

# A PRIMER ON THE LIVE ENTERTAINMENT TAX

BY JENNIFER ROBERTS, ESQ.



The Live Entertainment Tax (LET) is one of significant discussion and debate within the entertainment industry in Nevada. We can anticipate even more dialogue during the current legislative session, since there are two Bill Draft Requests (BDRs) dedicated to possible amendments, or even an overhaul, of LET laws. *See BDR 32-585 and BDR 41-591; see also Sean Whaley, “Nevada legislators told of ‘loopholes’ in live entertainment tax,” Las Vegas Review Journal (Feb. 6, 2015).*<sup>1</sup>

The LET has its roots in a federal tax called the Admissions Tax that basically charged a tax on admission to “any place other than racetracks and cabarets.” *See U.S. Senate Finance Comm. Report to H.R. 8371 at 33 (June 14, 1965).* For Nevada, that meant there was basically a 10 percent tax on admission to facilities at casinos, such as golf courses, boxing arenas, conventions and outdoor concerts. In order to compensate for this tax, some facilities chose to eliminate admission charges, but then raised prices of food and beverages or imposed a minimum number of drink purchases.

To capture activities occurring in showrooms and lounges, the federal government also created a federal Cabaret Tax, which was a 10 percent tax (that rose as high as 30 percent around World War II) on not only admission charges but also refreshments, services and merchandise at any cabaret, roof garden or “similar place.” *Id.* This tax did not target Nevada

casinos, because it was enacted in 1917, well before Nevada casinos became legal in 1931. When casinos began offering entertainment in a showroom or lounge (i.e., cabaret), the federal Cabaret Tax applied. For any other entertainment facilities, the Admissions Tax applied.

In the 1960s, the federal government started discussing the repeal of the federal Admissions Tax. Moreover, musicians and entertainers increased pressure to repeal the federal Cabaret Tax. Seeing the potential to capture revenues, Nevada enacted the casino entertainment tax (CET) in 1965. The CET required casinos to pay an amount equal to 50 percent of the federal Cabaret Tax. Shortly thereafter, both the Admissions Tax and the federal Cabaret Tax were repealed. However, Nevada law remained intact and required that 10 percent of revenues be paid from entertainment, other than instrumental background music, in showrooms, lounges or any casino facility “where music and dancing privileges ... are afforded the patrons in connection with the serving or selling of food, refreshments or merchandise.” *See Nev. A.G. Op. 317 (June 30, 1966) (citing CET).* The Nevada CET was similar to the federal Cabaret Tax, in that larger casinos venues were not taxed.

However, the CET brought with it various legal challenges and interpretations on its

application. In the year following its enactment, the Nevada Attorney General came to opine that boxing matches were not subject to the CET. *Id.* In a significant case that tested the boundaries of the CET, the Nevada Supreme Court set forth important principles that currently apply to legal challenges involving Nevada's entertainment tax.<sup>2</sup>

The CET remained in effect for nearly 40 years, but still only imposed tax on entertainment at casino facilities. Meanwhile, the multiple challenges and legal opinions also continued. These ranged from whether jai alai frontons were a taxable facility, whether the tax applied to outdoor concerts at casino venues and whether credit card fees were excluded.

During a special session in 2003, the Nevada State Legislature abolished the CET and enacted the Live Entertainment Tax. Despite all of the perceived faults with the CET, the LET was enacted without any public hearings and industry input. Under the new statutory scheme, the LET expanded the tax to not only apply to

casino facilities, but any place where live entertainment is provided.

Moreover, the new LET requires two state agencies to administer and collect the tax. For live entertainment venues located within a licensed gaming establishment, the Nevada State Gaming Control Board (NGCB) is the agency that receives, audits and oversees the tax. Even if the facility doesn't have any gaming, but is located at a licensed gaming establishment, the NGCB is the recipient state agency. If the live entertainment occurs at a facility that is not a licensed gaming establishment, the Nevada State Department of Taxation oversees the assessment of the LET. For example, for live entertainment at the House of Blues located at Mandalay Bay Resort & Casino or The Coliseum at Caesar's Palace, the NGCB is the tax reporting agency. Meanwhile, the Hard Rock

Café on Las Vegas Boulevard, which has no gaming, is assessed for LET by the Department of Taxation. What's interesting about facilities within licensed gaming establishments, the taxpayer is actually the gaming establishment.

Basically, the casino must pay for the tax on live entertainment taking place at its tenant location. One should expect to see lease provisions that address reporting, collecting, auditing, recording, reimbursing, etc., of the LET to the casino landlord by the entertainment-offering tenant.

Similarly to the CET, the LET imposes a 10 percent tax on any admission charge, as well as on amounts paid for food, refreshments and merchandise purchased at a facility where live entertainment occurs.<sup>3</sup> If you attend a concert, your beer, hot dog,

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t-shirt, souvenir drum stick and ticket to the show are all taxed at 10 percent. If the occupancy at the facility is more than 7,500 persons, the tax is just 5 percent on admission.<sup>4</sup> The LET can be passed along to the customer, which is why you see “L.E.T. Included” on concert tickets.

So, what is live entertainment? According to Nevada Revised Statutes Section 368A.090, live entertainment is 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.” Does this mean Cirque de Soleil? Yes. The PAC-12 basketball tournament? Yes. Watching UFC on TV in the sports book at Red Rock Casino? No.

Live entertainment includes singing, dancing, acting, acrobatics, animal stunts, sporting events, comedy or magic acts, and interactive DJing. *Id.* Background music in restaurants, televised events, dancing or singing by patrons and educational animal presentations are not considered live entertainment. *Id.* Moreover, although performances in a gaming area (i.e., party pits) generally do not trigger the LET, there remains active discussion in the industry about such entertainment being visible from non-gaming areas. *See id.*

There are several exemptions to the LET for events that may otherwise qualify as live entertainment.<sup>5</sup> These include, for example, non-profit or charitable benefits; boxing events; live entertainment at trade shows; roaming musicians (violinists); private events, so long as the purpose is not for live entertainment; common areas of shopping malls, such as a piano player in the middle of the Fashion Show Mall during the holidays; food and product demonstrations; NASCAR and baseball; and live entertainment in restaurants for ambience.<sup>6</sup>

Currently, there is a specific exemption for “[a]n outdoor concert, unless the concert is provided on the premises of a licensed gaming establishment.”<sup>7</sup> What this means is that you will not see the large outdoor music festivals such as Rock in Rio USA or Life is Beautiful, including the accompanying food, beverage and merchandise sales, subjected to the LET.

Like its CET predecessor, the LET is continuously being tested. Both the NGCB and Department of Taxation publish FAQs that answer questions ranging from whether bartenders who juggle bottles or singers performing the National Anthem are subject to the LET (generally not, by the way). In fact, the Nevada Supreme Court just recently rejected a challenge from adult entertainment facilities that such places have been unfairly targeted by the LET.<sup>8</sup>

The entertainment industry will continue to monitor how the LET is applied by the two different agencies that administer it, as well as what changes may come from the 2015 Nevada State Legislature. **NL**

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1. <http://www.reviewjournal.com/news/nevada-legislature/nevada-legislators-told-loop-holes-live-entertainment-tax>.
2. See *Cashman Photo v. Nevada Gaming Comm’n*, 91 Nev. 424, 538 P.2d 158 (1975).
3. NRS 368A.200(1)(a).
4. NRS 368A.200(1)(b).
5. See NRS 368A.200(5).
6. See NRS 368A.200(5).
7. NRS 368A.200(5)(n).
8. See *Déjà vu Showgirls of LV, LLC v. Nev. Dept. of Taxation*, Nev. Adv. Op. 73 (Sept. 18, 2014) (cert. denied).

### JENNIFER ROBERTS focuses her

practice on gaming law; federal, state and local alcohol beverage licensing control; and regulatory and administrative law. She has also been involved in the petition process on live entertainment tax assessments. Roberts regularly appears before the Nevada Gaming Control Board and Nevada Gaming Commission, as well as local councils and commissions. She is also an adjunct professor of gaming law at the William S. Boyd School of Law.

