LEGISLATORS, REGULATORS TAKE ON

Live Entertainment Tax in 2015

By Terry Johnson, Esq., Member of the Nevada Gaming Control Board

The oft-maligned Live Entertainment Tax ("LET") has been a topic of major discussion in 2015, both at the 78th Session of the Nevada Legislature as well as amongst Nevada's gaming regulators. No less than a half-dozen bills were initially introduced at the 2015 legislature concerning the LET statutes, Chapter 368A of NRS. Also, for the first time since the LET regulations were adopted for gaming facilities, the Gaming Control Board ("Board") conducted rulemaking workshops in early 2015 to review and determine whether regulation revisions were necessary. It would thus appear that 2015 would be the year that structural and other changes were made to the LET statutes and regulations. Accordingly, this article explores recent efforts to streamline the LET and why they are necessary.

Implementing the LET has long been a source of heartburn for both regulators and the regulated alike. For gaming regulators, the LET statutes are replete with broad and ambiguous provisions. For starters, "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."[1] There are no minimum amounts of time in which the entertainment "activity" must occur, for example. Absent rulings by the courts or gaming policymakers, or statutory revisions by legislators, as to any parameters that might govern, regulators must interpret the statutes as currently written and try to determine when "any activity" is live entertainment or not.

In addition to the sheer breadth of the live entertainment statutes, there are a number of ambiguities. For example, current law provides that a performance by a disc jockey is not subject to the LET if the disc jockey "generally limits" their interactions with patrons to certain activities.[2] Also excluded is music in a restaurant or lounge, provided the music does not "routinely" rise to the volume that interferes with "casual" conversation.[3] Other examples of ambiguities include references to live entertainment that is "incidental,"[4] and seating that may or may not be within the "immediate area"[5] of performers for purposes of the LET. In each of these examples, there is little statutory guidance as to how these terms are to be interpreted. Ordinarily, one would review the legislative record to divine the intent of the legislature to aid in interpreting statutory provisions. However, where the LET is concerned, the prior legislative record is scant, further compounding LET administration for gaming regulators.

For regulators, the LET's provisions can also be time consuming. Typically, a gaming licensee, unclear as to the applicability of the LET in a certain circumstance, will contact the Board for an advisory opinion. If the available information does not readily lend itself to a determination on whether the LET applies, professional staff from the Board, up to and including supervisors, the division chief, and occasionally a Board member, will visit the anticipated site of the live entertainment to assess firsthand whether the contemplated activities are within the ambit of the live entertainment tax. In some cases, Board staff will visit and observe the actual entertainment in an effort to see if the LET applies.

As demonstrated in the above examples, the Board can spend a disproportionate amount of time reviewing scenarios and determining the degree to which the LET will apply. In each case, the Board considers the information available, including input from the gaming licensee, and endeavors to make determinations

consistent with the statutory scheme and the intent of the legislature (where discernible).

For gaming licensees, LET compliance presents its share of challenges as well. Licensees have complained that some Board determinations are more subjective than less. For example, at what point does "[a]cting or drama provided by one or more professional or amateur actors or players"[6] become live entertainment? Does a tour guide wearing a costume and verbally describing the exhibits at an attraction engage in "acting or drama" for purposes of the LET? Does a disc jockey "generally limit" his or her interactions with the audience to certain permissible activities when they engage in cake throwing or crowd-surfing using an inflatable raft? Do those activities by the disc jockey constitute a "show or production" that could trigger the LET under NRS 368A.090(2)(a)(8)? In each of these types of instances, the Board has to make the best determinations possible in light of the governing statutes and regulations.

Given the longstanding concerns of regulators and the regulated alike concerning the LET, on June 1, 2015, the legislature enacted significant changes to the tax provisions. Senate Bill ("SB") 266 from the 2015 legislative session was co-sponsored by Senator Mark Lipparelli, R-Las Vegas, and Assemblywoman Marilyn Kirkpatrick, D-Las Vegas. The cornerstone of the measure is to limit imposition of the LET to instances where an admission charge is levied. Additionally, LET would no longer be imposed on sales of food, beverages, and merchandise sold in conjunction with live entertainment. Currently, these items are taxed at a rate of 10 percent at facilities with a maximum occupancy of less than 7,500 persons.[7] This results in double taxation when these transactions are also subject to sales tax.

In addition to removing the double taxation of food, beverages, and merchandise, other significant changes to the LET under SB 266 include:

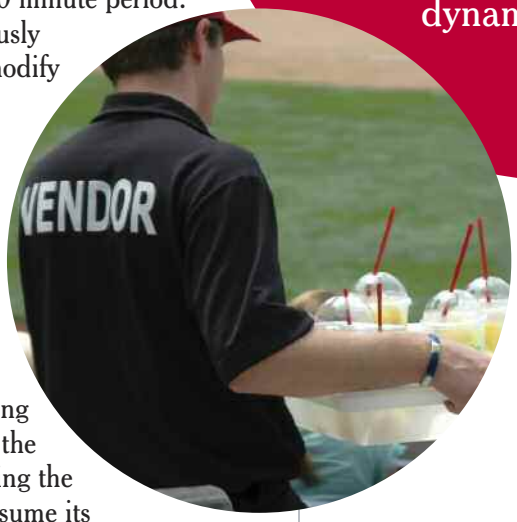
- Establishing a single rate of 9% instead of the previous rates of 5% or 10%, depending on the size of the facility
- Excluding from taxation a table reservation fee or charges to access a particular table, seat, or lounge in a facility if the charges are in addition to the admission charge
- Removing from LET assessment activities currently considered live entertainment, such as go-go dancing, uncompensated "spontaneous" performances, and other activities that do not constitute a "performance," including so called "ambient" entertainment
- Imposing LET on admission charges to facilities, including nightclubs, where a disc jockey presents recorded music

With all the changes to the LET, the shift to an admission charge-based tax system should provide greater predictability and ease for compliance and enforcement for both regulators and the regulated. The fact that an admission charge must first be levied to trigger the LET will prevent licensees from receiving unexpected tax bills after the fact for live entertainment that occurred on their premises. This is especially important since the "look back" period for an LET assessment is five years.[8] While there may be remaining debates that occur in instances where an admission charge is levied but there is an assertion that an activity does not meet the definition of "live entertainment," given the revisions to the LET statutes and regulations a determination of live entertainment should be more readily ascertainable.

One other significant new addition to LET administration from this year's legislative session deals with scenarios where the amount upon which a tax assessment must be based is "vague or subjective, not capable of reasonable determination or is the subject of a dispute that cannot be proven to the reasonable satisfaction of the

[Nevada Gaming] Commission."[9] In such scenarios, the Gaming Commission will be able to establish the LET amounts due "by multiplying the number of admissions to the facility where the live entertainment was provided by an amount not to exceed $50."[10]

In addition to the legislature's statutory changes, the Board also recently discussed possible changes to the LET regulations. Many of the clarifying definitions the Board had previously considered to address the ambiguous provisions in the statutes have now been largely rendered unnecessary with the enactment of SB 266. For example, SB 266 incorporated the Board's prior conceptual language from its rulemaking workshop that quantified certain limited entertainment as "not longer than 20 minutes during a 60 minute period." And though the Board had previously considered a recommendation to modify or delete provisions that would tax sales of food, beverages and merchandise where the underlying transactions had occurred after the live entertainment, this too has been rendered moot with the provisions of SB 266 that negate LET on these items.



The Board suspended its rulemaking workshops in January 2015, given the start of the 2015 Legislature. During the balance of 2015, the Board will resume its review of the LET regulations to determine the need for any remaining regulation changes. For example, the Board may consider whether a definition of "performance" is needed for purposes of the live entertainment tax. The Board had also previously considered the necessity of regulations addressing the refunding of any overpayment of taxes. Along with other "clean up" work to be done with the LET regulations, the Board will likely consider these topics in rulemaking workshops in the coming months.

In sum, recent changes to the LET should benefit both those subject to it, as well as those that must enforce it. Given the sheer breadth of the LET laws and some ambiguities therein, it was imperative that certain parameters be established and clarifications made. The fact that an admission charge will need to be collected first before establishing LET liability will provide much needed boundaries and guidance as to the intended scope and reach of the law. Further, by either eliminating or defining certain terms, all parties will be on better notice of the expectations of them under the law.

Simply put, better written laws and regulations will lead to better levels of compliance and enforcement. In a state that is home to the "Entertainment Capital of the World," it is only fitting that our state's live entertainment tax laws meet the current and future needs of such a dynamic entertainment environment.

Terry Johnson was appointed to the Nevada Gaming Control Board by Governor Brian Sandoval in 2012 and supervises the Board's Audit and Tax & License Divisions. He previously served in Governor Sandoval's cabinet as the State Director of Business & Industry.

[1] NRS 368A.090(1) (emphasis added)
[2] NRS 368A.090(2)(a)(9)
[3] NRS 368A.090(2)(b)(1)
[4] NRS 368A.200(5)(l), (q)
[5] NRS 368A.090(2)(b)(4)
[6] NRS 368A.090(2)(a)(3)
[7] NRS 368A.200(1)(a)
[8] NRS 463.3881(3)
[9] Senate Amendment No. 1045 to Sen. Bill No. 266, 78th Session of the Nevada Legislature (2015)
[10] Id.

STANDING ON THE SHOULDERS OF GIANTS:

Governor Paul Laxalt and the Corporate Gaming Act of 1969

By Adam Paul Laxalt, Attorney General of Nevada

I appreciate the opportunity to introduce myself to those members of the gaming law bar who I have not had the opportunity to meet. This group provides critical guidance to our state's premier industry and functions as part of the apparatus that ensures the gaming industry is vibrant, competitive, and remains the standard of excellence around the world.

I look at the profound success of Nevada gaming with a sense of great personal pride. My grandfather, Paul Laxalt, was elected Nevada governor in 1966. He recognized that for the gaming industry to attract new investment—which would ultimately further Governor Grant Sawyer's "hang tough" directive of ridding the gaming industry of organized crime—Nevada must reform its regulatory structure to accommodate corporate gaming ownership. As the *1970 Report of the Legislative Commission Subcommittee for Study of Gaming* (the "1970 Study") articulated:

> By 1969 it had become clearly evident that broadening of the investment base in the gaming industry was absolutely essential to the continued growth of the industry. Funds necessary for the construction of new establishments or expansion of those existing were simply not available from conventional sources in the form of loans. Reputable financial institutions were unwilling to lend the huge sums to a small group of investors and there were very few individuals who could afford the heavy personal investments necessary. With this source of money no longer available the danger of hidden interests of unsuitable persons was constantly increasing. [1]