IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

State of Nevada, ex rel. Department of Taxation and Tax Commission,

Respondents.

Supreme Court Case No.: 69886

District Court Case No.: A-11-648894-J consolidated with A-14-697515-J

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

RESPONDENTS' APPENDIX VOLUME I - BATES NUMBERS RA0001-RA0092

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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 Valerie Weber, Assembly District No. 5, Clark County

STAFF MEMBERS PRESENT:

Brenda J. Erdoes, Legislative Counsel
Diane Thornton, Committee Policy Analyst
Russell Guindon, Deputy Fiscal Analyst
Keith Norberg, Deputy Fiscal Analyst
Sarah Gibson, Committee Attaché

OTHERS PRESENT:

George Flint, President, Nevada Brothel Owners Association
Ray Bacon, Legislative Advocate, representing Nevada Manufacturers Association
Patrick McInnis, Engineer, Buildings and Grounds Division, Nevada Department of Administration
Dennis Friemann, Auditor, Clark County Recorder's Office
Alice Molasky-Arman, Commissioner of Insurance, Insurance Division, Nevada Department of Business and Industry
Dino DiCianno, Deputy Executive Director for Compliance, Nevada Department of Taxation
Christina Dugan, Director, Government Affairs, Las Vegas Chamber of Commerce, Las Vegas, Nevada
George Ross, Legislative Advocate, representing Retail Association of Nevada
Larry Hurst, Vice President, Public Affairs, Nevada State Board of Health Underwriters
Jack Kim, Legislative Advocate, representing Nevada Association of Health Plans
Donal Hummer, Jr., Vice President, Government Affairs, Harley-Davidson Financial Services
Bill Uffelman, President, Nevada Bankers Association
Bob Ostrovsky, Legislative Advocate, representing Nevadans for Affordable Health Care
Danny Thompson, Executive Secretary-Treasurer, Nevada State AFL-CIO
Nancy Ford, Administrator, Welfare Division, Nevada Department of Human Resources
Tony Sanchez, Legislative Advocate, representing Las Vegas Convention and Visitor's Authority
Carole Vilardo, President, Nevada Taxpayers Association

Scott Scherer, Legislative Advocate, representing Paramount Parks
Alan Glover, Carson City Clerk-Recorder, Carson City, Nevada
Chris Cook, Field Inspector II, Nevada State Board of Cosmetology

Chairwoman Buckley:
[Called meeting to order.] We will open the public hearing on A.B. 317.

Assembly Bill 317: Provides for imposition of tax on live entertainment provided by all houses of prostitution. (BDR 32-926)

Assemblywoman Sheila Leslie, Assembly District No. 27, Washoe County:
I am here today to present A.B. 317. This bill proposes a revision to the live entertainment tax. Those of you who were here last session remember in our tax discussions that brothels were included in the omnibus tax bill right up until the end of the session. A technical problem caused them to be dropped, the 300-seat rule. For those of you who were not here, I will walk you through all the negotiations and how it happened.

I have always found it refreshing to work with an industry that came forward and said they want to be part of the tax structure and pay their fair share to support our state's General Fund. They were so distressed when they were not able to be part of the tax package that I made a promise to Mr. Flint that I would reserve a bill draft for his industry.

I am personally not a supporter of the legal brothel industry; Mr. Flint is well aware of that. The fact remains that we cannot have it both ways in Nevada. They are either a legal industry or they are not. There is no organized effort to get rid of brothels in our non-urban counties; it is a county option right now. Since they are a legal business, I did agree to bring the bill forward. I do personally feel that they should be part of the tax structure.

The original language that is in your bill is actually holdover language from last session. We were trying to address the issue of strip clubs, out-call massage operations, and brothels. This was not the language that the brothel industry wanted. You have been distributed an amendment (Exhibit B) that I have worked on with Mr. Flint.

George Flint, President, Nevada Brothel Owners Association:
The *Las Vegas Sun* contacted me in 2002 or 2003 and suggested that maybe we should be included in the live entertainment tax. I was not sure that was what we are. I inquired as to who those individuals were who had thought that we ought to be included. I was told three names; they are all in this room today. Shelia came to me early on in the 2003 Session and asked me some specific

questions about how we would feel about this and what the tax might bring in. We talked about a bill draft request that would be similar to the one that is before you today. I felt that the Governor's tax package included us because of its broad definition of live entertainment. It did include us right up to the very end, when the 300-seat threshold was brought in to the bill at the request of Senator Neil to protect some of the small arenas in the North Las Vegas area. He felt they would be impacted by having to charge an admissions fee. That 300-seat threshold not only amended us out of the bill, but it amended out a big percentage of the other sexually related businesses, particularly in Clark County, which was not the intention.

[George Flint, continued.) Before you today is an amendment (Exhibit B), which is needed by my group. It changes the last two lines of page 1 of the bill and the first two lines from page 2. The old language had an industry-specific tax on what could be 30 percent of what the brothel operators receive, which would be devastating. This would be similar to raising the gross receipts tax on the casinos from 7 percent to almost 30 percent. It was not the language that we agreed to. It originally appeared in one of the special session bills in an attempt to bring in the out-call services in Las Vegas. Chairman Parks of Taxation worked with me to bring this language back in. I don't know how it landed in this bill. It was too late to change it before it was presented to you.

Were the bill to pass in its present form, it would be prohibitive, particularly in light of the fact that we already pay a tremendous amount of money to the local government. Brothels in Lyon County pay approximately $95,000 a year in business license taxes. It is similar in Nye County.

This bill would create around $1.6 million per year, or $3.2 million per biennium. Only a small portion of that is based on the admissions fee. Once a client decides to go to that area of the brothel where the live entertainment takes place, there would be an admissions fee in the $20 range, which would have a 10 percent tax on it. That is only a small part of the tax. A bigger part of the tax would be a 17 percent tax on alcohol or the bar tax. We have a new phenomenon in our industry—the sale of food and souvenirs. All food, alcohol, and souvenirs will be contributing up to 17 percent, as well as the 10 percent tax on admissions.

I hope that the Committee will give this bill serious consideration. I think that it is better to tax us and get some benefit from us, than to not. I think this tax will give us some added acceptability. It will probably become money that the state will be able to use and appreciate. I was told yesterday that there was $1.6 million need for a particular area of health care that has been left out of the Governor's budget. I am sure that you will find a place for this money.

[George Flint, continued.] I know that there are some of you who have philosophical problems or moral problems with my industry. I hope that you can look beyond that and see the overall good that can be accomplished. Speaker Perkins presented a white paper to the Taxation Committee two years ago. It was his approach to the tax issue. At that time, he said that we shouldn't overlook the brothels as a funding source. I went to him and asked if he was thinking in terms of an industry-specific tax; his response was no. He was thinking in terms of participation in the overall live entertainment tax.

I think this is a good thing. There is nothing negative about it. I would respectfully request that you not only give it serious consideration, but also amend the bill with our proposed amendment, which we drastically need because we don't have control over the whole 100 percent. The ladies pay us a small percentage, anywhere from 30 percent to 50 percent. It would be very difficult financially to have this as an industry-specific tax.

Assemblyman Seale:
Is there a sales tax on this entertainment?

George Flint:
No. This falls under the same category as all of the services such as barbers and beauty shops. There has been a consideration in the past to put a tax on services, but it has never been done. The only tax that is relative in our industry now is for the sale of food, beverages, and souvenirs.

Assemblyman Seale:
The other taxes that you are paying, are they local?

George Flint:
Sometimes people are surprised that we pay on our regular employees all the other taxes that any other business pays, including workers' comp and Social Security. We are a well-taxed industry, except that we have never had the privilege of participating in the state-level taxes.

Chairwoman Buckley:
I will close the public hearing on A.B. 317. I will open the hearing on Assembly Bill 245, Assemblyman Marvel's bill.

Assembly Bill 245: Makes various changes to provisions governing taxes on transfer of real property. (BDR 32-163)

Assemblyman John Marvel, Assembly District No. 32, Humboldt (part), Lander (part), and Washoe (part):
This bill is the result of one of our higher education subcommittee meetings. One of the things that came out was the need for more lab space at universities. Mr. Bacon was in the audience and thought this might be a way to come up with some funding that we can put into a special account for this.

Ray Bacon, Legislative Advocate, representing Nevada Manufacturers Association:
[Submitted Exhibit C.] This is one of those tax increase ideas that would impact my members, some in a negative way and some not. We currently have a situation which has been brought forth by the recorders on numerous occasions. Because of the exemption in the Real Property Transfer Tax [RPTT], we had an uninformed and unequal tax the way we handle it because it is a function of the corporate structure. While this bill has some flaws in it, in the way we currently handle business, it may not be appropriate to continue to process it at this stage of the game. The problem is still real and will have to be addressed at some point in time. It has been brought up to this Legislature on many occasions. Should anyone in a different situation wind up paying the tax when someone else doesn't pay the tax, I think the State is at severe risk of a lawsuit and losing. My interest in this is simple. I don't want one of my businesses dragged into the lawsuit and having to pay excessive legal fees.

It is going to be an irregular flow of income. The logical thing to do is to not throw that into the General Fund, but to take a look at doing something which solves a long-term problem. Every government entity in the state of Nevada does a reasonably poor job of maintaining their structures and buildings. The logical thing to do would be to move it into an account for maintenance of buildings, not just state buildings, but the universities or whoever has the greater need. Over time, that would build up to a sizeable chunk of money. From a short-term standpoint, it won't affect anyone that is in office at this stage of the game. In 15 or 20 years, if you continue to draw out 10 percent of principal plus the interest on the thing, you would have a sizeable chunk of change and be able to maintain buildings adequately. This protects the taxpayers' investment in new buildings. That is the concept of this bill.

The companies that I list on page one of the handout (Exhibit C) are some interesting examples. The Cingular-ATT merger was very interesting because some of the cell sites are owned by one company or the other and some of them are not. Some of them are on lease properties. Take a look at the GE-Bently operation. GE bought the company but didn't buy the real estate. They are leasing back the facilities. That happens in various other cases. The real issue to make this fair is that you have to get it down to the point where

you cannot just take the assessed value of the business. To make it equitable and fair, we need an appraisal to take a look at the real estate value of the transfer. This gets away from the stock transfer issues. It is a muddy problem and I think the State is at risk until we identify this thing. I suspect we will wind up with some sort of ongoing look at property taxes as part of the Interim. This should probably be folded into that issue. It really is a long-term risk for the State. We are not going to have many Mandalay or MGM mergers. At some point in time, there will be more of those mergers that come along, and this is good long-term policy.

Chairwoman Buckley:
Mr. Marvel, do you agree that this is something we should continue to look at and study as opposed to processing this bill?

Assemblyman Marvel:
I think this is something that should be analyzed to see what the prospective benefits to the State might be. There has been quite a bit of opposition to it in its present form. I think it is an area we should really take a hard look at, because potentially there could be some rather significant revenues for the maintenance of our schools. By building up these sorts of capital funds, this might be one way to solve the problem of too little lab space.

Chairwoman Buckley:
With your permission, I suggest we have Russ Guindon from Fiscal, who is our guru on taxes, do an analysis.

Assemblyman Marvel:
I think that is an excellent idea.

Chairwoman Buckley:
Do we have anyone in the audience who could talk about how tax actually works and is collected?

Patrick McInnis, Engineer, Buildings and Grounds Division, Nevada Department of Administration:
We are the recipients of the money in the existing bill.

Chairwoman Buckley:
He had a question about someone at the county level who collects real estate transfer tax.

Assemblyman Arberry:
On this transfer tax, when you have a homeowner who is husband and wife, and one of them is quit-claimed off so they can refinance the house, then when they refinance and want to put the other back on, the transfer tax comes into play. Why? They were already on it.

Dennis Friemann, Auditor, Clark County Recorder's Office:
If a husband and wife want to refinance a house and the wife deeds off and the husband gets the loan, there is Exemption 5 that the wife can deed back on. There is no transfer tax on that. Spouse-to-spouse is Exemption No. 5, which allows the transfer without any transfer tax assessed.

Assemblyman Arberry:
What if it is not spouse to spouse?

Dennis Friemann:
If it is not spouse to spouse, if they deed off, there will be transfer tax because transfer tax is triggered when title transfers. It does not matter to whom or from; transfer tax is assessed every time real property title is transferred. There are 13 exemptions that allow for the exclusion of transfer tax.

Chairwoman Buckley:
A.B. 554, which I submitted on behalf of the Committee, in Section 8, deals with this very topic and would be an excellent place if you have any suggestions on exemptions to include. This section of the bill expands the exemption to include spouses and relatives. If you are looking at further expansions in that area, that would be the place for you to amend it if you are interested.

Assemblyman Arberry:
The reason I ask is that we have clients who come in that might not be married but they own the property together and they want to pull cash out. The other individual's FICA [Federal Insurance Contributions Act, 26 USC 3101 et seq.] scores are not perfect, so the other person gets the loan. Now, they have to take almost half of the money that they got to pay for the transfer tax.

Chairwoman Buckley:
This would be the perfect area to bring that up. We could look at that.

With Assemblyman Marvel believing that the issue needs further examination, I would be inclined to ask our staff to prepare information for us, perhaps how other states view evaluation issues, to allow us to study this further, and to not

process the bill. We are going to withdraw the bill. We will close the public hearing on A.B. 245. Let's turn to our Work Session Document (Exhibit D).

Let's do A.B. 338.

Assembly Bill 338: Makes various changes relating to insurance. (BDR 57-232)

Diane Thornton, Committee Policy Analyst:
A.B. 338 is the omnibus bill from the Commissioner of Insurance that amends various provisions governing insurance. It addresses the following topics:

- Establishes oversight of discount health plans.
- Amends provisions regarding risk retention groups, including removing barriers for captive insurers and complying with the Federal Risk Retention Act of 1986.
- Amends provisions governing insurance producers.
- Clarifies the Nevada Insurance Guaranty Association's role in industrial insurance claims against insolvent insurers.

There are actually four amendments; we received one late amendment. Those amendments are behind Tabs B (Exhibit E), C (Exhibit F), D (Exhibit G), and N (Exhibit H). Behind Tab B is the amendment proposed by Ms. Molasky-Arman, Commissioner of Insurance, during the hearing on the bill. This amendment proposes separate administrative remedies and criminal penalties regarding criminal acts of fraudulent insurance.

Behind Tab C in your Work Session Document is an amendment (Exhibit F) proposed by Ms. Molasky-Arman, which addresses credit insurance. This amendment provides regulation for all consumer credit insurance sold in connection with loans or other credit transactions for personal, family, or household purposes.

Behind Tab D (Exhibit G) is an amendment proposed by Ms. Molasky-Arman. This amendment concerns credit property insurance.

Behind Tab N is a proposed amendment (Exhibit H) from Jim Wadhams that he brought up during the hearing on the bill.

Chairwoman Buckley:
We have the Commissioner here. For the sections having to do with credit insurance, we requested that the Commissioner present an option since our

laws were ranked quite poorly by a national survey. They looked at it carefully and are presenting the National Association of Insurance Commissioner's model act, which would update our statutes to provide the basic protections in this area. I believe the Commissioner had the opportunity to share them a bit with her staff. We also gave a copy to Mr. Wadhams, who had requested it.

[Chairwoman Buckley, continued.] Are there any questions on any of the amendments while we have the Insurance Commissioner with us? The only one that I noticed that was missing from the NAIC [National Association of Insurance Commissioners] was the issue about whether a consumer has a private right-of-action. That is one that I would like to add to it if we could. There have been some suggestions that we look at an insurance interim study to examine our rates, regulatory reform, zip-zap, and the recent report on credit scoring. This would give us a longer opportunity to look at different insurance issues in the State. We will see what other interim study ideas we have, but I thought it was a good idea for us to consider.

Assemblywoman Giunchigliani:
"Zip-zapped" is the process whereby the insurance industry improperly rates you based on your ZIP code, such as when areas of certain communities that may be more underprivileged get a higher rate just because of where they are able to afford to live.

Assemblywoman McClain:
Are we including this last amendment, too?

Chairwoman Buckley:
Assemblywoman McClain is referring to the amendment offered by Jim Wadhams. That amendment changes the percentages with regard to 75 percent going to the General Fund, instead of 90 percent. I assume the Division of Insurance supports this, because it would go to that office. It would also make the bill go to Ways and Means, I would think, which isn't a pleasant experience for anyone. Could you please give the Committee your position with regard to this amendment?

Alice Molasky-Arman, Commissioner of Insurance, Insurance Division, Nevada Department of Business and Industry:
I believe that our bill must go to Ways and Means at any rate. I would really appreciate support of this amendment, which is actually proposed by the Nevada Captive Insurance Association. This would enable us to retain the kind of staff we need to service a growing industry—to review their applications, to get those applications out in a positive and timely manner, and then to conduct

the appropriate examinations thereafter to ensure that they maintain the same integrity.

[Alice Molasky-Arman, continued.] When we began our captive laws, we did it with no request for General Fund money. We mimicked the statutes of other states that had this 10 percent dedicated to support the services of the Insurance Commissioner's Office. However, in those states that have that 10 percent, we did not realize at that time that they were also supported by their General Fund money. That 10 percent was used primarily in marketing activities by the Commissioner and then by the Economic Development Commission.

ASSEMBLYWOMAN McCLAIN MOVED TO AMEND AND DO PASS ASSEMBLY BILL 338 WITH ALL OF THE AMENDMENTS.

ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

Assemblywoman Gansert:
This requires a two-thirds majority. Is that because of the increase in some fees?

Alice Molasky-Arman:
I believe that is the case.

Assemblywoman Gansert:
Are there any new fees, or are they just changing fees?

Alice Molasky-Arman:
The fees are changing; they are actually decreasing, but that still has a fiscal impact on the State. I believe that is the reason for the two-thirds vote requirement.

Chairwoman Buckley:
I don't think we need two-thirds for decreasing revenue. Was one going up and one another down?

Brenda Erdoes, Legislative Counsel:
Yes, that is the case because the Constitution is worded so broadly. It says in the case of any increase, even if it is offset, you still have to do the two-thirds or you risk having the bill be held void.

Chairwoman Buckley:
So, overall net decrease, but because one is going up there is the two-thirds requirement.

Assemblywoman Giunchigliani:
Is the term "captive" the common term throughout the industry?

Alice Molasky-Arman:
The "captives" are a completely different breed of insurance company. They are self-owned and self-managed, principally by major corporations and a number by risk-retention groups that are formed to provide liability insurance for their members, such as medical malpractice.

Assemblywoman Giunchigliani:
So it is common. It is just a weird term.

Alice Molasky-Arman:
It is relatively new in Nevada since we have only had the law since 1999. We are attempting to become the Vermont of the West. Vermont is supported primarily by their money from captive business.

THE MOTION CARRIED. (Assemblyman Parks was absent for the vote.)

Chairwoman Buckley:
Next on the agenda is A.B. 360.

Assembly Bill 360: Provides for regulation of persons who practice permanent cosmetics. (BDR 43-925)

Diane Thornton, Committee Policy Analyst:
[Submitted Exhibit I.] A.B 360 was sponsored by Assemblywoman Weber, and was heard on April 4, 2005. The original bill requires that the Health Division of the Department of Human Resources adopt regulations to provide the licensing, training, and scope of practice for permanent cosmetics technicians. The bill defines permanent cosmetics and makes it unlawful for a person to engage in the practice of permanent cosmetics unless he is licensed.

[Diane Thornton, continued.] The proposed amendment (Exhibit J) under Tab E is the one that Assemblywoman Weber worked on with Richard Whitley, Deputy Administrator of the Health Division; Glen Savage of the Clark County Health District; and Mary Arnold-Ronish, who is a practitioner at Professional Permanent Cosmetics in Las Vegas.

The proposed amendment (Exhibit J) under Tab E:

1. Revises the definition of permanent cosmetics.
2. States that no one can practice permanent cosmetology without being certified by the Society of Permanent Cosmetic Professionals, or an equivalent nationally recognized organization.
3. Suggests that any person who violates this utility is guilty of a misdemeanor.
4. It is revised to include local health authorities.
5. Amended to read that cosmetology does not include the occupation of permanent cosmetics.
6. A person who performs permanent cosmetics or tattoo application shall not use infrared technology based equipment or laser technology based equipment unless such equipment is used under the direction of a physician. This relates to tattoo removal.
7. A person who performs permanent cosmetic or tattoo related work shall not remove any permanent cosmetic pigments using any drug, chemical, or biological agent, unless approved in regulations promulgated by the Health Authority and the U.S. Food and Drug Administration where applicable. Any violation of this section is a gross misdemeanor.

Chairwoman Buckley:
I received a letter from a physician with a national board of plastic surgeons, or some such group, expressing some concern about the bill. Do you have a copy of that letter, and was that concern addressed in this amendment?

Diane Thornton, Committee Policy Analyst:
No, I did not receive that letter.

Chairwoman Buckley:
We certainly can check on that issue. I don't know how the Committee feels about the bill in general, whether there is an appetite to process it or not. I think the sponsor worked very hard with those who were interested. I think there might be some lingering questions about tattooing being treated differently. There is some concern about people in the industry; some are a little apprehensive about what it might mean. I certainly could not process it or put it off until Friday, when we could have the sponsor come in.

Assemblywoman Giunchigliani:
I like the idea. It has become the new trend and I think there need to be some protections out there. I did not get the letter. I wouldn't mind doing an amend and do pass. If we have to have a subsequent change or correction, at least this moves it further.

Chairwoman Buckley:
We could get copies of the emails and letters to Assemblywoman Weber now and copy them for every Committee member, then take it up later. We don't have to rush it. We should allow people to look at it all, and make sure the sponsor has it as well.

Assemblyman Hettrick:
My wife had the permanent cosmetics done. I think it is a good thing to do something, because what they made her sign off on was worse than a surgical procedure, as far as the risk. I think we ought to have people who are qualified doing it. I think it is reasonable to proceed with something here. I would be in support of that.

Chairwoman Buckley:
Let's do that. Let's get the copies to everybody and then we will bring it back.

We will take A.B. 384 next.

Assembly Bill 384: Makes various changes relating to certain short-term, high-interest loans. (BDR 52-806)

Diane Thornton, Committee Policy Analyst:
[Submitted Exhibit K.] A.B. 384 was sponsored by Assemblywoman Buckley and was heard on April 6, 2005. This bill establishes uniform standards and procedures for the licensing and regulation of check-cashing services, deferred deposit services, payday loan services, and title loan services. The bill provides consumer protections including regulating customer repayment and default of these loans and requiring that the loan establishments comply with the federal Fair Debt Collection Practices Act [15 U.S.C. 1692]. The measure also provides remedies and administrative penalties. Behind Tab F is a mock-up of the amendment (Exhibit L) proposed by Assemblywoman Buckley.

Chairwoman Buckley:
I am continuing to work with consumer advocates and the industry. We are taking great care. If the Committee is willing to do an amend and do pass, I will bring the final amendment back to the Committee to allow us to continue to do some technical tweaking and further tightening of the language.

Assemblyman Anderson:
I see the need for legislation in this area.

ASSEMBLYMAN ANDERSON MOVED TO AMEND AND DO PASS ASSEMBLY BILL 384.

ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

Assemblyman Seale:
Weren't there several bills in this same vein?

Chairwoman Buckley:
Yes, the other one was A.B. 340, sponsored by Assemblywoman Giunchigliani. She indicated that she is still amending it and it wasn't ready for work session yet. It does not conflict. None of the provisions are in the same statute numbers, even though it does deal with the same subject.

Assemblyman Hettrick:
I will vote for this on the basis of what we have done. I have to indicate that I do have a concern. In Section 14, line 11, I know the fees always seem exorbitant, but 40 percent, calculated on an annual basis, will be so de minimis as to eliminate the industry entirely. I am concerned that number may be too low. I think the general direction of the bill is good.

Chairwoman Buckley:
Section 14 defines short-term loans as being subject to this chapter. Short-term loan is defined as anyone who charges more than a 40 percent APR [annual percentage rate]. The bill still allows them under this chapter to charge a higher interest rate. That is not the cap section. The way it was structured, everything had to be redefined.

Assemblywoman Gansert:
I didn't see a cap section. Is there a cap section?

Chairwoman Buckley:
Yes, the cap section is on page 15, Section 32.7. It states that a licensee may collect only the following amounts:

1. The principal amount of the loan.
2. The interest rate as disclosed on the federal truth and lending statement.
3. After the date of default, as defined by the bill, prime plus 10.
4. An insufficient fund fee.

In paragraph 2, it says that you may not charge the customer any other fees or cost. We are still working on that language because we want to make it crystal clear since the industry is very clever. The limitation upon default of prime plus 10 is in current law, NRS [*Nevada Revised Statutes*] 604. What we are really trying to tighten up here is, you get your contract amount, you get your interest rate in the contract up to default, upon default you get prime plus 10 for a period not to exceed 3 months, you get the bad check fee, and that is it. Collection charges of $2,000 for a $200 loan would be eliminated. That would be the heart of the bill. We will make that very clear for legislative history in case this is challenged. That is the intent.

THE MOTION CARRIED. (Assemblyman Arberry and Assemblyman Parks were not present for the vote.)

Assembly Bill 437: Revises provisions governing manufactured home parks. (BDR 10-1027)

Diane Thornton, Committee Policy Analyst:
[Submitted Exhibit M.] A.B. 437 was sponsored by the Committee on Commerce and Labor, and was heard April 1, 2005. This bill revises several provisions regarding manufactured home parks. The landlord of a manufactured home park is required to post a copy of the utility bill for the park if the utility bill is for multiple tenants. The bill revises which representative must meet with the tenants upon receiving a request to hear any complaints or suggestions. The bill also revises the provisions governing the closure of a manufactured home park and revises the provisions regarding the limited dealer's license.

Behind Tab G is an amendment (Exhibit N) proposed by Joe Guild from the Manufactured Home Community Owners. This amendment has four sections to it. The first two sections deal with who should meet with the tenants. In Section 3, sub 3, page 3, "managing" is deleted; "with working knowledge of

the operations of the manufactured home park and with the authority to make decisions" is added. In Section 3, sub 3, page 3, "an office with working knowledge of the operations of the manufactured home park designated by the corporation with the authority to make decisions." The second amendment is in Section 6, sub 3: the word "completed" is added in front of "application." This is to inform the prospective buyer and tenant concerning the approval or denial of a completed application. The third amendment proposed is in Section 7, sub 4, and deletes the words "potential closure." That was related to a question in Committee, if the manufactured park doesn't actually close. The fourth amendment is in Section 8, sub 4, and deletes all suggested amendments to this section and puts the language back to the original as it currently reads in statute.

Chairwoman Buckley:
I reviewed all of these amendments except for the last one. I thought after my conversations with Mr. Guild that we were going to leave that language in or clarify it.

Assemblyman Anderson:
According to my notes, particularly the language in paragraph D, page 9, was to be retained until a decision was made on the application by the approving local governing body, or zoning board. That appeared to be needed language in Section 8.

Diane Thornton:
I have that in my notes also. That was supposed to be left in.

ASSEMBLYMAN ANDERSON MOVED TO AMEND AND DO PASS ASSEMBLY BILL 437.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED THE MOTION.

Assemblyman Anderson:
That would be the amendments 1, 2, and 3?

Chairwoman Buckley:
Yes. This was the consensus bill that was worked on by the parks and the tenants. If any of them have concern, we want to make sure that we are preserving the consensus of that group, which is very difficult at times.

THE MOTION CARRIED. (Assemblymen Parks and Arberry were not present for the vote.)

Chairwoman Buckley:
Next we will hear A.B. 464.

Assembly Bill 464: Makes various changes regarding manufacture, sale and use of tobacco products. (BDR 32-1028)

Diane Thornton, Committee Policy Analyst:
[Submitted Exhibit O.] This bill was sponsored by the Committee on Ways and Means, and was heard on April 8, 2005. This bill prohibits possession of an unstamped cigarette package by any person other than a wholesale dealer. The bill requires manufacturers and wholesale dealers to provide periodic reports of shipments of cigarette packages to the Department of Taxation. Procedures are also established for accepting, mailing, or shipping orders of cigarettes, which include compliance with the state licensure and reporting requirements through the Department of Taxation. Licensure is also required for certain retail dealers, wholesale dealers, and manufacturers. This bill authorizes the Department to impose civil penalties for failure to comply with these laws. Criminal penalties are also specified for actions intended to defraud the State.

Three amendments have been proposed to this bill behind Tabs H, I, and J. Under Tab H is an amendment (Exhibit P) proposed by the Office of the Attorney General, Single Stick, USA Distributing, Nevada Petroleum Marketers, the Convenience Store Association, Retail Association of Nevada, Phillip Morris USA, and R.J. Reynolds Tobacco Company. This amendment was presented to the Committee during the hearing on the bill.

Under Tab I is an amendment (Exhibit Q) proposed by Sam McMullen and Phillip Morris. This amendment addresses the concerns voiced by Daryl Capurro of the Nevada Motor Transport Association. It is my understanding that Mr. McMullen and Mr. Capurro worked on this one together.

Behind Tab J is an amendment (Exhibit R) proposed by the Office of the Attorney General, Retail Association of Nevada, Phillip Morris, and R.J. Reynolds Tobacco Company. The amendment bifurcates the effective date of the bill.

Chairwoman Buckley:
I think that was the only question that had come up on the bill.

Assemblyman Anderson:
I am unclear on something. The amendment behind Tab J is also part of the AG's recommendation?

Diane Thornton:
Yes, that is my understanding.

ASSEMBLYMAN HETTRICK MOVED TO AMEND AND DO PASS ASSEMBLY BILL 464.

ASSEMBLYWOMAN GIUNCHIGLIANI SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblymen Parks and Arberry were not present for the vote.)

Chairwoman Buckley:
Let's look at A.B. 555.

Assembly Bill 555: Makes various changes relating to provisions governing medical professionals. (BDR 54-570)

Diane Thornton, Committee Policy Analyst:
[Submitted Exhibit S.] A.B. 555 was sponsored by Assemblyman Mabey and was heard on April 11, 2005. This bill relates to medical professions. The restricted license of an administrative physician is revised and further specifies that the administrative physician may not engage in the practice of clinical medicine. Several provisions related to the practice of allopathic and osteopathic medicine are also revised in this bill. In addition, the bill provides that a practitioner of respiratory care licensed under Chapter 630 of NRS does not have to be licensed under the chapter governing medical laboratories. The measure also defines a "licensed physician assistant."

There are four amendments that have been proposed. Behind Tab K are two amendments (Exhibit T) proposed by Keith Lee from the Board of Medical Examiners. Under Tab L is an amendment (Exhibit U) offered by Assemblyman

Mabey. Behind Tab M is an amendment (Exhibit V) from Daniel Royal, president of the Board of Homeopathic Medical Examiners.

Chairwoman Buckley:
I would recommend that we accept amendments K and L. Amendment K (Exhibit T) was discussed by Mr. Lee, and the second was Assemblyman Mabey (Exhibit U) wanting to lower those fees a little bit. I know Dr. Royal wanted to put in language about the homeopaths, but they should get their own bill to do that. I don't think we should do that. They were just angry that they were never consulted, and I understand that. I know what it feels like, but it doesn't seem appropriate.

Diane Thornton:
On number 1, Keith Lee's amendment, where it says deleting Sections 7, 8, 9, 12, and 13, it should be only a portion of Section 13. I believe there are several effective dates.

Chairwoman Buckley:
We will have the record reflect that, and we will have Legal fix the effective dates.

ASSEMBLYMAN CONKLIN MOVED TO AMEND AND DO PASS ASSEMBLY BILL 555.

ASSEMBLYMAN HETTRICK SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblymen Parks and Arberry were not present for the vote.)

Chairwoman Buckley:
That is the end of our Work Session Document.

Assemblyman Conklin:
Were we pushing A.B. 19 back?

Chairwoman Buckley:
It's Mr. Parks's bill and he is not here, so I was just going to wait.

Assemblyman Anderson:
I saw an amendment here for A.B. 317, and I didn't know whether or not it was on the handout.

Chairwoman Buckley:
Yes, that was the prostitution tax amendment. Back to our hearing agenda. Why don't we go ahead and open the public hearing on A.B. 67.

Assembly Bill 67: Authorizes Department of Taxation to suspend or revoke business licenses. (BDR 32-392)

Dino DiCianno, Deputy Executive Director for Compliance, Nevada Department of Taxation:
A.B. 67 is being brought before you on behalf of the Department of Taxation. The bill authorizes the Department to suspend or revoke a business license if it is found that the business is not in compliance with the provisions of the business license in statute and with respect to the regulations. I want to be very clear here that this is not an anti-business bill. It does allow the Department some discretion because it is permissive. It says the Department may revoke or suspend a business license. That particular business, if the Department determines that they are in violation of the statutes of the regulations, will be afforded a hearing. If they are unsatisfied with the determination of the hearing officer, they can appeal to the Nevada Tax Commissions. If we find that the taxpayer is in compliance, we will issue the business license.

Vice Chairman Oceguera:
Seeing no one wishing to testify either way, I will close the hearing on A.B. 67 and open the hearing on A.B. 68.

Assembly Bill 68: Authorizes Department of Taxation to deny licenses or permits to persons liable to Department for payment of money. (BDR 32-390)

Dino DiCianno, Deputy Executive Director-Compliance, Nevada Department of Taxation:
A.B. 68 is being brought to you on behalf of the Department of Taxation. The bill allows the Department to deny licenses or permits to persons liable to the Department for payment of money. We get calls all of the time from businesses who are in competition with other businesses stating that these people are not in compliance, and asking why we aren't doing something about this. That is the purpose of this bill. We just want to make sure those businesses that are in compliance are being competitively competed against by businesses that have

complied with all of the rules and regulations with respect to the payment of taxes. We also want to be able to determine, if they do have a liability, that it provides an additional collection tool for the Department to collect that prior to us giving them a new permit or a renewal on the permit that they may have.

Vice Chairman Oceguera:
I will close the hearing on A.B. 68 and open the public hearing on A.B. 320.

Assembly Bill 320: Proposes to authorize Legislature to prescribe temporary exemptions from sales and use taxes to provide for sales tax holidays. (BDR 32-1201)

Assemblyman Richard Perkins, Assembly District No. 23, Clark County:
A.B. 320 as it is written would take to the voters an amendment to our sales and use tax in such a way that would allow the Legislature to create a sales tax holiday. This would allow Nevada to join 12 other states in offering their families relief, usually around back-to-school time, by setting aside a few days where certain purchases are not charged sales tax. Every state handles its sales tax holidays differently—which items are taxed and not taxed. The length of the holidays varies from state to state also. Regardless of how it is implemented, a sales tax holiday would benefit everyone. It would be a boon for Nevada's businesses, relief for Nevada's taxpayers, and a windfall for our economy at large.

In other states, people will go in droves from neighboring states to find sales tax holidays. Businesses see record sales in response. There is even a website that catalogs for deal-savvy consumers each state that has a holiday and when it is. Extra money for these businesses will allow them to expand their operations in our state, benefiting our consumers and our economic base. Taxpayers will see the benefits through being able to spend a little extra or save a little extra by not paying sales tax.

Imagine if we instituted a sales tax holiday to correspond with the back-to-school shopping season. The National Retail Federation says that the average family in 2004 would spend about $219 on clothes for the new school year. At 7 percent, this comes to about $16 in savings just on clothing purchases alone. While this may not seem like a lot, those few extra dollars can be spent on a pair of jeans that last a little longer or those shoes that don't wear out so quickly. This is just if we exempt clothing. The savings would be even larger if we included supplies and computers.

[Assemblyman Perkins, continued.] Benefits for our taxpayers and our businesses translate into a stronger economy across the board. There has been much discussion this session of the best way to get a little extra state money back to taxpayers. I believe this is the way to do it. Instead of just a one-shot allocation, these savings will translate into savings over the long run. It is something that taxpayers will be able to count on year after year through stronger business, better savings, and a strong economy.

The bill as it is written provides for a question to be placed on the ballot, since the 2 percent state sales tax cannot be differed by this Legislature. The State also needs to consider that whatever we do should fall in line with the streamlined sales tax questions posed throughout this country. With that in mind, it might even be a better bill if we were to take the one that is before you and, instead of putting a question before the ballot, exempt everything but the 2 percent sales tax this year. We can do virtually anything we need to this year, prior to the end of the year. January 1, 2006 is the cut-off date for the streamlined sales tax agreements throughout the country and is the date that will have to remain in compliance.

Assemblywoman Giunchigliani:
Do we have a high and a low amount projected cost impact?

Assemblyman Perkins:
We do have some. I know Fiscal is working on additional numbers as well.

Assemblywoman Giunchigliani:
So if we move it, it will go to Ways and Means anyways.

Assemblyman Perkins:
Yes, it will be a Ways and Means question. Should this Committee decide to process this bill, it depends on what is exempted from sales tax, whether it is just clothing; clothing and school supplies, including computers; or opening the door completely if somebody decided that is when they want to purchase a new automobile. So, it depends on which items this state would want to exempt.

Assemblywoman Giunchigliani:
We have a lot of exemptions that we are dealing with this time around, and we just need to be careful and track that.

Assemblyman Perkins:
I have stated many times this legislative session that, assuming the numbers are real and we finish this session with as healthy a surplus as has been suggested, we have a partnership with our taxpayers, and some should be returned. I know

there has been a great deal of criticism on the DMV [Department of Motor Vehicles] rebate and other things. This would be one additional option.

[Assemblyman Perkins, continued.] I have in front of me the chart from the 12 states that had sales tax holidays in 2004 and the estimated percent loss in annual sales tax collections by state based upon their experience and the items included in the exemption. It averages between one-tenth of a percent and three-tenths of a percent throughout the country. That is as restricted to just clothing in Iowa, Texas, Florida, and many of the states, as well as all retail items in the state of Massachusetts.

Assemblyman Sherer:
Do the other states have just a one-day holiday, or is it a two-day holiday, and do they have a couple of them or just one?

Assemblyman Perkins:
The average is a three-day sales tax holiday. It is oftentimes Friday through Sunday the weekend before school starts, or a couple of weekends before, to give some the opportunity to provide for back-to-school. Vermont actually did two separate sales tax holidays, as did the District of Columbia.

For the benefit of the Committee, I will have this document sent to the rest of the Committee.

Christina Dugan, Director, Government Affairs, Las Vegas Chamber of Commerce, Las Vegas, Nevada:
I have a letter (Exhibit W) that I would like to place on the record. We are in favor of A.B. 320 because we believe a sales tax holiday would be good for the businesses of the state of Nevada, both in terms of their opportunity to provide more sales and their opportunity to participate in a sales tax holiday. As a result, we would ask the Committee as a policy position for future sales tax holidays to ensure that they were across the board, and that everyone is able to participate in them, because everyone pays the sales tax in one form or another.

George Ross, Legislative Advocate, representing Retail Association of Nevada:
The Retail Association of Nevada is wholeheartedly in support of this bill, particularly the back-to-school holiday concept. It is an excellent opportunity to help Nevada's working families. This is a good opportunity to purchase those school supplies and other supplies that they may need at a reduced rate. Perhaps they could even buy better materials for their children. We think this would be both an excellent opportunity to help Nevada's working families to give back some of the surplus and to stimulate Nevada's business as well.

Vice Chairman Oceguera:
I will close the hearing on A.B. 320 and open the hearing on A.B. 387.

Assembly Bill 387: Provides for reduction, under certain circumstances, of certain excise taxes imposed on employers. (BDR 32-198)

Assemblyman Lynn Hettrick, Assembly District No. 39, Douglas, Carson (part) and Washoe (part):
In 1995, I was encouraged by several physicians from Reno to pass a bill creating medical savings accounts. It was quite progressive at the time. The problem was that medical savings accounts were never utilized in the state of Nevada because there was no mechanism to fund medical savings accounts, which were generally funded by a deduction from an employer's taxes, and a deposit was made into the medical savings account. Since we didn't have any broad-based business tax, no one ever activated a medical savings account. A year or two ago, the federal government changed the medical savings account provisions and created a new category called a health savings account (HSA).

Their idea was that because the cost of medical insurance is getting so high, they wanted to come up with something that would foster the purchase of health insurance by allowing a very high deductible health insurance plan, which lowers the premium. That proved not to be terribly practical because it left the employee with a huge deductible and large copay. They developed the health savings account, which says that the employer can deposit into a health savings account for the employee for the purpose of paying high deductibles and copays, a reduction of the employer's tax. In the last session, we passed a modified business tax, which is not broad based. It applies to every business in the state of Nevada. We now have an opportunity to take advantage of the HSA program established by the federal government to provide more people in the state of Nevada with health insurance.

It is an opportunity that will not make a huge difference, but it is a step in the right direction, and perhaps we can get some people to either retain or buy health insurance for employees that they otherwise would not have purchased. We have a fiscal note (Exhibit X). The bill is very simple.

The bill amends NRS chapters 363A and 363B. The language in both chapters is identical. Beginning in Section 1, subsection 1, it simply says that an employer may abate the tax if he is participating in this program. The interesting part that we put in the bill is that if an employer decides to do this, we phased in the tax deduction that they are allowed to make from the modified business tax. We

phased it in so that it has minimal impact on the State of Nevada. Whatever the amount of the tax abatement, the employer must divide that abatement equally amongst all of his employees who opt to get into an HSA. The highest-paid executive in the company and the lowest-paid worker in the company will get the exact same benefit. It will be equal for all. That is what lines 8 through 10 say, the idea being that the person who could least afford the high deductible or the copay would be the person who was the lowest paid. The highest-paid person in the company could afford to pay more, so it will take longer for his copays to be covered relative to his wages.

[Assemblyman Hettrick, continued.] Lines 11 through 15 limit who can use this. People who are already covered by Medicare, Medicaid, or negotiated bargaining agreements are not eligible. To minimize the fiscal impact to the state of Nevada, we limited this to those folks who are not covered by those items. This would go to companies and employees who have no health coverage or limited health coverage relative to these other people that are in lines 11 through 15.

Lines 16 through 21 say nothing but that the abatement must equal the contributions. The employer cannot abate $1,000 but only contribute $800. Page 2, lines 1 through 10 show the phase-in, so it has minimal impact upon the budget. Lines 11 through 17 say if you don't pay it, you owe the money back to the Department of Taxation. When we did the modified business tax, we put in a deduction for health insurance before the tax is calculated. This simply says that this deduction is in addition to that. You calculate the payroll, subtract the premium for health insurance, and then calculate the tax. You would lower the amount that this would apply to. It reduces the amount of tax.

Section 2 is identical to Section 1. It just applies to the other section of NRS 363, which pertains to the other employers. Section 3 of the bill changes the term "medical savings account," which is in the existing law, to "health savings account" so it comports with the federal changes.

The Department of Taxation has looked at this. They have given a fiscal note (Exhibit X). The programming cost to allow this to be done is $57,000 in the first year of the biennium. Fiscal years 2005 and 2006 will have a $23,000 cost to the State estimated to begin to initiate HSAs in the first year of the biennium; $49,000 in the second. It is estimated that after fully phased in, the effect on future biennia is $188,000. This is a very low cost to the State of Nevada, probably a blip on the State's income relative to the entire budget. The opportunity to have more people insured would be significant, and any one person in the state of Nevada who took advantage of this in a major claim would potentially receive more from having health insurance coverage than the

whole $188,000, which is over future biennia. The cost of this is $90,000 a year. It is extremely minimal to try to get people covered by health insurance.

Assemblyman Seale:
I just happened to enter into an HSA last week for myself. It caused my insurance cost to drop by half. There are other things that you get to do inside an HSA in conjunction with the federal government that make it an incredibly attractive option. I think that the State participating in something like this is something that we should definitely do, particularly since its cost is so low. When word gets out, small businesses are going to look at this as a significant opportunity to provide health care for their employees and control costs in a very significant way. I applaud you for this legislation.

Assemblyman Hettrick:
I did have an opportunity to meet with members of the insurance industry about this bill. It is very interesting. They told me that HSAs are hard to explain when you try to sell these in the general public. People have a tough time with it, and it really hasn't gone very far. They said this will really make a difference because the cost of health insurance is getting so high that right now there are many small employers in the state of Nevada who are paying $600 a month per employee. The cost of an HSA policy with the very high deductible drops down to the range of $120 to $250 a month per employee, compared to $600. If you take a business with 20 employees, that could save $250 a month per employee on health insurance. That is $5,000 a month; a huge savings. Otherwise, they might have dropped health insurance entirely. Then they come back with a tax abatement from the State of Nevada under this program and fund the copay for the employee. The employee comes out with the same benefit, but the cost to the employer goes way down and will keep far more people insured in the state of Nevada. Hopefully, Nevada will gain some insured as they learn how this works.

Assemblyman Conklin:
I was under the impression that the employee will have control of the employer part that has been donated. Is that correct? [Assemblyman Hettrick answered in the affirmative.] That is one of the key criteria for this.

Assemblyman Hettrick:
I will address that fully for the record. Yes, an HSA is an amount of money actually deposited to the employee's health savings account. The employee controls the account. The employee can spend from that account for the copay, the deductible, or other medical expenses. He receives that money tax-free and controls the money. If he leaves that business, he takes the money with him. The money goes to the next employer, if they have a health savings account

plan. If they don't, the employee still gets to keep the money and spend it for medical expenses until it is gone.

Assemblywoman Gansert:
In the bill, you are funding the equivalent of whatever the tax would be, but employers can also fund additional money if they choose to, once they establish the HSAs.

Assemblyman Hettrick:
Yes, I believe that is correct. I actually didn't become an expert on the HSA plan, but yes, the employer is entitled to make the contributions. I am not certain that the employee can't ask that money be deducted before tax and put in as well. There are people here who can answer those questions better than I. For those that haven't seen this, or for those on the Internet, this phases in at 10 percent the first year, and an additional 10 percent annually on the amount that can be abated, up to 50 percent of the tax that an employer could owe to the State of Nevada. If it got to 50 percent, he would have to be dividing that equally amongst all of the employees with an HSA and give every one of them an equal share of that amount.

Assemblyman Conklin:
It is my understanding, when you say equal share, you mean throughout the range of the company. So, if you have a $9-an-hour employee at the bottom, and a $200-an-hour at the top, the actual amount that goes into their health savings account is equal in real dollars.

Assemblyman Hettrick:
Absolutely; that is exactly what the bill says. The person on the bottom end of the pay scale is the one who needs the most help with the high deductibles and high copay. The person on the higher end of the scale would get the same amount, but would have the ability, if need be, to make up the difference more easily. That is why we did equal. We are trying to reach the people who would otherwise not be able to get health insurance. The reality is that a highly paid executive could go out and buy health insurance outside of the company. The lower-paid employee could not afford to do that and would have no coverage. We are trying to compensate for that.

Chairwoman Buckley:
Right now, you get a credit on our modified business tax for health care plans. Are health savings accounts now covered?

Assemblyman Hettrick:
No, they are not. The premium could be, but you are not covering the health savings account portion, which is the amount that is deposited for the employee's ability to cover his deductible. We currently calculate the tax by determining the total payroll, subtract the premium for health insurance, and then calculate the tax. If your premium goes down, you would pay more, but if you could get a bigger credit to give people in the HSA, it would be minimal. If your premium goes up because you didn't have health insurance previously for your employees, you would get a deduction, and then you would still be able to take something out on the abatement to give to the employee to cover the deductible and the copays.

Chairwoman Buckley
So why aren't health savings accounts receiving the benefit of what we did last session? Is it because the employer's contribution is not considered a premium?

Assemblyman Hettrick:
The premium portion of the health savings account, the high deductible insurance, would be deducted from the calculation for the modified business tax, whether it is an HSA plan, a high deductible plan, or any other plan. You get to deduct it. The part that is not deducted is the deposit to the employee's actual health savings account. That is what we are deducting here by doing the abatement.

Chairwoman Buckley:
Is that the employer's share or the employee's share?

Assemblyman Hettrick:
The employer's share. The employee can make a deposit if he wishes by a pretax deduction, at his option. The employer who is buying the insurance is getting to abate a part of his liability to the state of Nevada to give that to the employee to cover the deductible and copay.

Assemblyman Conklin:
I signed onto this bill because I thought it was very good, particularly for small business. What is happening with small business is they are being squeezed out of exceptional health care plans because they are too costly. This bill allows you to buy a plan with a higher deductible and then open a savings account controlled by the employee. The money that the employer puts into that account cannot be taken back; it is the employee's money now. It can be deducted, and that money must be spent to pay the part of health care costs that is not covered by the program. This HSA can be deposited into by the employer and the employee, but the employer's deposit then becomes tax

deductible under the payroll tax, even though it is not going towards the premiums; it is covering the cost of copays, prescriptions, et cetera.

Chairwoman Buckley:
I am very skeptical about health savings accounts. Nationally, they are being decried on the basis of adverse selection. The folks that generally pick them are healthier individuals, causing more affordability crisis through adverse selection and a shifting of the risks. There have also been some papers and studies suggesting that it discourages preventative care by focusing more on funding catastrophic needs. Someone saves for the heart, but neglects the visit that could have prevented the heart attack, obscuring our movement over the last decade towards prevention. I recognize the argument that it is better than nothing because of the incredible costs that small businesses are facing, which is why we did the interim committee with the HIFA [Health Insurance Flexibility and Accountability] waiver proposal. I worry about all of those issues. I worry about adverse selection, a sense of reliance on the plan, and the public policy of discouraging more preventative services. I wonder as a nation whether we should be doing more to come up with a solution to our broken health care system, rather than relying on this method, which has so many problems, according to the scholars.

Assemblyman Hettrick:
In terms of adverse selection in the way we are funding this, every employee in a business, if this were explained to them, would go out and get an HSA. They are going to get free money from their employer and health coverage that they may not have otherwise had, and they can spend it on any medical bill, tax free, as long as it is on a deductible medical bill. In this plan, the way it is funded, there is no reason for every employee not to do this, should the employer go this way. I don't think adverse selection applies to this funding method because everyone is going to benefit the same.

In terms of prevention, the important part of this is that the employee controls the plan. As long as he spends the money on medical care, he can spend it in any form, preventative or otherwise, prescriptions, anything that is tax deductible under the federal law. In this case, the biggest negative I can see in terms of prevention is that when you start the plan, there is not a huge amount of money, maybe $300 a year or something like that. It is not a huge amount of money to cover a $1,000 deductible. If, in the meantime, you had a catastrophic event and spent your deductible money in your HSA, you would not be able to buy preventative care, because you wouldn't have any more money in the HSA. That is true; however, you got your $1,000 deductible covered for the catastrophic. If you didn't have catastrophic, you would have the money in your account to cover preventative care. Either way, I don't see

how anyone loses on this deal. I understand the long-term argument nationally about people doing this, but we purposely tried to fund this with equality so that everyone would benefit the same. There is no adverse selection in this bill.

Chairwoman Buckley:
It is not in the bill, it is in the concept of HSAs in general. As I understand, with the HSA law, the deductible could be as high as $10,000. The low end is $1,000, but $10,000 is the high end. I think the concern is that if the younger and healthier people switch to HSAs, will the health insurance then become too costly for everyone else? What does that do with the other health care plans, which have better coverage? They then have additional adverse selection because they have older and sicker individuals. So, the plans which provide more coverage end up, because people switch out of them, having to raise their costs to pay for the younger individuals who choose HSAs. I could go on for hours on HSAs, but I won't.

Assemblyman Seale:
I mentioned that I had just recently involved myself in an HSA high-deductible policy. The way that I was looking at that was to roll back a couple of years and was looking at a catastrophic event that I had. Had I had an HSA high-deductible policy, it would have saved me significant amounts of money because of the copay that was required. At the time, I ended up having to pay, out of pocket, over six figures in order to meet the policy. I was healthy at the time; I am probably less so now. In terms of the preventative care, even with the HSA, I intend to go on the same schedule that I have been going on for the last few years. I like the idea a lot. I think there are some policy issues that need to be dealt with, but I think this is the right direction to go.

Larry Hurst, Vice President, Public Affairs, Nevada State Board of Health Underwriters:
[Read from Exhibit Y.] We are here today as a nonpartisan, factual resource regarding private health insurance solutions.

> We seek to improve our consumers' ability to meet their health, financial, and retirement security needs through education and advocacy. We are the premiere professional organization with over 400 agents and brokers locally and over 20,000 members nationally. We represent employer and individual health benefits for thousand of Nevadans. Our goal is to improve employers' access to benefit plans while saving them money. We respectfully request your support for A.B. 387. This bill will assist Nevada employers on the verge of losing access to benefits as well as offering affordable and quality health insurance.

[Larry Hurst, continued.] Progressive bills such as A.B. 493, the HIFA Waiver demonstration initiative, and A.B. 387 recognize the importance of offering accessible and affordable health benefits for Nevadans. These bills are a step in the right direction to assist Nevada employers that struggle to offer health benefits for their employees. Our consumers will be thankful for your support, as they will benefit from these bills.

Health savings accounts are a new option for health insurance. They have two parts. The first part is a health insurance policy that covers large medical bills. The second part of the health savings account is an investment account or retirement account from which one can withdraw money tax free for medical care. Otherwise, the money accumulates with tax-free interest until retirement, when one can withdraw for any purpose and pay normal income taxes.

Health savings accounts are a new way for consumers to pay for medical expenses. As of January 1, 2004, anyone with a qualified high-deductible health plan can also have a health savings account. HSAs save money on current medical care and provide a good way to save for future medical expenses. HSA funds can pay for expenses before a deductible is met and help pay for services not covered by one's health plan, COBRA [Consolidated Omnibus Budget Reconciliation Act] coverage during periods of unemployment, medical expenses after retirement, and long-term care expenses, to name just a few.

A high-deductible health plan can be obtained through an employer or a policy purchased individually. Even if one obtains a high-deductible health plan or even an HSA account through an employer, that account is individually owned. You decide how much to contribute, how much of the account to use for medical expenses, and which medical expenses to pay from that account. You also choose whether to pay for medical expenses from the account or save it for future use. Even if you change jobs, your health savings account is still yours.

You can keep the account even if you move to another state, and you can continue to keep it as you grow older. Regardless of where you get your health insurance plan, whether on your own or

> through your employer, your health savings account funds are yours.
>
> [Larry Hurst, continued.] Unlike some other types of accounts, you don't lose HSA funds at the end of the year. Unspent balances remain in your account earning interest until you spend them on medical care. This is a strong incentive for you to spend wisely on your medical care, just like you do on other items you purchase. You'll want to shop around for the best value for your health care dollars.

High-deductible health plans have a piece in them called preventive care, which is not subject to deductible. When you go to see your OB-GYN and your primary care provider, it is just a regular copayment. You are getting preventive care whenever you choose. The deductibles range from $1,000 for an individual, and $2,650 if you have a family. Your deductible is reachable. A couple of large medical bills will get you to that deductible very quickly, and then your insurance kicks in. My company offers an 80-60 plan, 80 percent in network, 60 percent out of network. Once that deductible is met, insurance kicks in.

Jack Kim, Legislative Advocate, representing Nevada Association of Health Plans:
We just want to go on the record in support of this bill and any other legislation that addresses the uninsured. We have had an uninsured problem in the state for years.

Donal Hummer, Jr., Vice President, Government Affairs, Harley-Davidson Financial Services:
Harley-Davidson would like to go on the record in support of this bill. I believe this would be a great thing for the state of Nevada, especially for smaller employers who cannot afford a conventional medical plan.

Bill Uffelman, President, Nevada Bankers Association:
We support this bill. My counterpart in another state was offered the program through Blue Cross. They had to research how to set up HSAs for these folks. The bank employees thought it was a better plan, so they got in on it too. It mushroomed for them in a rural Iowa setting. I have suggested to the Nevada Bankers that they ought to be looking at this, because one of their concerns and complaints is the cost of health care for their employees. They want to be able to provide it. We think this is a good bill and endorse it.

Bob Ostrovsky, Legislative Advocate, representing Nevadans for Affordable Health Care:
We rise in support. We would like to support anything that makes it easier for employers to purchase insurance for their employees. When we did the tax package last session, we created this payroll tax deduction for premiums and created a lot of language for self-insured employers. We never thought about self-insured employees. These are employees who are setting money aside. We created a whole mechanism to allow self-insured employers to deduct the money, but never thought about the process of HSAs. I think they were too new. We just wanted to be on the record.

Chairwoman Buckley:
Brenda, in your opinion, can we already deduct? Bob mentioned that we didn't envision this. Would you clarify whether you think HSAs are already covered under the law?

Brenda Erdoes, Legislative Counsel:
The provisions of NRS 363B are very broadly worded and already say that any payments for any kind of health benefits or health insurance benefits can be included in the deduction against the modified business tax. It even says such other similar payments for health care or insurance for health care for employees or authorized by the Department. It could be deducted, but I think this bill provides for abatement, which is an additional amount of money that would be a set-off. So, yes, they can already allow for the money that the employer puts in for these HSAs to be deducted from the amount of the tax due. This bill would provide for additional money that could come off of that.

Chairwoman Buckley:
What additional money? If it is already allowed to be deducted, is that creating a double standard?

Brenda Erdoes, Legislative Counsel:
I'm not sure if it's a double standard, but the abatement would be for the full amount of the tax due, rather than the way the deduction is currently working in the statute itself.

Assemblyman Hettrick:
I believe Brenda is correct. The premium for an HSA is the exact same premium that we currently allow an employer to deduct prior to calculating his tax liability under the modified business tax. Yes, they are able to do an HSA plan today, as the law exists. The intent of this bill is to help fund the high deductible portion for the employee who receives this insurance package, because it may be all the employer can afford. If you will give the money from this abatement to your

employee, you can take it off your tax. That is what this bill is allowing, simply that they will be able to deduct a percentage of their modified business tax annually up to 50 percent, and give that to the employee to cover the deductible cost. It would still be a part of the insurance cost in terms of what comes off the modified business tax. That is the effect of what this is doing. If the employer doesn't get abatement on his tax, then he would be paying the premium and having to give additional money to the employee to help fund an HSA, and that won't happen.

Chairwoman Buckley:
Brenda, from a legal point of view, is that correct?

Brenda Erdoes:
Yes, I agree with what Mr. Hettrick is saying. This is in addition to being able to deduct whatever health benefits you can deduct from the tax. It is just a percentage that goes from 10 percent for the first year up to 50 percent. It is a phase-in, and it is actually 50 percent of your tax liability that you can deduct. The first thing that is currently under the law as it stands is that it is a one-for-one: whatever dollars you put in for buying health insurance for your employees, you can take off your tax within the parameters of the bill. This is in addition to that. The point is that the employer would be expected to be making payments to health insurance plans in addition to these health savings accounts, and that currently isn't allowed under the provisions of the law.

Chairwoman Buckley:
That is clear as mud.

Danny Thompson, Executive Secretary-Treasurer, Nevada State AFL-CIO:
We have the very same concern that you have with these types of arrangements. We don't support these. Ultimately, you are going to impact the cost to people with better policies. You are going to drive people to the most expensive care—no preventative care—and they are going to end up in the emergency rooms. That is our concern with these types of arrangements.

Nancy Ford, Administrator, Welfare Division, Nevada Department of Human Resources:
[Submitted Exhibit Z.] I don't have a position on the bill, but I have some concerns about the language regarding exempting people who are eligible for Medicaid and Medicare. A condition of our State plan for participation in the Medicaid program is that we safeguard the information regarding recipients and applicants of Medicaid. I don't know how the Department of Taxation would get this information. We would be unable to share information with the Department of Taxation or with employers as to who is a recipient of Medicaid. For

Medicare, that is a federal agency, and I am not sure if they would be able to share that information, either.

Chairwoman Buckley:
I will close the public hearing on A.B. 387 and open the public hearing on A.B. 503.

Assembly Bill 503: Extends period during which Department of Taxation may issue deficiency determination under certain conditions. (BDR 32-389)

Dino DiCianno, Deputy Executive Director for Compliance, Nevada Department of Taxation:
A.B. 503 is on behalf of the Department of Taxation. The bill tolls the statutory period during which the Department can review the entire liability of a business when they file a claim for a refund. If the business is owed a refund, they will get a refund. Our concern is that when we get these requests for refunds, it is only one particular item out of their entire liability. We want to be able to audit that entire liability and make adjustments to that refund if they do owe other taxes.

Assemblywoman Gansert:
I'm just wondering if there should be a time frame so someone is not pending a refund for a year or two.

Dino DiCianno:
If I understand your question correctly, you want to make sure that the Department, when it receives a refund request, acts within a certain time frame. Currently, there are provisions in statute. If the Department does not act on a refund within a six-month period, it is deemed to be appealed. We are required within a six-month period to make a determination whether they are entitled to a refund or not. That already exists within statute.

Chairwoman Buckley:
Seeing no further testimony, I will close the public hearing on A.B. 503.

ASSEMBLYMAN SHERER MOVED TO AMEND AND DO PASS Assembly Bill 503.

ASSEMBLYMAN HETTRICK SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblyman Oceguera, Assemblyman Anderson and Assemblywoman McClain were not present for the vote.)

Chairwoman Buckley:
I will open the hearing on A.B. 554.

Assembly Bill 554: Makes various changes to provisions governing taxation. (BDR 32-1344)

Assemblyman David Parks, Assembly District No. 41, Clark County:
This is the bill that attempts to clarify five different provisions of the tax measures that were enacted mostly in S.B. 8 of the 20th Special Legislative Session. The first clarification has to do with the determination of a business and who is subject to the business license fee. The definition of a "business" is revised in Section 1 of the bill to include only persons that supply a product or service and not a person that consumes a service. The second provisions deals with community banks. Community banks are often referred to as "hometown banks." These hometown bankers serve the same communities in which they live, work, and play. Currently, there is not a definition of a community bank within our statute. Section 2 of the bill defines a "community bank" as a bank that is headquartered in the community it serves and is owned by an entity that has less than $1 million in total banking assets. Section 3 exempts a hometown bank in a community with less than 50,000 people from the excise tax. In addition, in Section 4, a 1 percent modified business tax is imposed on these hometown banks in a community with a population less than 100,000.

The next area is the live entertainment tax. This bill amends two items regarding the live entertainment tax. The live entertainment tax was enacted as part of S.B. 8 of the 20th Special Legislative Session. Section 5 clarifies that an entity filed with the Nevada Secretary of State is a nonprofit corporation and is exempt from the live entertainment tax. This clarification came about from a nonprofit high school rodeo that was visited by the Department of Taxation. Although they are considered a nonprofit, they are not a 501 nonprofit organization. Currently, under NRS 368A.210, taxpayers are required to hold live entertainment taxes in a separate checking account for payment. This provision has required some smaller businesses to establish an account that may only be used a few times a month. In addition, most of the other taxes could be paid from the business's regular account. In researching this provision and

discussing it with the Department of Taxation, there was no reason for this provision; therefore, the bill repeals this statute.

[Assemblyman Parks, continued.] The next area was the use tax. Last year, at a trade show in Las Vegas, auditors for the Department of Taxation were sent to collect the use tax on items that were being given away on the trade show floor. Sections 6 and 7 of this bill exempt these freebies from the use tax.

Finally, the state transfer tax is our last item in this bill. It is currently in Section 9 of NRS 375.090. It exempts a transfer assignment or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of consanguinity. Under this exemption, a child can add a parent's name to a deed, but if a married couple puts a parent's name on the deed, the tax is owed. To alleviate this problem, this section of NRS is amended by adding "or to the spouse of such a person" in Section 8.

Assemblyman Seale:
If I could direct you to Section 2, in the definition of a community bank, it says that the majority of its patrons reside, and is owned by an entity that has less than $1 billion... That is a big number. Was that meant to be $100 million?

Assemblyman Parks:
$100 million seems to be a much more appropriate number.

Chairwoman Buckley:
Do either our Legal or Fiscal have any additional comments with regards to that definition? Can anyone recall where that number came from and whether it needs to be adjusted?

Tony Sanchez, Legislative Advocate, representing Las Vegas Convention and Visitor's Authority:
We are in support of A.B. 554, particularly Sections 6 and 7. They had a concern over the imposition of use taxes on free samples that are given at trade shows. These sections are very broadly written. The Department of Taxation had a concern, which is very warranted, on just how broadly that could be read. We propose a slight change to the end of both Sections 6 and 7, which would make it clear that this is not related to high-priced items. These are typically free items that are given away at trade shows and others. We propose language that would read, at the end of line 23, "...only with respect to individual items whose value does not exceed $100." The trade show market has cutthroat competition between various cities for very limited convention and trade show

markets. It is our hope that this can be a streamlined provision; if these things get up over $100, at that point the use taxes would come forward.

Carole Vilardo, President, Nevada Taxpayers Association:
In Section 1 of the bill, where we are trying to put a definition in to exempt individuals that may have been captured, that was not the intent. I support that provision, but there may be some language in S.B. 388 that would better clarify. I further suggest that the language be amended into NRS 363A and 363B, because we have had instances where individuals consume a service, not provide it. For example, if you hire a nanny to watch your children after school because you work, they are considered your part-time employee, but you feel enough of a responsibility to be a good citizen and pay unemployment wages on behalf of this employee, you are now defined as a business, because although we defined "employee," we never defined a "business". I think that was the intent.

Chairwoman Buckley:
For the record, our staff found that it has to be carried down to those other statutes. We already have that ready for work session.

Carole Vilardo:
Relative to NRS 363A and B, we sent letters to all of the members of the Legislature last session. We have never supported industry-specific taxes. I do not have a position specifically to that this year. On the basis that we have never supported industry-specific taxes, if you are going to put something forth as proposed in these provisions, then we would ask that you do it across the board for banks. At some point, there needs to be a little bit of policy, more than just getting one industry or just getting revenue. In lieu of not hanging some of these, we have had major complaints about the branch tax, particularly in the rural communities. I would urge you to eliminate the tax. It did not turn out to be a major revenue generator. At the very least, we could wind up getting rid of that. Other than that, relative to the issues with nonprofit corporations and clearing those, we too have had a lot of communication on whether or not a nonprofit is captured. We do support those provisions as clarifying points to the bill.

Scott Scherer, Legislative Advocate, representing Paramount Parks:
We have a brief proposed amendment (Exhibit AA) that we would like to submit. We support the bill and the clarifications in it, but we would also like further clarification as to the live entertainment tax. Paramount Parks operates Star Trek: The Experience, in Las Vegas. It used to be exempt from the required casino entertainment tax. That exemption was put in 1995. It was noted at the time that they were considering building Star Trek: The Experience, and that it

would be an example of interactive entertainment that would then be exempted from the casino entertainment tax. They built that attraction in 1996 after the exemption was granted, and then two years ago, the exemptions were all eliminated. The tax was changed from the casino entertainment tax to a live entertainment tax. Paramount, believing that their Star Trek: The Experience was a motion simulator ride, or a digital 3D video, didn't believe that they were live entertainment.

[Scott Scherer, continued.] It was recently suggested to them that they may be captured under the live entertainment tax because they do have their ride attendants in costume and they do recite a few lines. They are arguably providing some live entertainment, but the primary purpose of the ride is a motion simulator amusement ride. People would not show up simply to see the costumed attendants; they show up for the ride itself. This amendment would clarify that live entertainment does not include entertainment that is incidental to an amusement ride.

Each of these people, although they are in costume in order to enhance the ambience of the ride, have other important functions. They provide safety and security, and they make sure people move the ride at the appropriate pace, because timing is everything. That is the reason for them, but they do try to enhance the ride. As you have seen in theme parks all over the country, that is the trend with these rides to try to make them a little bit more realistic, and to create a little more of that environment so that people actually feel like they are in that experience. That is the idea with this.

This amendment applies a primary purpose test, which is a test that has been applied by the Nevada Supreme Court in other tax situations. It is a well-known test to the courts in the State of Nevada.

Bill Uffelman, President, Nevada Bankers Association:
Nevada bankers are seeking a return to fairness and equity in Nevada's business tax structure. In our opinion, Sections 2, 3, and 4 of A.B. 554 do not do that. The bill defines "community bank" as a bank that is part of a holding company with less than $1 billion in banking assets. By my calculation, approximately 30 of Nevada's 45-plus banks meet that portion of the bill. The bill then exempts from the $7,000-per-year branch fee only those community banks located in counties with a population less than 50,000. This seems to apply only to 3 Nevada banks. Ironically, one of those banks is larger than at least 15 other Nevada banks, while the other 2 are larger than at least 5 other banks. The payroll reduction for a community bank in a county with less than 100,000 population may apply to all 3 banks, although one of the banks has branches in three counties. In many instances, rural Nevada communities are

served solely by banks that do not qualify for these tax reductions. Because of the smaller customer base, the cost of doing business in a rural community on a per customer basis is higher whether a bank is large or small. In some cases, you will now be giving a tax advantage to competitors who are located across the street from one another, similar to the credit union issue.

[Bill Uffelman, continued.] Nevada's bankers want restoration of a fair business tax system, elimination of the $7,000-per-branch fee for all banks, and a reduction of the 2 percent bank payroll tax to the 0.65 level paid by all other employers. In our opinion, Sections 2, 3, and 4 of A.B. 554 miss that mark.

Chairwoman Buckley:
I think there is some sense that we want to do something about the per branch fee for the rural communities, whether we do it by defining community bank in a different manner, or whether we exempt out the first five or six branches as a way to help the rural communities. What would your suggestion be if a Legislature wanted to reduce the per branch fee in the rural communities? What method would achieve that goal?

Bill Uffelman:
There are large banks that have branches in rural Nevada. In some communities there is only one branch present and that happens to be the branch of the large bank. The only way that you could get a rural is to say that a branch located in a county with a population of less than X would be exempt from the $7,000 fee. I have a number of members who are small banks, many of them located in Clark County. They typically have three or four branches at the most. Clark County is clearly not rural, but they are smaller than at least one of the rural banks, and in some cases smaller than all of the rural banks by the other definition. You end up trying to determine how to allocate this $7,000-per-year fee that raises $3 million for the state of Nevada. When all is said and done with all of the cuts and cross-outs, I couldn't even tell you what you would wind up with as the leftovers out of that $3 million. At least with respect to the $7,000, just making it go away, period, is probably the fairest thing one could do for all bankers, large and small.

Alan Glover, Carson City Clerk-Recorder, Carson City, Nevada:
We are neutral on the bill but very supportive of Section 8, which deals with the spousal exemption. We are here today to make you aware of S.B. 390, in which we put some language that accomplishes what you want to do. We are suggesting an amendment (Exhibit BB). You may want to wait until you get a conflict notice, but the language that we prefer is a transfer, assignment, or other conveyance of real property if the owner of the property is related to the person to whom it is conveyed within the first degree of lineal consanguinity or

affinity. Affinity takes care of the spouse and corrects the situation in which mom and pop want to deed to their son and daughter-in-law. If they want to go that route at the moment, they have to pay the full tax on that. How you get around that is to do two deeds. Mom and pop deed to their son, who turns around and does another deed to himself and his wife. It just corrects that problem. There is no revenue loss for the State; it is a slight revenue loss for the counties, but we think it is fair and equitable. That language is in S.B. 390, which it appears the Senate Taxation Committee is going to process. If you processed your bill, we would appreciate if you would consider our language in there.

Chairwoman Buckley:
Brenda, in your legal opinion, does this language accomplish the same thing as the language in the other bill?

Brenda Erdoes, Legislative Counsel:
Yes, I believe that it does. It allows you to make a transfer with your spouse and their parents.

Chairwoman Buckley:
I will close the public hearing on A.B. 554. Let's consider A.B. 67 from work session.

Assembly Bill 67: Authorizes Department of Taxation to suspend or revoke business licenses. (BDR 32-392)

ASSEMBLYMAN PERKINS MOVED TO DO PASS ASSEMBLY BILL 67.

ASSEMBLYWOMAN ALLEN SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblyman Anderson and Assemblywoman McClain were not present for the vote.)

Chairwoman Buckley:
Let's consider A.B. 68.

Assembly Bill 68: Authorizes Department of Taxation to deny licenses or permits to persons liable to Department for payment of money. (BDR 32-390)

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO AMEND AND DO PASS ASSEMBLY BILL 68.

ASSEMBLYWOMAN GANSERT SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblyman Anderson and Assemblywoman McClain were not present for the vote.)

Chairwoman Buckley:
Let's go to A.B. 19.

Assembly Bill 19: Prohibits issuance of gift certificate that contains expiration date and prohibits issuer of gift certificate from charging fee for inactivity to buyer or holder of gift certificate. (BDR 52-558)

Assemblyman David Parks, Assembly District No. 41, Clark County:
What you have is a revision of the bill. It included the changes that most of the opponents to the bill had requested. If there is a gift certificate that has an expiration date or any fees, those fees must be clearly printed on the face of the document in plain sight for somebody to see before they purchase the gift certificate. There are a number of exemptions that it does not apply to. Those are identified in the bill. It even has a provision for a toll-free phone number if there are balances remaining on the bill. For the most part, I believe that I have covered all of the concerns that the opponents had on the bill. The major concerns are at the bottom of the first page and at the top of the second page. It also deals with the telephone cards. That covers the provisions of the bill.

Assemblyman Seale:
Are these gift cards still going to the State?

Assemblyman Parks:
The presumption is that these would be cards that would have identification as to the owner. There is a provision that after a particular date, if the card does not have an expiration date, it would not expire. My understanding would be that they would escheat to the State.

Chairwoman Buckley:
Did you work with Dr. Hardy on the amendments (Exhibit CC) and on the bill?

Assemblyman Parks:
Yes, I did, and we got some input from Assemblyman Seale. We discussed the major components of the bill.

Chairwoman Buckley:
We were also going to amend Assemblyman Hardy's name on it as a cosponsor.

Assemblyman Parks:
Yes, that is correct.

Assemblyman Seale:
A lot of this language came from Illinois, which has very good unclaimed property laws.

ASSEMBLYMAN SEALE MOVED TO AMEND AND DO PASS ASSEMBLY BILL 19 WITH THE AMENDMENTS AND ADDING ASSEMBLYMAN HARDY AS A SPONSOR.

ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblyman Anderson and Assemblywoman McClain were not present for the vote.)

Chairwoman Buckley:
Did we want to go back to A.B. 360, the cosmetologists?

Assembly Bill 360: Provides for regulation of persons who practice permanent cosmetics. (BDR 43-925)

Chairwoman Buckley:
I sent one of the emails from someone who was concerned and I also sent a couple of emails from Assemblywoman Weber. I had asked her to get information on how often these tests are given and how much they cost. I sense some folks are lukewarm, some are supportive. I think both Assemblywoman Giunchigliani and Assemblyman Hettrick were comfortable

moving it. I could go through some of the information I received in email for the record. Looks like we are going to have a discussion first.

Assemblyman Hettrick:
I did see one of those emails. My first thought was that it wasn't much of an issue. I do see a concern with it requiring people to join a private organization, not an institutional or licensing organization. I am not sure that is the appropriate place to put them. I am for some kind of regulation; I am not necessarily into forcing them to join a private organization.

Chairwoman Buckley:
Mr. Conklin concurs. I sense that there is a concern about the industry in general. I think it is a matter of figuring out what is the right way to deal with it. The Health Department would still have jurisdiction over the tattoos; should this be a board or a test? Maybe it is even something for which we could ask the counties to adopt a regulation to ensure some sort of quality control.

Assemblywoman Giunchigliani:
I am looking back at the bill, and I never thought the Health Division was the proper place to do it. I felt the Cosmetology Board is the standing board that should be the one authorized to regulate this area, because they inspect the schools and the spas that offer the permanent makeup. Rather than creating another board, we could see about having the Cosmetology Board require an examination and then issue a license to those conducting permanent makeup. It already licenses schools that offer this training, so that would be simpler.

Chairwoman Buckley:
It was my understanding that in the amendment behind Tab E (Exhibit J), that the Board was going away. Instead, this approach was being suggested in its place. It would define permanent cosmetics, and it would say that no one can practice it without being certified by the national organization.

Assemblywoman Giunchigliani:
I have a discomfort with mandating that they join a group. I think the Cosmetology Board is capable of licensing permanent makeup application, because they already license the schools and spas. I think this got over thought.

Chris Cook, Field Inspector II, Nevada State Board of Cosmetology:
The Board of Cosmetology does not license permanent makeup and is currently held by the county health departments and licensed through the cities. We do have one school in Las Vegas that does have an add-on of a permanent makeup school, but that is not regulated under us. We don't have anything to do with it. We have a statute that specifically states that cosmetologists cannot implant

permanent pigment. This is a tattoo issue, not a cosmetic issue. The Board of Cosmetology has no interest in regulating permanent cosmetics.

Chairwoman Buckley:
Assemblywoman Weber, I think the discussion has been that folks feel that there is a need for some sort of quality control. There just seems to be a sense of how to accomplish that. There is some concern about whether you have to be certified by a national organization if that is the best way to ensure quality control.

Assemblywoman Valerie Weber, Assembly District No. 5, Clark County:
It is a fascinating topic for our state since it involves a growing area. I haven't seen a mock-up of the amendment as it was sent forward, but I believe that by definition if someone calls themselves a permanent cosmetic technician, there should be some sort of certification behind that, or barrier to entry.

Chairwoman Buckley:
They put in paragraph 2 of the amendment, "A person shall not practice permanent cosmetics without being certified by the Society of Permanent Cosmetic Professionals, its successor organization, or equivalent recognized national certifying organization. "

Assemblywoman Weber:
I believe those are the two national organizations that do this certification. By way of their certification, that includes different levels of hours of training.

Assemblywoman Gansert:
Is that certification required to practice this type of tattooing by everyone? Do they have to already have this type of certification to be licensed? If you were to open a practice at all, do you have to go through some sort of certification, and is this the one everybody uses?

Assemblywoman Weber:
At this time, there is nothing required by the State. There may be some county ordinance that states that there should be a sanitation exam. That is in Clark County right now, but there is no standardization in the state of Nevada.

Assemblywoman Gansert:
So this is a certification; it is not an organization that they join. It is a certifying entity.

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.

Chairwoman Buckley:
That would certainly be an option; we could leave in community banks and ask Ways and Means to further examine the rural question to see whether we can just do some broader exemptions there.

Assemblywoman Giunchigliani:
I was glad to see this language in here. Tom Collins [former Assemblyman, District No. 1, Clark County] had requested the bill to try to deal with assisting. In looking at my notes, there is no single definition of a community bank; however, most analysts think of the bank as having two key characteristics—they are small in size and do most of their business in the community in which they are located. They agree to define community banks as a bank owned by an organization with less than $1 billion in total banking assets. That is probably where that language came from. I just want to make sure that if we were to move this, the larger banks don't think that they can try to eliminate the bank branch because they asked for that tax. I think we unintentionally affected some of the smaller banks that really do help in those communities. We have to be sensitive to that part of it. If you want a motion to move no recommendation to Ways and Means, we would have to make sure that they know that it is coming, because if it is not exempted by Friday, it still dies.

Chairwoman Buckley:
I would probably take a motion to amend and re-refer with the Alan Glover amendment on the real estate transfer tax, the Star Trek amendment, the amendments mentioned by Ms. Vilardo, and carry down the section with the $100 convention, because that would save Ways and Means some time from having to hear the smaller conforming issues.

ASSEMBLYWOMAN GIUNCHIGLIANI MOVED TO AMEND AND RE-REFER ASSEMBLY BILL 554 WITH THE STATED AMENDMENTS.

ASSEMBLYMAN SEALE SECONDED THE MOTION.

THE MOTION CARRIED. (Assemblywoman McClain was not present for the vote.)

Chairwoman Buckley:
Let's open the discussion on the brothel tax bill. [Assembly Bill 317.]

Assemblywoman Giunchigliani:
$1.6 million is $1.6 million that goes into the coffers. If we change the live entertainment tax, then we would have to stay inline with whatever we do with the brothels, because you can't treat them differently. That was the problem we had last session with trying to capture the strip clubs as well. If they are offering to pay, I don't understand why we don't want to accept it. I don't have any problems with it.

Chairwoman Buckley:
This is such a weighty issue. I am going to let all of the members think about it and let me know what your preferences are in moving the bill. Seeing no other business to come before the Committee, we are adjourned [at 3:23 p.m.].

RESPECTFULLY SUBMITTED:

_____
James S. Cassimus
Transcribing Attaché

APPROVED BY:

_____
Assemblywoman Barbara Buckley, Chairwoman

DATE:_____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: April 13, 2005 **Time of Meeting: 12:00 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A	Agenda	
A.B. 317	B	Assemblywoman Sheila Leslie	Proposed Amendment
245	C	Ray Bacon, Nevada Manufacturers Association	Letter to Committee
338	D	Diane Thornton, Research Division	Work Session Document
338	E	Diane Thornton, Research Division	Proposed Amendment
338	F	Diane Thornton, Research Division	Proposed Amendment
338	G	Diane Thornton, Research Division	Proposed Amendment
338	H	Diane Thornton, Research Division	Proposed Amendment
360	I	Diane Thornton, Research Division	Work Session Document
360	J	Diane Thornton, Research Division	Proposed Amendment
384	K	Diane Thornton, Research Division	Work Session Document
384	L	Diane Thornton, Research Division	Mock-Up proposed amendment to A.B. 384
437	M	Diane Thornton, Research Division	Work Session Document
437	N	Diane Thornton, Research Division	Proposed Amendments
464	O	Diane Thornton, Research Division	Work Session Document
464	P	Diane Thornton, Research Division	Proposed Amendments
464	Q	Diane Thornton, Research Division	Proposed Amendments
464	R	Diane Thornton, Research Division	Proposed Amendments Part II
555	S	Diane Thornton, Research Division	Work Session Document
555	T	Diane Thornton, Research Division	Proposed Amendment
555	U	Diane Thornton, Research Division	Proposed Amendment
555	V	Diane Thornton, Research Division	Letter with proposed amendment
320	W	Christina Dugan, Las Vegas Chamber of Commerce	Letter in support of A.B. 320
387	X	Dino DiCianno, Department of Taxation	Fiscal note
387	Y	Larry Hurst, National Association of Health Underwriters	Health Savings Account information

387	**Z**	Nancy Ford, Nevada State Welfare Division	Written testimony
554	**AA**	Scott Scherer, Paramount Parks	Proposed Amendment
554	**BB**	Alan Glover, Carson City Clerk-Recorder	Proposed Amendment
19	**CC**	Diane Thornton, Research Division	Work Session Document

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DEJA VU SHOWGIRLS OF LAS VEGAS, L.L.C. d/b/a DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, L.L.C. d/b/a LITTLE DARLINGS; K-KEL, INC. d/b/a SPEARMINT RHINO GENTLEMAN'S CLUB; OLUMPUS GARDEN, INC. d/b/a OLYMPIC GARDEN; SHAC, L.L.C. d/b/a SAPPHIRE; THE POWER COMPANY, INC., d/b/a CRAZY HORSE TOO GENTLEMEN'S CLUB; D. WESTWOOD, INC. d/b/a TREASURES; and D.I. FOOD AND BEVERAGE OF LAS VEGAS, L.L.C., d/b/a SCORES, Plaintiff(s), vs. NEVADA DEPARTMENT OF TAXATION, NEVADA TAX COMMISSION and NEVADA STATE BOARD OF EXAMINERS, Defendant(s).	2:06-cv-0480-RLH-RJJ **ORDER** (Motion to Dismiss–#12)

Before the Court is Defendants' **Motion to Dismiss Amended Complaint** (#12, filed May 10, 2006). Plaintiffs' Opposition (#16) was filed June 5, 2006. Defendants' Reply (#17) was filed June 14, 2006.

The Motion will be granted.

BACKGROUND

This suit arises from a statute enacted by the Nevada State legislature, 20th Special Session, in 2003, which, *inter alia*, replaced the casino entertainment tax with a tax on all live

entertainment. The provisions of the live entertainment tax were placed in Chapter 368A of the Nevada Revised Statutes ("NRS") and were further amended by the Nevada State Legislature in 2005.[1]

Plaintiffs, who operate establishments at which "live performance dance entertainment" is provided, contend that the Live Entertainment Tax violates their rights under the First and Fourteenth Amendments of the United States Constitution as a restraint on speech and a violation of substantive due process. They seek declaratory relief concerning the constitutionality of the tax and their non-obligation to pay it, and seek an injunction against its enforcement and seek damages under 42 U.S.C. §1983, including a refund of taxes paid.

Defendants' Motion to Dismiss challenges this Court's jurisdiction, invoking 28 U.S.C. §1341 (the "Tax Injunction Act" or "TIA"), which states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Defendants also contend, based upon the pleadings and requirements of the Tax Injunction Act, that Plaintiffs have failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(1) and (6).

STANDARD OF REVIEW

Rule 8 (Fed. R. Civ. P.) requires every complaint to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." Local Rule LR 8-1 requires that, "The first allegation of any complaint . . . shall state the statutory or other basis of claimed federal jurisdiction and the facts in support thereof. Federal courts are courts of *limited jurisdiction*. They have no inherent or general subject matter jurisdiction. They can adjudicate only those cases which the Constitution and Congress authorize. These are usually only those

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[1] The Live Entertainment Tax applies to certain gaming and non-gaming facilities. NRS 368A.060 AND 368A200. The Department of Taxation administers the tax with respect to entities without gaming licenses. The Gaming Commission administers the tax with regard to gaming licensees.

which involve a federal question, the United States is a party or where there is diversity of citizenship and certain criteria are met. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). The Plaintiffs bear the burden of proof by a preponderance of evidence that federal subject-matter jurisdiction exists. *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

DISCUSSION

The United States Supreme Court has held, in a fairly recent decision, that the Tax Injunction Act "shields state tax collections from federal-court restraints," and "was designed expressly to restrict the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." *Hibbs v. Winn*, 542 U.S. 88, 104 (2004).

Drawing a clear distinction between tax credits (over which the district courts have jurisdiction) and actions seeking to avoid payment of taxes or to otherwise interfere with state tax collection, *Hibbs* took great pains to reaffirm a long line of its decisions which denied jurisdiction to U.S. district courts in cases where the purpose of the suit was to avoid the payment of taxes–usually on constitutional grounds–or seek a refund for taxes already paid. *See e.g., Rosewell v.*

LaSalle National Bank, 451 U.S. 1011 (1981) (two-year delay of tax refund was still a plain, speedy and efficient remedy to preclude federal district court jurisdiction under Tax Injunction Act); *Fair Assessment in real Estate Association, Inc. V. McNary*, 454 U.S. 100 (1981) (comity and TIA barred taxpayers' suit for damages under §1983); *California v. Grace Brethren Church*, 457 U.S. 393 (1982) (TIA prohibits federal district court from enjoining or declaring unconstitutional state tax laws where plain, speedy and efficient remedy available); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (district court cannot enjoin, suspend or restrain the assessment or collection of taxes under State law, where plain, speedy and efficient remedy may be had in State courts).

The Ninth Circuit likewise has held that the Tax Injunction Act barred federal court consideration of a complaint involving the constitutionality of California Proposition 13. *Marvin F. Poer and Company, v. Counties of Alameda*, 725 F.2d 1234 (1984). In that case, the Circuit Court stated that, "federal courts have generally dismissed cases in which plaintiffs have sought both injunctive or declaratory relief and a refund or damages." *Citing Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972, *cert. denied*, 410 U.S. 966); *City of Burbank v. State of Nevada*, 548 F.2d 708 (9th Cir. 1981); and *Dillon v. State of Montana*, 634 F.2d 463 (9th Cir. 1980).

The *Hibbs* Court went to significant lengths to explain that it responds to State governments' need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference and the legal right that the disputed taxes be determined in a suit for refund. 542 U.S. at 103. The Court also noted that two of the purposes of the Act was to eliminate disparities between large out-of-state corporations and in-state taxpayers in what their remedies should be; and, to stop taxpayers, with the aid of a federal injunction, from withholding large sums thereby disrupting state government finances. *Id.* at 104. The Tax Injunction Act was "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings," training "its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing

authority." *Id.* at 104-105. The Court noted that "federal-court relief would have operated to reduce the flow of state tax revenue," and acknowledged that "the principal purpose of the TIA was to 'limit drastically' federal-court interference with 'the collection of [state] taxes.'" *Id.* at 105-106.

Plaintiffs' Opposition attempts to argue that First Amendments rights enjoy a special protection from improper taxation, fee assessment or licensing requirements. They cite cases in support of this argument, including Supreme Court cases. This Court does not question the decisions in those cases, but they are inapposite to the jurisdictional issue here. In their lead-off case, they cite *Fair Assessment in real Estate Ass'n, Inc. v. McNary,* which the *Hibbs* case cites as noted above. However, this case is contrary to Plaintiffs' argument. In *McNary,* the dismissal on jurisdictional grounds was affirmed.

The other cases cited either do not address taxation collection issues, or they involve cases where the proper jurisdictional route was taken, *i.e.*, they were pursued through *State courts*, up through State Supreme Courts and then to the Supreme Court of the United States. Those cases adopted the procedure mandated by the Tax Injunction Act!

Another argument attempted by Plaintiffs is that there is no remedy in the State courts. This argument is based upon NRS 368A.280(1), which states:

> 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 this 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.

First, it should be noted that the foregoing statute does not preclude a taxpayer from pursuing the established procedures for contesting a tax or seeking a refund.

Second, the language of the statute does not, as Plaintiffs suggest, preclude judicial recourse in the State court. It merely prevents a preemptive strike, that is an action to enjoin the collection of the taxes. It does not prevent a judicial challenge either to the collection of the tax or the constitutionality of the statute authorizing the tax. Indeed, the Nevada Supreme Court, in a

case involving a statute which precluded any suit whatever unless an administrative claim had been filed, held that notwithstanding the statute, the California corporation could bring the suit to challenge the tax. *State v. Scotsman Mfg. Co. Inc.*, 109 Nev. 252, 849).2d 317 (1993). This decision strongly suggests that declaratory relief is available in State court notwithstanding NRS 368A.280(1).

At any rate, Plaintiffs have not alleged in their complaint, with specific facts, that there exists no "plain," speedy or efficient remedy available under the laws or through the courts of the State of Nevada. Accordingly, Plaintiffs have neither established jurisdiction nor stated a claim upon which relief can be granted by this Court. This case clearly is a case designed to enjoin or restrain the assessment or collection of a tax under a State law and further seeks damages, including a refund of taxes. It clearly falls within the purpose of the Tax Injunction Act and removes this Court's jurisdiction.

Defendants also argue that they are not "persons" for the purposes of Section 1983 and therefore no claim under that section can lie against them. Although the Court need not address this argument, it notes that the assertion is correct.

Defendants also argue that they are immune from this suit pursuant to the provisions of the Eleventh Amendment of the Constitution. In this case the State of Nevada has not waived its Eleventh Amendment Immunity, nor is such a waiver alleged or pled. Nor do Plaintiffs allege that Congress has abrogated the State's Eleventh Amendment immunity under these circumstances. This is clearly a suit against the State of Nevada and its agencies.

For all the foregoing reasons, the Court finds that Defendants' Motion to Dismiss has merit and must be granted.

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IT IS THEREFORE ORDERED that **Motion to Dismiss Amended Complaint** (#12) is GRANTED.

Dated: July 25, 2006.

ROGER L. HUNT
United States District Judge

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ORIGINAL

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FILED
Dec 19 12 34 PM '06
City of Virginia
CLERK

DISTRICT COURT, CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A533273
DEPT. NO.: IX
DOCKET NO.:

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES, AND ATTORNEY FEES AND COSTS

RECEIVED
DEC 19 2006
COUNTY CLERK

NOW COMES Plaintiffs, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls*, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings*, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club*, Olympus Garden, Inc., d/b/a *Olympic Garden*, SHAC, L.L.C., d/b/a *Sapphire*, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club*, D. Westwood, Inc., d/b/a *Treasures*, and D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* (collectively referred to herein as the "Plaintiffs"), by and through their attorneys, and state for their complaint against Defendants Nevada Department of Taxation, Nevada Tax Commission, Nevada State Board of Examiners, and Michelle Jacobs in her official capacity only (collectively referred to herein as the "Defendants"), as follows:

INTRODUCTION

1. This is a civil action wherein Plaintiffs pray for a declaratory judgment, damages, attorney fees and costs, as well as both a preliminary and permanent injunction to restrain and enjoin the Defendants, as well as their agents, employees and representatives, from acting under color of state law to deprive the Plaintiffs of their rights, privileges and immunities secured to them by the Constitution of the State of Nevada and the Constitution of the United States. Specifically, Plaintiffs seek to have this Court declare as unconstitutional on its face, and to enjoin, all aspects of the Nevada Tax on Live Entertainment (referred to herein as the "Live Entertainment Tax," or simply the "Tax") as established by Title 32, Chapter 368A, of the Nevada Revised Statutes ("Chapter 368A"), as being an impermissible tax on constitutionally protected expression. A copy of that statute is attached hereto as Ex. "A," and is incorporated herein by reference.

JURISDICTION AND VENUE

2. This Court has jurisdiction and power to grant the injunctive relief requested pursuant to Rule 65 of the Nevada Rules of Civil Procedure and N.R.S. § 33.010, and jurisdiction and authority to grant the declaratory judgment prayed for here pursuant to Rule 57 of the Nevada Rules of Civil Procedure and N.R.S. 33.040.

3. The federal statutory law which further authorizes the institution of this suit is 42 U.S.C.

§ 1983, which provides, in part:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

4. Authorization for the request of attorney's fees and costs is conferred by 42 U.S.C. § 1988.

5. This suit is authorized by law to redress deprivations under color of state law of rights, privileges, and immunities secured by Article I, §§ 9 and 10, of the Nevada Constitution, as well as the First and Fourteenth Amendments to the United States Constitution, and for declaratory and injunctive relief.

6. Venue resides in this Court and is proper and appropriate as the various acts complained of occurred, and the Defendants are located, within Clark County in the State of Nevada.

PARTIES

7. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

8. Plaintiff, Deja Vu Showgirls of Las Vegas, L.L.C., d/b/a *Deja Vu Showgirls* ("*Deja Vu*"), is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

9. Plaintiff, Little Darlings of Las Vegas, L.L.C., d/b/a *Little Darlings* ("*Little Darlings*"), is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

10. Plaintiff, K-Kel, Inc., d/b/a *Spearmint Rhino Gentlemen's Club* ("*Spearmint Rhino*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

11. Plaintiff, Olympus Garden, Inc., d/b/a *Olympic Garden* ("*Olympic*")is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

12. Plaintiff, SHAC, L.L.C., d/b/a *Sapphire* ("*Sapphire*") is a Limited Liability Company duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

13. Plaintiff, The Power Company, Inc., d/b/a *Crazy Horse Too Gentlemen's Club* ("*Crazy Horse*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

14. Plaintiff, D. Westwood, Inc., d/b/a *Treasures* ("*Treasures*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

15. Plaintiff, D.I. Food & Beverage of Las Vegas, LLC, d/b/a *Scores* ("*Scores*") is a Corporation duly organized under the laws of the State of Nevada, and is authorized and qualified to do business in the State of Nevada.

16. None of the Plaintiffs operate their facilities as licensed gaming establishments under the laws of the State of Nevada.

17. Defendant, Nevada Department of Taxation (hereinafter sometimes referred to simply as the "Department") is a governmental entity created under the laws of the State of Nevada, which administers and enforces the statutory provisions challenged herein, and collects the Live Entertainment Tax, for all non-gaming licensed taxpayers.

18. Defendant, Nevada Tax Commission (hereinafter sometimes referred to simply as the "Commission") is a governmental entity created under the laws of the State of Nevada, which administers and enforces some of the statutory provisions challenged herein, and is authorized to consider and rule upon, among other things, appeals of claims under Chapter 368A.

19. Defendant, Nevada State Board of Examiners (hereinafter sometimes referred to simply as the "Board of Examiners") is a governmental entity created under the laws of the State of Nevada, and consists of the governor, the secretary of state, and the attorney general. Pursuant to N.R.S. § 368A.250, the Board of Examiners is authorized to approve, among

other things, refunds with regard to any erroneously or illegally collected or computed tax under Chapter 368A.

20. Defendant, Michelle Jacobs, who is named in this lawsuit in her official capacity only, is an employee of the Nevada Department of Taxation, and is responsible for the administration of Chapter 368A.

STATEMENT OF FACTS

21. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

22. On or about July 22, 2003, the State of Nevada enacted, pursuant to the adoption of Chapter 368A, a Tax on Live Entertainment, which imposes, subject to numerous exceptions, an excise tax on admission to any facility within the State of Nevada that provides defined "live entertainment."

23. Pursuant to N.R.S. § 368A.140, the Defendant Nevada Department of Taxation is obligated to collect the tax imposed by Chapter 367A from taxpayers who/which are not licensed gaming establishments, and is also obligated to adopt such regulations as are necessary to carry out those functions.

24. Upon information and belief, one of the primary purposes for the enactment of Chapter 368A was to impose an excise tax upon those establishments in the State of Nevada that provide live so-called "adult" entertainment in the form of exotic dancing, "topless" dancing, and fully nude performance dance entertainment.

25. As originally enacted, the tax imposed by Chapter 368A was not applicable, under the terms of N.R.S. § 368A.200(5)(d), to live entertainment that is not provided at a licensed gaming establishment if the facility in which the live entertainment is provided had a maximum occupancy of less than 300 persons.

26. On June 17, 2005, Chapter 368A was amended by Assembly Bill No. 554, which - - among other things - - reduced the scope of the exception as contained in N.R.S. § 368A.200(5)(d) from a maximum seating capacity limitation of 300 to 200. Upon information and belief, the

purpose of the July 17, 2005, amendments to Chapter 368A, and in particular those to N.R.S. § 368A.200(5)(d), was to specifically extend the tax obligation as contained in Chapter 368A to "adult" entertainment establishments which were not then subject to the Live Entertainment Tax, including a number of the Plaintiffs in this action.

27. *Deja Vu* operates a commercial establishment at 3247 Industrial Road, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Deja Vu* is subject to Chapter 368A, as amended, and have required *Deja Vu* to pay the Live Entertainment Tax as mandated therein.

28. *Little Darlings* operates a commercial establishment at 1514 Western Avenue, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Little Darlings* is subject to Chapter 368A, as amended, and have required *Little Darlings* to pay the Live Entertainment Tax as mandated therein.

29. *Spearmint Rhino* operates a commercial establishment at 3344 S. Highland Avenue, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Spearmint Rhino* is subject to Chapter 368A, as amended, and have required *Spearmint Rhino* to pay the Live Entertainment Tax as mandated therein.

30. *Olympic Garden* operates a commercial establishment at 1531 S. Las Vegas Boulevard, Las Vegas, Nevada, 89104, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Olympic Garden* is subject to Chapter 368A, as amended, and have required *Olympic Garden* to pay the Live Entertainment Tax as mandated therein.

31. *Sapphire* operates a commercial establishment at 3025 Industrial Road, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Sapphire* is subject to Chapter 368A, as amended, and have required *Sapphire* to pay the Live Entertainment Tax as mandated

therein.

32. *Crazy Horse* operates a commercial establishment at 2476 Industrial Road, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Crazy Horse* is subject to Chapter 368A, as amended, and have required *Crazy Horse* to pay the Live Entertainment Tax as mandated therein.

33. *Treasures* operates a commercial establishment at 2801 Westwood, Las Vegas, Nevada, 89109, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Treasures* is subject to Chapter 368A, as amended, and have required *Treasures* to pay the Live Entertainment Tax as mandated therein.

34. *Scores* operates a commercial establishment at 3355 South Procyon Avenue, Las Vegas, Nevada, 89102, whereupon live performance dance entertainment is presented to the consenting adult public. The Defendants have taken the position that *Scores* is subject to Chapter 368A, as amended, and have required *Scores* to pay the Live Entertainment Tax as mandated therein.

35. All of the facilities operated by the Plaintiffs have maximum occupancies of less than 7,500 persons.

36. The Plaintiffs all present upon their business premises some form of live "exotic" performance dance entertainment. Some of the Plaintiffs present live clothed and "topless" female performance dance entertainment, and others of the Plaintiffs present live clothed, "topless" and fully nude female performance dance entertainment; all of which is non-obscene. The non-obscene performance dance entertainment presented on the establishments operated by the Plaintiffs constitutes speech and expression, as well as a form of assembly, protected by not only Article 1, §§ 9 and 10, of the Nevada Constitution, but the First and Fourteenth Amendments to the United States Constitution, as well.

37. The Defendants take the position that pursuant to the definitions set forth in Chapter 368A,

Plaintiffs are obligated to pay the Live Entertainment Tax since their establishments fall within the definition of "live entertainment" found in N.R.S. § 368A.090, and since they are not otherwise exempted from having to pay that tax.

38. Plaintiffs contend that the Live Entertainment Tax as mandated by Chapter 368A is both illegal and unconstitutional, and for those reasons they do not desire to pay those taxes. Nevertheless, under threat of criminal prosecution and/or the imposition of fines and other penalties against them, Plaintiffs have all, beginning at various times, paid the Live Entertainment Tax mandated by Chapter 368A.

39. Plaintiffs have filed this action in order to protect their fundamental constitutional rights from infringement by the enforcement of Chapter 368A, which they contend is unconstitutional on its face as it imposes a tax directly on "live entertainment;" an activity which is protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth to the United States Constitution. Chapter 368A is therefore a direct tax on "First Amendment" freedoms, and in particular on live exotic performance dance entertainment.

40. Plaintiffs have suffered, and will continue to suffer, irreparable harm due to the enforcement of Chapter 368A in that their constitutional rights have been infringed upon, as well as their ability to provide constitutionally protected entertainment.

EXCERPTS OF THE TAX ON LIVE ENTERTAINMENT STATUTE

41. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

42. Chapter 368A states, at N.R.S. § 368A.200(1), that "[e]xcept 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 less than 7,500, the rate of tax is 10% of the admission charge to the facility plus 10% of any amounts paid for food, refreshments and merchandise purchased at the facility. If the live entertainment is provided at a facility with a maximum occupancy of

at least 7,500, the rate of the tax is 5% of the admission charged to the facility.

43. Chapter 368A defines an "[a]dmission charge" in N.R.S. § 368A.020 as:

> [T]he 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.

44. Chapter 368A defines a "facility" in N.R.S. § 368A.060 as:

> "(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 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."

45. "[L]ive entertainment" is defined in § 368A.090 as:

> "[A]ny activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other similar pupose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present."

This definition includes, among other activities, "[d]ancing performed by one or more professional or amateur dancers."

46. Chapter 368A states, at N.R.S. § 368A.142(2), that the Department shall collect the Live Entertainment Tax from non-gaming licensed taxpayers, such as is the case of the Plaintiffs here, and is empowered to "adopt such regulations are necessary to carry out" that collection.

47. Pursuant to N.R.S. § 368A.200(5), the tax imposed by Chapter 368 is not applicable to a variety of circumstances. Some of the exemptions include live entertainment that the State is prohibited from taxing under the Constitution, laws or treaties of the United States or Nevada Constitution; live entertainment that is not provided at a licensed gaming establishment if the facility has a maximum seating capacity of less than 200; live entertainment that is provided at 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 limits, if the facility has a maximum seating capacity of less than 200; 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; and music performed by musicians who move constantly through the audience if no other form of live entertainment is afforded to the patrons.

48. Overpayments and refunds of the Live Entertainment Tax are addressed in N.R.S. § 368A.250, which provides that if the Department determines that any tax has been "erroneously or illegally collected or computed," the Department must record the fact and certify the amount owed and from whom it was collected to Defendant Board of Examiners. If the amount is approved by the Board of Examiners, it is then credited on any amount that is due from that person under Chapter 368A, with the balance refunded to that person.

49. Chapter 368A provides, at N.R.S. § 368A.280(1), that "[n]o 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." Accordingly, Plaintiffs have no ability to seek injunctive relief in state court against collection of the Live Entertainment Tax.

50. Chapter 368A provides, at N.R.S. § 368A.290(1), that the Nevada Tax Commission is authorized to render a final decision upon claims for refunds under that chapter. Further, at N.R.S. § 368A.300(2), Chapter 368A provides that a claim thereunder that is disallowed by the Department may be appealed to the Nevada Tax Commission.

COUNT I - DECLARATORY RELIEF

51. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

52. Chapter 368A is unconstitutional on its face under Article I, §§ 9 and 10 of the Nevada Constitution as well as the First and Fourteenth Amendments to the United States Constitution, for numerous and various reasons, including, but not limited to, the fact that:

a. It effectuates an impermissible prior restraint on speech and expression;

b. It fails to further any important, substantial or compelling governmental interest;

c. It permits restrictions on speech and expression that are greater than are essential to further any asserted governmental interests;

d. It permits restrictions on speech and expression that are not the least restrictive means available;

e. It contains criteria that are both arbitrary and capricious and which are not supported by any legislative record;

f. It contains numerous and various terms and phrases which are impermissibly vague, and ambiguous, and the applicable definitions as contained therein are impermissibly and substantially overbroad judged in relation to their plainly legitimate sweep;

g. It imbues the Defendants with unbridled discretion;

h. It impermissibly singles out constitutionally protected businesses for certain regulations;

i. It violates the substantive due process rights of the Plaintiffs and others;

j. It violates Plaintiffs' equal protection rights in that it unconstitutionally discriminates against expressive businesses based upon the content of speech, and it further creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Nevada, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;

k. It is an impermissible direct tax on constitutionally protected freedoms;

l. It impermissibly requires a person or business to pay for the right to exercise a right guaranteed by the Nevada and United States Constitutions;

m. It was enacted upon an insufficient record and is not justified on any factual or legal ground; and

n. It violates the separation of powers doctrine.

53. Because the Live Entertainment Tax is an impermissible and/or unconstitutional direct tax upon expression protected by Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, Plaintiffs are not subject to payment of the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a).

54. This Court has the authority to declare the rights and other relations of the Plaintiffs and of the Defendants, and should do so here.

55. Because of the questioned constitutionality of the Live Entertainment Tax as required by

Chapter 368A, and because of the potential application of the exemption as contained in N.R.S. § 368A.200(5)(a) in regard to the Live Entertainment Tax being applied to these Plaintiffs, Plaintiffs are entitled to a declaration by this Court in regard to the constitutionality of Chapter 368A as well as the applicability of the exemption as contained in N.R.S. § 368A.200(5)(a).

56. For the reasons as set forth above, this Court should declare that the Live Entertainment Tax as mandated by Chapter 368A is unconstitutional on its face. Also for the reasons as set forth above, this Court should declare that Plaintiffs need not pay the Live Entertainment Tax as required by Chapter 368A both as a result of the constitutional violations as enumerated above as well as the specific exemption as set forth in N.R.S. § 368A.200(5)(a). In addition, this Court should declare that the Defendants have violated the constitutional rights of the Plaintiffs by requiring them to have paid the Live Entertainment Tax in the past.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court declare the Live Entertainment Tax under Chapter 368A unconstitutional on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax in the past.

COUNT II - INJUNCTIVE RELIEF

57. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

58. Any action taken or to be taken by the Defendants to enforce any portion of Chapter 368A against Plaintiffs has been taken and will be taken under color of law, and has deprived and will deprive Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which compensatory damages are an inadequate remedy as a matter of law.

59. The threat of enforcement of Chapter 368A is both great and immediate. In addition, Chapter 368A is both flagrantly and patently violative of Plaintiffs' constitutional rights. There is no other remedy at law which would suffice to protect Plaintiffs' interests for the reasons above numerated.

60. The public interest weighs in favor of preventing deprivation of constitutional rights, and is always served by enjoining an unconstitutional law.

61. Plaintiffs have a substantial likelihood of success of prevailing on their constitutional claims against Chapter 368A, in that it is blatantly and patently unconstitutional. The Defendants will suffer no harm by the entry of such an injunction, as there can be no legitimate governmental interest in enforcing an unconstitutional law. In addition, the "balancing" of the equities tips in favor of the Plaintiffs and in the entry of a preliminary injunction, due to the paramount position of rights afforded under the First Amendment in comparison to the lack of harm occasioned to the Defendants if such an injunction is granted.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter both a preliminary and permanent enjoining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs. Further, Plaintiffs respectfully request that this Honorable Court enter a permanent injunction ordering Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs under Chapter 368A, together with interest as required by N.R.S. § 368A.310.

COUNT III - DAMAGES AGAINST DEFENDANTS

62. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

63. All of the actions of Defendants, by and through their agents, employees and representatives,

have been undertaken, and will be undertaken, in the course and scope of official duties and under the color of state law.

64. As a direct and proximate cause of the application and/or enforcement of Chapter 368A by Defendants against the Plaintiffs, the Plaintiffs have incurred and suffered significant and substantial damages, and will in the future suffer significant and substantial damages, including, but not limited to having to pay an illegal and/or unconstitutional tax; loss of constitutional rights; lost business profits; and having to incur costs and attorney fees in seeking protection of their constitutional rights asserted herein.

65. Any actions by Defendants to enforce and/or apply Chapter 368A against the Plaintiffs have been and will be made under color of state law, and will unquestionably result in the deprivation of Plaintiffs' constitutional and civil rights as set forth above so as to render Defendants liable for these losses pursuant to 42 U.S.C. §1983.

66. Pursuant to 42 U.S.C. §1983 and common law, Plaintiffs are entitled to an award of damages for the injuries set forth above.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enter an award of damages against Defendants and in favor of the Plaintiffs in amounts to which the Plaintiffs are found to be entitled.

COUNT IV - ATTORNEY FEES AND COSTS

67. Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

68. Because Chapter 368A is violative of the Nevada Constitution and the United States Constitution on its face, and because its application and/or enforcement has and will deprive the Plaintiffs of their fundamental state and federal constitutional rights, Plaintiffs are entitled, as prevailing parties, to an award of costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to award costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment against Defendants, which would include:

A. A declaration that the Live Entertainment Tax under Chapter 368A is unconstitutional on its face; that Plaintiffs need not pay the Live Entertainment Tax as mandated by Chapter 368A both because it violates Article I, §§ 9 and 10 of the Nevada Constitution as well as the First Amendment to the United States Constitution, and because Plaintiffs are exempt from paying the Live Entertainment Tax pursuant to the provisions of N.R.S. § 368A.200(5)(a); and that the Defendants have violated the Plaintiffs' constitutional rights by having required them to have paid the Live Entertainment Tax in the past;

B. A preliminary and permanent injunction restraining the Defendants, as well as their officers, agents, employees and representatives, from enforcing Chapter 368A against the Plaintiffs and/or from collecting the Live Entertainment Tax against the Plaintiffs;

C. A permanent injunction ordering Defendant Nevada Tax Commission to record the payments of the Live Entertainment Tax made by the Plaintiffs and to certify those amounts to the Defendant State Board of Examiners, and further ordering the Defendant State Board of Examiners to approve and authorize the refund from the State Treasury of all such Live Entertainment Tax payments that have been involuntarily made by the Plaintiffs under Chapter 368A, together with interest as required by N.R.S. § 368A.310;

D. Entry of an award of damages against Defendants and in favor of the Plaintiffs in amounts to which the Plaintiffs are found to be entitled;

E. Entry of an award of costs and attorney fees incurred herein pursuant to 42 U.S.C. § 1988; and,

F. Entry of such other and further relief as the Court deems just and proper.

Dated: December 19, 2006

Respectfully Submitted:

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EXHIBIT A

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 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;

(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 [six] 6 games, or any combination of slot machines and games within those respective 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

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