
Ms. Sheila Leslie
Mr. John Marvel
Ms. Kathy McClain
Mr. Richard Perkins
Mr. Bob Seale
Mrs. Debbie Smith
Ms. Valerie Weber

STAFF MEMBERS PRESENT:

Mark Stevens, Assembly Fiscal Analyst
Steve Abba, Principal Deputy Fiscal Analyst
Bob Atkinson, Senior Program Analyst
Larry Peri, Senior Program Analyst
Mindy Braun, Education Program Analyst
Mike Chapman, Program Analyst
Joyce Garrett, Program Analyst
Janet Johnson, Program Analyst
Susan Cherpeski, Committee Attaché
Carol Thomsen, Committee Attaché

Senate Bill 4: Makes various changes relating to Commission for Cultural Affairs. (BDR 18-398)

Scott Sisco, Interim Director, Department of Cultural Affairs, introduced Robert Ostrovsky, Chairman, Commission for Cultural Affairs, and Ronald James, State Historic Preservation Officer. Mr. Sisco provided Exhibit B and indicated that they were present to discuss S.B. 4.

Mr. Sisco explained that in 1993 the Commission for Cultural Affairs (CCA) grant program was authorized for the Commission for Cultural Affairs to issue approximately $2 million annually for the preservation and development of cultural resources throughout the state. The primary function of the CCA grant

group, were substantially better off in that situation because they did not have to pay local charges and fees they would otherwise be paying.

Mr. Seale disclosed that he had an interest in a financial institution, but the legislation would not affect him any differently than anyone else. He said he agreed with Mr. Marvel's comments.

Assemblywoman Gansert made a similar disclosure and agreed with Mr. Marvel.

Assemblywoman Giunchigliani indicated that she had proposed legislation earlier in the session regarding community banks and much of that bill had been folded into A.B. 554 to ensure that those smaller banks were not restricted based on what had been done in the previous session.

Mr. Marvel said he had been the Community Reinvestment Act (CRA) director for the old American Federal Bank, and the CRA mandated that the bank serve low-income people and first-time home buyers. When a tax was added and increased the cost of doing business, that source of funding for people who really needed the loans dried up. He asserted that it bothered him that so much money was being removed from the lending stream.

Mr. Uffelman pointed out that the CRA contributions of Nevada banks to the communities that they served were substantial and were required by federal law. He offered to provide the grand total as well as breakdowns as to what areas were served in terms of education. He commented that one bank had spent over $250,000 in Las Vegas for textbooks for the school. He emphasized that the sums were substantial.

Mr. Uffelman added that the $7,000 branch tax was basically a $3 million per year tax on banks. It was a $7,000 per year cost of entry to expand a bank and open a new branch and then employees were hired and the banks paid a 2 percent payroll tax. He said that in the overall picture, the $7,000 branch tax "[stuck] in the craw" because it was in addition to all the fees already paid to regulatory agencies.

Mrs. Gansert asked how many branches existed in the rural areas of the state. Mr. Uffelman said he would have to get that information, but it was in excess of 20 branches, but they were scattered throughout the state. Mrs. Gansert asked if some of the branches were excluded from the exemption because of the banking assets, even though the branches were in the rural areas. Mr. Uffelman said the branch fee exemption was based on the holding company's size.

Ms. Giunchigliani noted that there was another component in the bill separate from the bank fees and that was the live entertainment tax. There were some issues raised by groups, particularly a rural rodeo group that was told to pay the live entertainment tax when they held fund-raisers. There were other groups in similar situations, and the language on page 6 addressed those issues.

Mr. Marvel asked if there was any legislation to clean up the live entertainment tax. Ms. Giunchigliani said that A.B. 554 cleaned up the smaller pieces of the live entertainment tax.

Mr. Marvel interjected that more money was made under the former system. Ms. Giunchigliani said that $6 million had been raised on one portion of the tax, but the other portion needed to be clarified. A.B. 554 helped the smaller groups that had inadvertently been captured by previous legislation.

Assemblywoman McClain interjected that A.B. 554 also fixed the real property transfer tax issues.

Jim Nadeau, representing the Nevada Association of Realtors, addressed Section H in A.B. 554. Mr. Nadeau said that Section H related to the real property transfer tax. He said there was a question on page 7, line 22, with the insertion of the word "lineal" with consanguinity. Lineal would mean that it could be from parents to children, but would not allow for transfer from brother to sister. He requested clarification.

Ms. McClain said she had questioned that and LCB's Legal Division had informed her that there was not a problem.

Mr. Nadeau explained that lineal consanguinity meant there had to be a blood relation and the addition of "affinity" on line 23 allowed for a relationship through marriage. He said that under current law, if a person wished to transfer property to his son and daughter-in-law, they would be subject to fees; however, the bill would allow an individual to transfer property to his son, and then the son could transfer the property to his wife so that there could be joint ownership, otherwise there would be a transfer tax on the initial transfer. He emphasized that the problem was that the term "lineal consanguinity" meant an individual could not transfer property to a sibling.

Chairman Arberry indicated that the issue would be discussed with the LCB Legal Division to make sure the language was correct.

Mr. Nadeau added that he supported the language and that was an important element that had inadvertently been missed. He reiterated that there needed to be clarification regarding "lineal consanguinity," but he liked the addition of "affinity."

Alfredo Alonso, Lionel Sawyer and Collins, representing MGM Mirage and Paramount Parks, indicated that Exhibit D was the portion of the *Nevada Administrative Code* (NAC) that exempted certain items with respect to the live entertainment tax. Mr. Alonso noted that there was already an exemption in place for the rides at the Luxor and the Hilton, and the amendments in Exhibit D would include the exemptions from the NAC in the bill. He added that there should also be exemptions for the racetrack, which would make the live entertainment tax rules consistent. The racetrack had been the only entity to pay the tax, so there was no fiscal impact other than the racetrack issue.

Chairman Arberry asked who was proposing the amendment, and Mr. Alonso said it was proposed by the MGM, the Nevada Resort Association, and Paramount Parks. Chairman Arberry asked for clarification regarding the racetrack provision that Mr. Alonso had mentioned.

Tony Sanchez, Jones Vargas, representing the Las Vegas Motor Speedway, addressed Chairman Arberry's question. Mr. Sanchez explained that the amendment would remove the live entertainment tax with respect to athletic events. Currently, the Las Vegas Motor Speedway had one NASCAR race in March, which generated $140 million in direct impact to the local economy from gaming, hotel, car rentals, et cetera. The previous year, California and Arizona were each awarded a second NASCAR race, and the Las Vegas Motor Speedway felt that the continued imposition of the live entertainment tax was hampering its efforts to acquire a second race as well.

Scott Scherer, Hale Lane Peek Dennison and Howard, representing Paramount Parks, addressed the Committee. Mr. Scherer said that there was already an exemption in the bill for amusement rides, such as Star Trek: The Experience, which was run by Paramount Parks. The rides were exempt under the old casino entertainment tax. When all the exemptions were eliminated last session, those rides could have been taxed, although that had not happened. He emphasized that Paramount Parks wished to clarify going forward that the live entertainment tax would not apply to rides.

Ms. Giunchigliani asked if there was another bill that contained similar language. Mr. Alonso said that A.B. 554 already contained most of the exemptions, but Exhibit D had been provided to show what additional amendments could be made to make the statutes consistent with the NAC.

Ms. Giunchigliani noted that the NAC contained the language adopted by the Tax Commission during the interim. She remarked that the language ensured that groups, such as the strolling musicians or the "hula girls," were not taxed.

Assemblyman Denis asked if it would affect amateur productions. Mr. Alonso said that Exhibit D was related to the gaming side of the live entertainment side and would not affect amateur productions.

Mr. Scherer added that within the bill on page 5, lines 17 and 18, there was an exemption for nonprofit corporations presenting live entertainment, so if an amateur production was being presented by a nonprofit organization, such as a school or a nonprofit theater company, it would be exempt from the live entertainment tax.

Terry K. Graves, Graves Communications, representing The Beach nightclub in Las Vegas, addressed the Committee. Mr. Graves said he had been very involved during the interim in writing the regulations that were put together by the Tax Commission and the Gaming Commission. He said that work was reflected in Exhibit D, and he supported that amendment. He noted that S.B. 247, which was the other bill Ms. Giunchigliani had mentioned, had been referred to the Committee.

As there was no further testimony, Chairman Arberry closed the hearing on A.B. 554 and indicated that the Committee would discuss budget closing items.

Mark Stevens, Assembly Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, explained that two budget accounts needed to be closed.

ELECTED OFFICIALS
WASHINGTON OFFICE (101-1011)—BUDGET PAGE ELECTED-9

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO CLOSE BUDGET ACCOUNT 101-1011 WITH THE REMOVAL OF ALL FUNDING.

ASSEMBLYWOMAN LESLIE SECONDED THE MOTION.

Mr. Marvel commented that he had used the services of the Washington Office, and it had been very helpful. Ms. Giunchigliani said she had not used the services of the Washington Office, but she did not feel the Washington Office was necessary.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON WAYS AND MEANS

Seventy-Third Session
June 2, 2005

The Committee on Ways and Means was called to order at 8:00 a.m., on Thursday, June 2, 2005. Chairman Morse Arberry Jr. presided in Room 3137 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Morse Arberry Jr., Chairman
Ms. Chris Giunchigliani, Vice Chairwoman
Mr. Mo Denis
Mrs. Heidi S. Gansert
Mr. Lynn Hettrick
Mr. Joseph M. Hogan
Mrs. Ellen Koivisto
Ms. Sheila Leslie
Mr. John Marvel
Ms. Kathy McClain
Mr. Richard Perkins
Mr. Bob Seale
Mrs. Debbie Smith
Ms. Valerie Weber

COMMITTEE MEMBERS ABSENT:

None

STAFF MEMBERS PRESENT:

Mark Stevens, Assembly Fiscal Analyst
Steve Abba, Principal Deputy Fiscal Analyst
Connie Davis, Committee Attaché
Carol Thomsen, Committee Attaché

Assembly Bill 570: Prevents issuance of additional allodial titles. (BDR 32 1477)

Assemblyman Bob Seale advised that A.B. 570 would remove the provision for allodial titles that allowed for the prepayment of property taxes in perpetuity from the State Treasurer's Office. In 1997, the Legislature created *Nevada Revised Statutes* (NRS) 361.900 to 361.920 entitled, "Allodial Title," which became effective July 1, 1998.

Mr. Seale indicated that only one family had established allodial title, and it was determined that a significant unfunded liability could be created with the increase and decrease of property taxes. While passage of A.B. 570 would prevent the issuance of additional allodial titles, the one family utilizing allodial title would be protected, and the funds would be placed in an escrow account.

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Assembly Bill 554: Makes various changes to provisions governing taxation. (BDR 32-1344)

Mark Stevens, Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, explained that A.B. 554 made a number of changes to the revenue package passed during the 20th Special Session, and a number of amendments had been proposed for which he provided a brief overview:

- ✓ Sections 1, 2, and 3, which related to community banks, were proposed to be deleted by the bill's sponsor.

- ✓ Amendments, proposed by the Nevada Resort Association to S.B. 392, a bill that made various changes to state financial administration, were to place provisions included in the *Nevada Administrative Code* (NAC) in *Nevada Revised Statutes*.

- ✓ Clarifying language was proposed regarding the application of the Live Entertainment Tax to the "Star Trek" ride as well as similar public rides and outdoor activities excluding sporting events.

- ✓ Additional provisions requested by the Gaming Control Board regarding the option of implementing a cash or accrual basis for the payment of the Live Entertainment Tax.

Mr. Stevens said there had been a number of discussions regarding bringing a second racing event to the Las Vegas Motor Speedway in Las Vegas and whether that event should be subject to the Live Entertainment Tax. Additionally, Mr. Stevens indicated there was a proposal to include language to not implement the tax for that particular event, which he had not yet seen but would provide it to the Committee, if there was a desire to include the language in the amendment.

Assemblyman Hettrick advised that Dennis Neilander, Chairman, State Gaming Control Board, had indicated he also wanted to provide language for a proposed amendment regarding Live Entertainment Tax.

Mr. Hettrick was advised the language regarding Live Entertainment Tax proposed by Mr. Neilander would be provided by Alfredo Alonso, a registered lobbyist.

In the meantime, in response to a question from Assemblywoman Gansert regarding the exclusion of sporting events from Live Entertainment Tax, Mr. Stevens advised there was a provision to exempt sporting events at gaming locations, but sporting events such as baseball, hockey, and similar sports would continue to be taxed as they were currently.

Assemblywoman Weber indicated that in a previous hearing a request was made to delete the word *lineal* in Section 8, subsection 9, and asked if that request had been taken into consideration.

While Assemblywoman Weber's question was being researched, Mr. Hettrick was provided with language regarding live entertainment submitted by Mr. Neilander.

MINUTES OF THE
SENATE COMMITTEE ON FINANCE

Seventy-third Session
June 4, 2005

The Senate Committee on Finance was called to order by Chair William J. Raggio at 8:20 a.m. on Saturday, June 4, 2005, in Room 2134 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator William J. Raggio, Chair
Senator Bob Beers, Vice Chair
Senator Dean A. Rhoads
Senator Barbara K. Cegavske
Senator Bob Coffin
Senator Dina Titus
Senator Bernice Mathews

GUEST LEGISLATORS PRESENT:

Assemblyman William C. Horne, Assembly District No. 34

STAFF MEMBERS PRESENT:

Gary L. Ghiggeri, Senate Fiscal Analyst
Bob Guernsey, Principal Deputy Fiscal Analyst
Anne Vorderbruggen, Committee Secretary

OTHERS PRESENT:

Jone M. Bosworth, J.D., Administrator, Division of Child and Family Services, Department of Human Resources
Kenneth S. Kruger, Nevada Professional Driving School Association
Dorothy "Dotty" Merrill, Washoe County School District
Joyce Haldeman, Clark County School District
Joseph Guild, State Farm Insurance Company
Ronald P. Dreher, Peace Officers Research Association of Nevada
John P. Comeaux, Director, Department of Administration

CHAIR RAGGIO:
We have two bills scheduled for this morning's meeting. I will open the hearing on Assembly Bill (A.B.) 47.

ASSEMBLY BILL 47 (1st Reprint): Requires certain children referred to system of juvenile justice to be screened for mental health and substance abuse problems. (BDR 5-194)

JONE M. BOSWORTH, J.D. (Administrator, Division of Child and Family Services, Department of Human Resources):
The Division of Child and Family Services supports A.B. 47. If the bill passes, the Division would have a statutory obligation to promulgate regulations. The fiscal note to promulgate regulations is $4,870.

RONALD P. DREHER (Peace Officers Research Association of Nevada):
Yes, I do.

SENATOR MATHEWS MOVED TO AMEND AND DO PASS S.B. 203.

SENATOR COFFIN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR RAGGIO:
The Committee has received copies of Amendment No. 958 to S.B. 107. Would staff please explain what this amendment does?

SENATE BILL 107 (3rd Reprint): Revises provisions relating to governmental administration. (BDR 27-31)

MR. GHIGGERI:
Amendment No. 958 adds the requirement that the report not only be provided to the director of the Legislative Counsel Bureau but also the director of the Department of Taxation. It also extends the reporting period in the legislation to the Friday following the third Thursday in May.

SENATOR TITUS MOVED TO CONCUR WITH AMENDMENT NO. 958 TO S.B. 107.

SENATOR COFFIN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR RAGGIO:
The Committee has Amendment No. 1151 to S.B. 392. Senate Bill 392 is the cleanup bill that came out of the Senate Committee on Taxation.

SENATE BILL 392 (6th Reprint): Makes various changes to state financial administration. (BDR 32-683)

MR. GHIGGERI:
Amendment No. 1151 would delete the doubling of the health care exemption that would have been effective July 1, 2007, for the Modified Business Tax (MBT). It would also delete the exemption from the MBT for domestic health care providers. However, I understand that A.B. 554 will include an exemption for domestic service providers that is broader than just the health care portion. This amendment also deletes the exemption for the live-entertainment tax that was intended to be incidental for amusement rides. This may also be included in A.B. 554. The amendment also deletes the repeal of language that requires the live-entertainment tax to be collected and submitted in a separate account to the state. Again, I understand this is going to be included in A.B. 554.

MINUTES OF THE
SENATE COMMITTEE ON TAXATION

Seventy-third Session
June 5, 2005

The Senate Committee on Taxation was called to order by Chair Mike McGinness at 2:05 p.m. on Sunday, June 5, 2005, in Room 2135 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:
Senator Mike McGinness, Chair
Senator Sandra J. Tiffany, Vice Chair
Senator Randolph J. Townsend
Senator Dean A. Rhoads
Senator Bob Coffin
Senator Terry Care
Senator John Lee

GUEST LEGISLATORS PRESENT:
Assemblyman David R. Parks, Assembly District No. 41

STAFF MEMBERS PRESENT:
Chris Janzen, Deputy Fiscal Analyst
Ardyss Johns, Committee Secretary
Tanya Morrison, Committee Secretary

OTHERS PRESENT:
Anthony F. Sanchez, Las Vegas Motor Speedway
George W. Treat Flint, Nevada Brothel Owners Association
Charles Chinnock, Executive Director, Department of Taxation
William Bible, Nevada Resort Association

CHAIR MCGINNESS:
We will open the hearing on Assembly Bill (A.B.) 554. The bill has not been officially received and we are unable to take a motion on it, but we will take testimony and hold a Committee meeting on the Senate Floor to consider a motion.

ASSEMBLY BILL 554 (2nd Reprint): Makes various changes to provisions governing taxation. (BDR 32-1344)

ANTHONY F. SANCHEZ (Las Vegas Motor Speedway):
You have before you an issue previously heard by this Committee. It was Senator Titus's bill, Senate Bill (S.B.) 247.

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

MR. SANCHEZ:
Due to the lack of progress on S.B. 247, we have been working to add a provision in A.B. 554. This was passed out of the Assembly this morning.

The bottom of Page 6 has an exemption regarding the National Association for Stock Car Auto Racing (NASCAR). The way it is currently written indicates if there are two or more races in a calendar year, the second race is exempt. The concern on the part of the Las Vegas Motor Speedway is due to an administrative inefficiency. The track sells its tickets all at the same time, so the Speedway would have to tax all races except the second one.

We have worked with and spoken to leadership in the Assembly as well as the Senate and are proposing an amendment (Exhibit C) which would delete the second race exemption and propose both races be exempt for the next biennium. The first race that would impact would probably be a March 2008 race.

CHAIR MCGINNESS:
Will this take effect July 2007?

MR. SANCHEZ:
It would take effect now, but they would not avail themselves of this until March 2008. I am not sure if it would affect a race in the fall of 2007.

SENATOR RHOADS:
How much would the fiscal impact be on this State?

MR. SANCHEZ:
The money raised in March 2005 was between $1.5 million and $1.8 million. In Exhibit C, the race had a 20-percent jump in economic impact in the southern Nevada economy, even over last year. It is approximately $167million. In 2004, it was $143 million, so it is continuing to grow. That is why we are hoping to send a loud signal to NASCAR that Las Vegas deserves a second car race.

SENATOR RHOADS:
What would the fiscal impact be on this State?

MR. SANCHEZ:
It would be between $1.5 million and $1.9 million.

SENATOR RHOADS:
Do they generate $167 million?

MR. SANCHEZ:
That is correct.

SENATOR RHOADS:
Are most NASCAR racetracks throughout the country exempt?

MR. SANCHEZ:
California and Arizona do not have live entertainment taxes. Those are the markets we compete against.

SENATOR RHOADS:
Do other states impose entertainment taxes like this one?

MR. SANCHEZ:
Some of them do. I believe Tennessee does. I am trying to remember when this issue was before you in the last Session. That was when the 5 percent was first imposed. Tennessee and South Carolina had entertainment taxes at that time. The only way to get a second NASCAR race is through Bruton Smith, the owner of the Las Vegas Motor Speedway. He owns several tracks around the country. The only way to get another race in Las Vegas is for him to buy another facility which has an existing race and bring that race to Las Vegas. That is a $200-million-plus investment because there are so few.

SENATOR COFFIN:
Does this bill contain anything about the topless clubs?

MR. SANCHEZ:
Assembly Bill 554 does have live entertainment aspects, but more to entertainment places inside casinos.

SENATOR COFFIN:
Does A.B. 554 include everything but the topless clubs?

MR. SANCHEZ:
There was a lot more in S.B. 247 not contained in A.B. 554 which is much more streamlined and condensed. It has less information than S.B. 247.

SENATOR COFFIN:
Where are the topless clubs in this bill?

GEORGE W. TREAT FLINT (Nevada Brothel Owners Association):
I have an intimate relationship with this bill and its verbiage since the last Session. On page 6 of A.B. 554, the topless clubs would be covered under lines 1 through 3, unless they have an occupancy capacity of less than 300. The major men's cabarets are covered under that section. I have been told by the Department of Taxation that the major places create approximately $7 million a year. Most of the smaller clubs could probably be brought into A.B. 554 if you amend the section to read a total occupancy of 200 rather than 300. To protect my client, I do not want you to bring the occupancy number down too much lower than 200 or you will have my clients back in this tax law.

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

ASSEMBLYMAN DAVID R. PARKS (Assembly District No. 41):
Assembly Bill 554 was heard in the Assembly Committee on Commerce and Labor. As far as specific numbers and discussion on the number of seats, I am not sure there was any detailed discussion on that issue.

CHAIR MCGINNESS:
Is the Assembly agreeable to proposed changes by NASCAR representatives?

MR. PARKS:
I have not had a full briefing on what they are proposing. In general, I am aware there has been a request for a change on that part of the bill.

CHAIR MCGINNESS:
Mr. Sanchez, will there be no fiscal impact if we make the effective date July 1, 2007?

MR. SANCHEZ:
We are fine with that date. We would not be prepared to have that race by that time anyway.

SENATOR RHOADS:
Mr. Sanchez, does this bill have any affect on the National Finals Rodeo?

MR. SANCHEZ:
No, it does not. The National Finals Rodeo is held on the university property.

SENATOR CARE:
How will this bill affect the Nextel Cup Series? Do they have a long-term contract for the spring race?

MR. SANCHEZ:
The contract is with Bruton Smith, owner of the raceway and NASCAR.

SENATOR CARE:
How long does that contract run?

MR. SANCHEZ:
They are currently in negotiations for that contract. I am not sure about the length of the contract, but I can get that information for you.

SENATOR CARE:
In negotiations for the second race, are you at liberty to discuss whether the subject of the tax impact of an entertainment tax has come up in these negotiations? Is anybody posturing about having a second race?

MR. SANCHEZ:
Mr. Smith owns five tracks around the country, and if he gets the rights to another race, he could put it in California, Arizona or wherever. He is looking for the best economic portfolio for him to place it in. This bill is a sign the State of Nevada wants another race.

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

CHARLES CHINNOCK (Executive Director, Department of Taxation):
Many jurisdictions, whether fire marshals or the building code departments that oversee these facilities, found increased safety concerns with the 300-seating capacity. From the building and safety officials' standpoint, they would much rather see less occupancy than greater occupancy. If you had 300 or greater seating capacity, they were willing to adjust that seating capacity from the standpoint it was a safer venue to reduce that capacity. It became an easy issue for them to reduce the seating capacity.

SENATOR COFFIN:
Are you saying they reduced the seating number to avoid the tax in the interest of safety?

MR. CHINNOCK:
Yes, it was in the interest of safety.

SENATOR COFFIN:
If we changed the language to lower the amount, would we unintentionally include entities we do not want to tax?

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

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

WILLIAM BIBLE (Nevada Resort Association):
I really cannot assist you with this issue because the taxes would apply to venues associated with gaming. The seating capacity in A.B. 554 is for areas not on gaming premises.

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

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

SENATOR LEE:
I would like to go on record saying we have a $1-billion machine called the Speedway. We seem to be doing quite well because of this. I am not for the second taxation; though in talking with Mr. Sanchez, it has no merit now. In the future I am going to work to see that does not happen, and we continue to work toward removing that law and enticing these individuals to come to our community for the next race. I would be supportive of Bruton Smith bringing that other race to us, and I will do what I can to see it gets here.

CHAIR MCGINNESS:
Mr. Sanchez, please come forward and clarify your proposed amendment which would take effect July 1, 2007, and remove the tax from the Speedway. Am I correct in saying that?

MR. SANCHEZ:
Yes, that is correct. Some of the language would be used, but it would just indicate the beginning to be July 1, 2007. This would clarify NASCAR races in Nevada would be exempt. It does not necessarily have to be Las Vegas Motor Speedway; although, that is the only facility we currently have to accommodate this type of race. The speedways understand they have the drag racing championships there also, and this would not apply to them.

SENATOR TOWNSEND:
I did not understand the issue of the date. The proposal would be in effect July 1, 2007, for the removal of the tax. Then it would be the intention of the Speedway to have both races after that so neither one would be affected. Is that my understanding?

MR. SANCHEZ:
That is correct, Senator Townsend.

MINUTES OF THE
SENATE COMMITTEE ON TAXATION

Seventy-third Session
June 5, 2005

The Senate Committee on Taxation was called to order by Chair Mike McGinness at 4:01 p.m. on Sunday, June 5, 2005, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mike McGinness, Chair
Senator Sandra J. Tiffany, Vice Chair
Senator Randolph J. Townsend
Senator Dean A. Rhoads
Senator Bob Coffin
Senator Terry Care
Senator John Lee

GUEST LEGISLATORS PRESENT:

Senator Maggie Carlton, Clark County Senatorial District No. 2
Senator Dina Titus, Clark County Senatorial District No. 7

STAFF MEMBERS PRESENT:

Chris Janzen, Deputy Fiscal Analyst
Mavis Scarff, Committee Secretary

Chair McGinness requested an amendment to Assembly Bill (A.B.) 554 to change the effective date for the National Association for Stock Car Auto Racing (NASCAR) Nextel Cup Series to July 1, 2007, and to change the maximum seating capacity for live entertainment from 300 to 200.

ASSEMBLY BILL 554 (2nd Reprint): Makes various changes to provisions governing taxation. (BDR 32-1344)

SENATOR COFFIN MOVED TO REQUEST AN AMENDMENT TO A.B. 554 TO CHANGE THE EFFECTIVE DATE FOR THE NASCAR RACE TO JULY 1, 2007, AND TO REDUCE THE MAXIMUM SEATING CAPACITY FOR LIVE ENTERTAINMENT FROM 300 TO 200.