

77th Legislature

Takes a Brief Look at the LET

By Jeff Rodefer

In its ten-year existence, the Live Entertainment Tax (LET) has been the focus of some discourse concerning its reach, or lack thereof, depending on your perspective. The LET's goal was to broaden the tax base of its predecessor the Casino Entertainment Tax (CET) and capture live entertainment at non-gaming venues as well. In looking at the numbers, during the fiscal year 2012, the state collected \$137.0 million in both gaming and non-gaming LET revenues, which represents 4.4% of the General Fund's total revenue of \$3.081 billion.¹ Of the \$137.0 million in LET revenues, \$125.3 million or 91.15% came from gaming facilities and \$11.6 million or 8.5% from non-gaming sources.² The Audit Division of the State Gaming Control Board (Board) estimates that 76% of the gaming related LET is derived from taxable admissions and 24% from taxable food, beverage and merchandise sales or \$95.228 million and \$30.072 million, respectively.³ By comparison, for fiscal year 2003, the CET generated \$70.2 million in revenues for the state.⁴

The LET has become for better or worse a case study in Nevada tax policy. Although well-intended in its purpose to expand the scope of the CET, it certainly misses the mark with regard to clarity.

The LET had an inauspicious start. It was passed, without any discussion, during the 2003 Special Session to replace the CET.⁵ The CET, as is well known, assessed a 10% tax on the sale of food, beverage, merchandise or admission to a cabaret, nightclub, showroom or lounge that charged for admission to live entertainment.⁶ The CET was modeled after the Federal Cabaret Tax⁷ that was repealed by Congress in 1965.⁸ The Legislature, at the urging of Governor Grant Sawyer, saw an opportunity to pick up this revenue for itself when the federal tax was eliminated.⁹ Casino showrooms and cabarets that had been collecting and paying the tax to the federal government for years¹⁰ began remitting a similar tax to the Board. Interpretation of the tax required an ongoing reliance on the repealed federal tax and its related case law. In 1977, the Board urged the Legislature to convert the CET to a general admissions tax that would both broaden its reach and make a clean break from the archaic burden of relying on a repealed federal law to administer the CET.¹¹ The Legislature did not act.¹²

Thirty-eight years after the passage of the CET that essentially shifted a revenue stream from the federal government to the state, the LET was born. The LET is in many aspects a significant departure from its predecessor. Instead of just one tax rate, the LET creates two tax rates of 5% or 10% depending on the size of the venue.¹³ The LET does not limit its scope to casino-related live entertainment, but instead applies to

live entertainment in non-gaming facilities too. As a result, the tax is administered by both the Board and the Nevada Department of Taxation. A crucial difference, between the taxes is that the LET, unlike the CET,¹⁴ does not require the payment of an admission fee to prompt the tax.¹⁵ This relatively simple divergence appears benign, but it has had its fair share of discussion over the years. As former Board Chairman Mark Lipparelli acknowledged at the 2010 Gaming Law Conference, the LET has generated "gray areas" in trying to determine the Legislative intent with regard to those facilities that do not charge admission. These "grey areas" make the LET challenging for the Board to administer and equally difficult for taxpayers to comply with it.

In a December 2004, Senate Majority Leader Dina Titus (D-Las Vegas), Senator Randolph Townsend (R-Reno) and Senator Bob Beers (R-Las Vegas) indicated in a Las Vegas Review Journal interview that the LET was intended "to capture revenue from the multi-million dollar gentlemen's clubs cropping up in Las Vegas."¹⁶ As the article states, it was never the intent to attack small businesses and local musicians.¹⁷ Yet, it did just that.

Given the lack of discussion in the 2003 Special Session, the related Legislative history is obviously silent regarding the intended meaning of these provisions. In 2005, the Legislature reviewed the LET again and amended, among other things, the definition of "live entertainment" in NRS 368A.090.¹⁸ The revision specifically addressed performances by musicians, professional dancers, actors, animal acts, acrobats, professional and amateur sporting events, comedy shows, as well as certain types of performances by DJs as qualifying as "live entertainment."¹⁹ It also created carve outs from this definition for ambient or background music in a restaurant, lounge or similar area; occasional performances by employees whose primary function is to prepare, sell or serve food and where the entertainment is not advertised to the public; strolling performers in larger gaming establishments; performances in smaller gaming establishments that enhance the theme of the establishment and seating for patrons is provided in the immediate area; broadcasts of live entertainment through television, radio, closed circuit or Internet; singing or dancing by patrons; and animal acts intended primarily for education or scientific research.²⁰ Unfortunately, the related Legislative history again sheds no light on the intent of these changes, most notably, the exceptions that were added to the definition of "live entertainment." The Legislature addressed the LET four more times during the 2005 Special Session, and in 2007, 2009 and 2011.²¹ Each time, the changes were nominal in nature and provided little guidance.



In 2013, Assembly Speaker Marilyn Kirkpatrick (D-District 1) sought to enact some sweeping revisions to the LET. On May 8, 2013, she introduced Assembly Bill 498²² that was intended to expand the tax by eliminating many of the exemptions set forth in the current LET, except for events by nonprofit organizations or facilities with seating for less than 50.²³ It also established a single tax rate of 8%.²⁴ Entitled the “Nevada Entertainment and Admissions Tax,” or NEAT for short, it harkened back to some of the policies established by the CET. Generally, the NEAT would have only been triggered if an admission charge was paid.²⁵ No admission fee, no tax. The tax would continue to be administered by both the Board and Department of Taxation. Of significance, the tax was no longer limited to live entertainment. It targeted “places of amusement, sport, recreation or other entertainment.”²⁶ This included such things as, convention centers, exhibition halls, trade shows, sporting events and contests, greens fees to golf, gym memberships, movie tickets, bowling, ski lift tickets, as well as the Las Vegas Motor Speedway, Burning Man, Electric Daisy Carnival and brothels.²⁷ As a new tax or one that would levy a tax increase, it would have required a two-thirds majority vote of both the Senate and Assembly to pass.²⁸ Meaning, at least four Republicans were needed to support it.²⁹ More importantly, Governor Sandoval was reportedly opposed to the tax and threatened to veto it.³⁰ On May 14, 2013, a joint hearing of the Assembly Taxation and Senate Revenue and Economic Development Committees was held where special interests voiced their spirited opposition.³¹ In turn, the proposal, dubbed the “Fun Tax” and “Family Fun Tax” by Republicans, received little support in the waning hours of the 77th Legislature and failed to pass out of the Assembly Taxation Committee.

On May 31, 2013, Speaker Kirkpatrick made a second attempt and introduced Assembly Bill 508 that tried to assuage some of the concerns raised about Assembly Bill 498.³² Although this bill did receive support from the Nevada Resort Association, the Nevada Retail Association and the Las Vegas Chamber of Commerce, it again, failed to garner the necessary two-thirds majority to satisfy constitutional requirements and it too died in Committee.³³

As a result, the LET remains intact for at least two more years. What does this mean? The “gray areas” that former Board Chairman Lipparelli correctly observed will continue to present challenges for the Board and industry alike. One of these areas that was recently contested concerned the exception in the “live entertainment” definition for ambient or background music. Specifically, NRS 368A.090 states, in part:

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: . . .
 - (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.***

NRS 368A.090 (emphasis added).



The provision sets forth a two-part test that the taxpayer must satisfy to demonstrate that the entertainment offered in its restaurant, lounge or similar area is not “live entertainment,” but rather ambient or background music. Since the related Legislative history is silent, it becomes difficult, if not impossible, to ascertain what the Legislature meant by some of these terms. Specifically, what does the term “routinely” mean or, more precisely, how frequently would the music’s volume have to increase to constitute “routinely?” How loud does the music have to be to interfere with casual conversation? What qualifies as casual conversation? What did the Legislature mean in the second part of the test “if such music would not generally cause patrons to watch as well as listen?”

The Nevada Supreme Court has from time-to-time turned to dictionary definitions as a guide to try and glean the Legislature’s intent of certain statutes.³⁵ The word “casual” would commonly infer an informal type of conversation.³⁶ The adverb “routinely” was included for some reason.³⁷ An occurrence that happens “routinely” generally means something that is commonplace or repetitious in nature.³⁸ This would suggest that the Legislature was targeting music that was repeatedly loud enough to interfere with casual or informal conversation, rather than one occurrence of such interference.³⁹ Why would this be important to the Legislature?

As previously noted, the LET was adopted to replace the CET that was based on the Federal Cabaret Tax, which was repealed in 1965. Both the federal tax and the CET assessed tax on the sale of food, beverage, merchandise and admission to a cabaret, nightclub, showroom or lounge that charged for admission to live entertainment.⁴⁰ Without any meaningful Legislative history from 2003 or 2005, one can only speculate that the Legislature may have included the term “routinely” to ensure that a restaurant would not morph into a cabaret where the live music was the predominate element or attraction. This may also be the rationale behind the Legislature’s desire to exempt from the LET’s reach in NRS 368A.200(5)(q) for “Live entertainment provided in a restaurant which is incidental to any other activities in the restaurant or which only serves as ambience so long as there is no charge to the patrons for that entertainment.” If not, then the application of NRS 368A.090(2)(b)(1) and 368A.200(5)(q) to the same exact set of facts may result in very different outcomes.

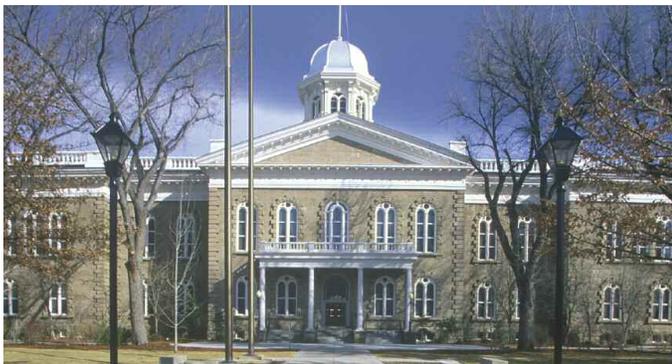
To further illustrate this point, let’s assume the following facts: a restaurant provides live music, such as piano playing with occasional singing to enhance the dining experience of its patrons. Moreover, the patrons are not charged for this entertainment either by way of a cover charge, an admission fee, or through an inclusion on their food and beverage bill. Nor, are they required to purchase a minimum amount of food or beverage when the pianist performs. Such entertainment is incidental to the restaurant’s normal activities...i.e., the selling and serving of prepared food and refreshments. Per NRS 368A.200(5)(q), such entertainment should be excluded from the reach of LET since it is merely incidental to the restaurant’s normal business and the patrons were not charged for the performances. However, under NRS 368A.090(2)(b)(1), if the Board determines through observations that the music, in this case piano playing, interfered with casual conversation, presumably at least once, and patrons watched and listened, then it would qualify as “live entertainment” and would be subject to taxation.⁴¹ Given the appropriate forum, this apparent conflict in statutory provisions may be resolved by applying a long held rule of statutory construction. That is, conflicting tax statutes are to be construed in the taxpayer’s favor and will not be extended by implication to create a tax liability.⁴²

In looking further at the second prong of the test in NRS 368A.090(2)(b)(1), the verb “cause” denotes, among other things, “to compel.” If this is correct, then the Legislature was more concerned that music that would not generally “compel”⁴³ patrons to watch and listen, rather than whether they did, in fact, watch and listen. Clearly, if the Legislature only wanted to focus on patrons watching and listening to the

live music, then it could have easily said so or simply deleted the word “cause.”⁴⁴ In giving some meaning to the term “cause,” this would seem to imply that Legislature was addressing, in the second part of the test, a particular nature or quality of the music that would entice patrons to watch and listen. How would a taxpayer meet its burden of establishing that the music did not generally compel patrons to watch and listen? Remember, the second part of the test asks “if such music would not generally cause patrons to watch as well as listen.” The inquiry concerns the effect that the live music has on a group of patrons, rather than a single patron. As such, is there some way to quantify the effect live music will have on restaurant patrons, especially given the demographics of those present when the entertainment is offered? The answer is clearly “no.”

Regardless of what the terms in NRS 368A.090(2)(b)(1) mean (or are intended to mean), logic would dictate that if the piano playing (in the example above) is found to be live entertainment, that it would, nevertheless, escape LET under NRS 368A.200(5)(q). More specifically, even if the piano playing is found to be “live entertainment” (i.e., it failed to meet the two-part test in the statute for ambiance) it should still escape taxation as being incidental to any other activities in the restaurant, as long as the patrons were not charged for that entertainment.

Ambient music is just one of the many areas that have become difficult to interpret and, undoubtedly, trying for the Board to audit as well. Addressing the various “gray areas” in the LET on an issue-by-issue basis through contested tax cases being presented to the Nevada Gaming Commission or in judicial argument will be protracted and the outcomes uncertain. Alternatively, the industry needs to be proactive in 2015. It must take the lead and introduce legislation that would specifically limit the scope of the LET to only those facilities charging admission. Such a change is long overdue. Our tax statutes should be clear and unambiguous. Such a policy benefits both the state and the gaming industry.



Jeff is the Vice President of Legal Affairs, Assistant General Counsel and Corporate Compliance Officer for Boyd Gaming Corporation (NYSE: BYD). Prior to joining Boyd Gaming, he was with the Nevada Attorney General’s Office for over 13 years, including eight years as counsel to the Nevada Gaming Commission and the State Gaming Control Board where he last served as Assistant Chief Deputy Attorney General. Jeff has been the Chairman of the State Bar of Nevada’s Gaming Law Section since 2000.

¹ See State of Nevada Economic Forum, Summary of the Economic Forum General Fund Revenue Forecast, May 1, 2013.
² *Id.*
³ Statistical information provided by Michael Lawton, Senior Research Analyst, Nevada State Gaming Control Board.
⁴ *Id.*
⁵ See Act of July 22, 2003, ch. 5, § 73, 2003 Nev. Stat., 20th Special Sess. 146-155.
⁶ *Cashman Photo v. Dep’t of Taxation*, 91 Nev. 424, 427, 538 P.2d 158 (1975).
⁷ 28 U.S.C. § 4231-4234 (1964).
⁸ See Act of June 21, 1965, Pub. L. No. 89-44, § 301, 79 Stat. 145.
⁹ Op. Nev. Att’y Gen. No. 85-17 (November 12, 1985).

¹⁰ The Federal Cabaret Tax was enacted in 1917. *Id.* In 1931, Governor Fred Balazar signed Assembly Bill 98 that legalized many forms of gaming and laid the foundation for the regulated casino industry. See Act of March 19, 1931, ch. 99, § 1-16, 1931 Nev. Stat. 165-169.
¹¹ See n. 9.
¹² *Id.*
¹³ NRS 368A.200(1).
¹⁴ Cf. Nev. Gaming Comm’n Reg. 13.020(10)(2003) (One scenario still existed where CET would be triggered and an admission charge was not present, specifically, the sale of food and refreshments in a bar that is adjacent to a cabaret, provided the bar patrons could clearly see and hear the entertainment in the adjacent cabaret).
¹⁵ See State of Nevada, Department of Taxation, *Annual Report*, Fiscal 2011-2012, at 38 (per the Department of Taxation LET is only triggered when there is an admission charge); cf. NAC 368A.200(1)(c) (regarding application of the tax to sale of food, beverage and merchandise in a facility with live entertainment and no admission charge).
¹⁶ Ed Vogel, *Live Tax Target of Senators*, Las Vegas Review Journal, Dec. 21, 2004.
¹⁷ *Id.*
¹⁸ See Act of June 17, 2005, 2005, ch. 484, § 9, 2005 Nev. Stat. 2481.
¹⁹ NRS 368A.090(1).
²⁰ NRS 368A.090(2).
²¹ See Act of June 17, 2005, ch. 9, § 38, 2005 Nev. Stat. 22nd Special Sess., 140-144; Act of June 25, 2007, ch. 547, § 1, 2007 Nev. Stat. 3433-3435; Act of May 6, 2009, ch. 33, § 7, 2009 Nev. Stat. 67; Act of June 17, 2011, ch. 495, § 9, 2011 Nev. Stat. 3144.
²² Assem. Bill 498, 77th Leg., Assem. Journ. (May 8, 2013).
²³ Assem. Bill 498, 77th Leg., § 10.
²⁴ *Id.*
²⁵ *Id.*, at § 6 (“Admission charge” was defined to be the total amount of money or consideration paid for admission, including, among other things, entertainment fees, cover charges, table reservation fees, membership fees and required minimum purchases of food, beverages or merchandise).
²⁶ *Id.*, at § 3, 6.
²⁷ *Id.*
²⁸ Nev. Const. art. 4, § 18(2).
²⁹ Ed Vogel, *Legislators Clash Over Tax on “Family Fun”*, Las Vegas Review Journal, May 14, 2013.
³⁰ Andrew Doughman, *Fun For All: Kirkpatrick Revises Entertainment Tax Bill*, Las Vegas Sun, May 31, 2013.
³¹ Anjeanette Damon, Las Vegas Sun, *Democrats Circle the Wagons Against Family Fun Tax’ Foes*, May 15, 2013; Steve Sebelius, Las Vegas Review Journal, *Nobody Wants to Pay the Family Fun Tax*, May 15, 2013.
³² Assem. Bill 508, 78th Leg., Assem. Journal (May 31, 2013).
³³ Anjeanette Damon, Las Vegas Sun, *Kirkpatrick’s Second Attempt at Entertainment Tax Stalls*, June 2, 2013.
³⁴ See Harrah’s Las Vegas, Inc., dba Harrah’s Casino Hotel Las Vegas (NGC Case Nos. 10-064-LL and 10-065-LL); see also Coast Hotels and Casinos, Inc., dba Suncoast Hotel and Casino (NGC Case No. 12-007-LL).
³⁵ *Rogers v. Heller*, 117 Nev. 169, 174, 18 P.3d 1034, 1037 (2001).
³⁶ *Id.* at 213.
³⁷ *Building Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836 P.2d 633 (1992).
³⁸ Webster’s Ninth New Collegiate Dictionary 1027 (1989).
³⁹ See *State, Dep’t of Motor Vehicles & Pub. Safety v. Brown*, 104 Nev. 524, 526, 726 P.2d 882 (1992)(the court would not create statutory language where the Legislature could have easily inserted such language into the statute, but chose not to do so).
⁴⁰ *Cashman Photo*, 91 Nev. at 427.
⁴¹ See Coast Hotels and Casinos, Inc., dba Suncoast Hotel and Casino (NGC Case No. 12-007-LL).
⁴² *State of Nevada, Dep’t of Taxation v. Visual Communications, Inc.*, 108 Nev. 721, 725, 836 P.2d 1245 (1992); see also *Cashman Photo*, 91 Nev. 428.
⁴³ Black’s Law Dictionary 114 (5th ed. 1983).
⁴⁴ *Brown*, 104 Nev. at 526 (the court would not create statutory language where the Legislature could have easily inserted such into the statute, but chose not to do so).