

Nevada's Live Entertainment Tax: Its History and Applicability

By Andrew Moore, Esq. Kummer
Kaempfer Bonner Renshaw &
Ferrario

Introduction: The Casino Entertainment Tax The Precursor to Nevada's Live Entertainment Tax

Many tourist destinations attempt to increase interest by labeling themselves with an interesting moniker or by creating an interesting and kitschy attraction. Mitchell, South Dakota is famous for its Corn Palace, a large building with a facade containing murals made out of corn. The Cadillac Ranch, a monument of ten graffiti-covered and half-buried Cadillac sedans, is located just outside of Amarillo, Texas along famous Route 66. Gilroy, California has nicknamed itself the "Garlic Capital of the World." Not surprisingly, large cities with economies largely dependent on tourism are not immune to this nickname game. A search on Wikipedia for the term "Entertainment Capital of the World" yields four results: Las Vegas, Nevada; Los Angeles, California; New York City, New York; and Orlando, Florida¹. Aside from the glaring omission of Branson, Missouri² from the list and the fact that Americans apparently have a penchant for exaggeration and hyperbole as evidenced by the fact that only American cities are listed as possible "Entertainment Capitals of the World," out of the four cities listed on Wikipedia, there can be no doubt that Las Vegas is the true "Entertainment Capital of the World."

While Los Angeles, New York City, Orlando, and Branson like to tout their tourist appeal, no city in America truly offers the entertainment options that Las Vegas provides in such a concentrated and convenient space. Entertainment options abound along the six mile stretch from Mandalay Bay Hotel & Casino on the southern end of the Las Vegas Strip to the Golden Nugget Hotel & Casino in downtown Las Vegas. Whether one is interested in seeing a large production show by Cirque du Soleil, a Neil Diamond or Coldplay concert, an improvisational comedy show, a magic show, a large scale production show replete with showgirls, or karaoke renditions of classic songs, one can always find something to do in Las Vegas other than hitting the craps tables, lounging by the pool, or enjoying an outstanding meal at one of the city's

famous restaurants.

Given these numerous and wide-ranging entertainment options in Las Vegas, in 1965 the Nevada legislature began assessing an entertainment admissions tax on Nevada casino resorts as a source of tax revenue for the State³. In 2003, the original version of the entertainment admissions tax was overhauled and the Nevada legislature enacted the live entertainment tax ("LET"). This article will focus on the creation of the LET, the enforcement of the LET, and certain practical pointers for businesses subject to the LET.

Originally when enacted in 1965, the casino entertainment tax ("CET"), as it was called, provided that any entertainment on the premises of a licensed gaming establishment was subject to a ten percent tax⁴. Since the CET was patterned after the federal admissions tax and the federal cabaret tax, which were both repealed in 1965, the resorts merely paid a tax for entertainment offered at a cabaret⁵. A cabaret, which could be considered a relic in these days of arenas, nightclubs, and ultra lounges, is defined as "a restaurant serving liquor and providing entertainment (as by singers and dancers)."⁶ During the 1960s, cabaret-style shows were the dominant form of entertainment on the Las Vegas Strip. Shows like "Lido de Paris" at the Stardust and "Folies Bergere" at the Tropicana were wildly popular in the 1960s and into the 1970s. The CET, codified at NRS 463.401⁷, was written broadly and provided that gaming licensees pay a ten percent tax on all amounts patrons paid for admission, merchandise, refreshment, or service. The CET was "levied upon each licensed gaming establishment in this state where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise."⁸

The CET did not apply to licensees that had less than 50 slot machines, less than three table games, or any combination of slot machines and table games within those limits.⁹ The CET was not assessed against a licensed gaming establishment providing entertainment if no distilled spirits, wine, or beer were served or allowed to be consumed or if only light refreshment was served. Additionally, the CET was not collected if space was provided for dancing and no charge was made for the dancing or if music was provided, when the

music was instrumental or supplied without charge to the owner, operator, or lessor of the licensed gaming establishment or when the music was mechanical music.¹⁰

The manner in which the CET statute was drafted exempted a large portion of entertainment activities and, thereby, reduced the amount of tax dollars finding their way into the State's coffers.



For instance, concerts held on the premises of a gaming establishment where the concert was in an outdoor stadium or in an auditorium separate from the casino lounges and showrooms were not subject to the casino entertainment tax.¹¹ The number of tax-exempt entertainment activities became especially apparent when the casino resorts of yesterday, such as the Sands and the Dunes, gave way to the megaresorts of today, such as MGM Grand and Mandalay Bay, as many entertainment options available to Las Vegas tourists fell outside the purview of the CET.

Creation of the Live Entertainment Tax

In 2003, Governor Kenny Guinn issued a proclamation convening the 20th Special Session of the Nevada Legislature to order for consideration of “a tax plan sufficient to meet all of the appropriations and other spending measures that were passed during the 72nd Session of the Nevada Legislature.”¹² The defining bill of the 20th Special Session was Senate Bill 8 which adopted key components of the State's revenue plan including the LET. The LET is codified at NRS 368A.010 through 368A.370 and at NAC 368A.010 through 368A.540. Taking effect on January 1, 2004, the LET taxes admission at most all facilities where live entertainment is provided in Nevada.¹³

Enforcement of the Live Entertainment Tax

The State Gaming Control Board (“Board”) is required to collect the LET from licensed gaming establishments, while the Nevada Department of Taxation collects the LET from all other

taxpayers.¹⁴ The Nevada Gaming Commission (“Commission”) has authority to revoke the gaming license for any licensed gaming establishment that “willfully fails to report, pay or truthfully account for” the LET.¹⁵

Under the LET, live entertainment is defined as “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.”¹⁶ The statute provides a list of activities that are included in the definition of “live entertainment.”¹⁷ These include: (1) music, vocals, dancing, or acting provided by one or professional or amateur musicians, vocalists, dancers, or actors;¹⁸ (2) athletic or sporting contests, events, or exhibitions provided by one or more professional or amateur athletes;¹⁹ (3) comedy or magic performed by one or more professional or amateur entertainers;²⁰ and (4) disc jockey performances that are not merely limited to interactions with patrons to introduce the recorded music, making general interest announcements to patrons, and encouraging interaction amongst the patrons.²¹ The LET statute also provides a list of activities





that are excluded from the purview of the statute.²² These include: (1) occasional performances by employees who primarily serve food or beverages to patrons if the employee performances are not advertised as patron entertainment;²³ (2) performances in a licensed gaming establishment if the performers stroll continuously throughout the facility;²⁴ (3) performances in a licensed gaming establishment, other than those in nightclubs, lounges, restaurants, or showrooms, “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[;]”²⁵ and (4) television and closed circuit broadcasts of live entertainment.²⁶ Additionally, boxing contests, live entertainment provided “at 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, if the facility in which the live entertainment is provided has a maximum occupancy of less than 200 persons,” live entertainment provided at private meetings or dinners attended by members of a particular organization at a licensed gaming establishment, and outdoor concerts, except for those concerts provided on the premises of a licensed gaming

establishment, are all excluded from the LET.²⁷

Determining Applicability of the Live Entertainment Tax

The process for licensed gaming establishments to determine whether they are subject to the LET is comprised of the following few steps. The first step involves determining if the licensed establishment has less than 51 slot machines, less than six table games, or has a combination of slot machines and table games within those limits. If the licensed establishment has 51 or more slot machines or six or more table games or a combination of slot machines and table games above those limits, it is subject to the LET. From there, determining the amount of LET that needs to be paid, one must look to the maximum occupancy of the live entertainment venue.²⁸ If the maximum occupancy of the live entertainment facility is more than 7,500, the LET is ten percent of all admission charges and food, refreshment, and merchandise charges. If the maximum occupancy of the live entertainment facility is less than 7,500, the LET is five percent of admission charges only.

If the licensed gaming establishment has less than 51 slot machines, 6 table games, or any combination thereof, the next question to ask is whether the facility charges an admission fee. If it does not, the facility is not subject to the LET. If it does charge an admission fee and the maximum occupancy is less than 200, the facility is also not subject to the LET. However, if the facility has a maximum occupancy of more than 200, the



facility is subject to the LET and the amount of the LET (either five percent or ten percent) is based upon whether the maximum occupancy reaches 7,500 as outlined above.

Helpful Tips in Understanding the Live Entertainment Tax

In terms of interpreting, administering, and enforcing the LET provisions in the Nevada Revised Statutes and the Nevada Administrative Code, the Board drafted a helpful document entitled "Frequently Asked Questions (FAQs) about the Live Entertainment Tax" which is posted on the Board's website.²⁹ Gaming licensees with specific questions as to whether the LET statutes apply to a specific tax situation should consult an attorney or seek an advisory ruling via a written request to the Board Chairman. But the FAQs document published by the Board is a helpful start in understanding the nuances of the LET provisions.

In determining when the LET begins to apply for a particular venue, NAC 368A.410 provides that live entertainment status begins at the earlier of "the time when taxable live entertainment commences" or "the time when any patron is required to pay an admission charge before the patron is allowed to enter a facility."³⁰ Given the fact that many venues allow patrons to purchase tickets weeks in advance of an actual performance, live entertainment status does not commence until patrons are admitted to the venue for the performance.³¹ For smaller venues that do not sell tickets in advance, live entertainment status commences when the patron is required to pay an admission charge; for gaming licensees who exceed the slot machine and/or table game minimum requirement found at NRS 368A.200, however, an admission charge is not required for the tax to apply as "live entertainment status begins at the earlier of when the live entertainment starts or when the admission charge is imposed."³² This means that some venues are subject to the LET even before admission charges are imposed if live entertainment is provided prior to the admission

charge being collected.

The Nevada Gaming Control Act allows those collecting the LET to pass the cost along to patrons. "A business entity that collects any amount that is taxable [under the LET provisions] is liable for the tax imposed, but is entitled to collect reimbursement from any person paying that amount."³³ What this means is that tickets for a Las Vegas concert will generally include language that reads "LET included" and the patron will be required to pay an additional 10% of the ticket price. For instance, if a patron pays \$150.00 for a ticket to a concert at the MGM Grand Garden Arena, the ticket cost will include an additional \$15.00 fee for the LET so that the



actual cost of the ticket is \$165.00 to the patron. NRS 368A.200 authorizes such a payment arrangement.

As noted previously, the LET does not solely apply to admission and ticket prices. The LET is applied to any food, beverage, or merchandise sold at the live entertainment facility.³⁴ But the LET can be collected for food and beverage sold outside the live entertainment facility, as well. The LET "applies to the sale of food and refreshments at a location in close proximity to a facility if the primary purpose of the location is to provide food or refreshments to the patrons of that facility who view the live entertainment."³⁵ Assessing the LET in such a situation requires the Board to have sufficient evidence that the primary purpose of the bar or snack bar located outside the live entertainment venue was to serve the performance's attendees.³⁶ Tests for determining the primary purpose include "consideration of the hours of operation of the bar relative to the entertainment hours and the frequency with



which other patrons were likely to purchase refreshments from the bar.”³⁷

Lastly, even though many licensed gaming establishments lease nightclub space or concert space at casinos to third-party operators, the gaming licensee is responsible for the payment of the tax. This payment responsibility resting with the gaming licensee applies “even if another person [separate from the gaming licensee] is affording the entertainment.”³⁸ In such cases, the licensee “is responsible for collecting the tax from the person affording that entertainment and for remitting the tax based upon the records of the person affording that entertainment.”³⁹

Specific Live Entertainment Tax Examples

Even though the definition of live entertainment excludes situations in which patrons entertain other patrons, for some years karaoke was deemed to be subject to the LET.⁴⁰ However, the Board has altered its opinion on karaoke. Now, karaoke will only be subject to the LET if the karaoke leader/disc jockey takes on the role of performer rather than just introducing songs.⁴¹ This is in line with the exclusion in NRS 368A.090(2)(b)(6) which exempts entertainment provided by a patron.⁴² Further, payment of prizes to the karaoke-performing patrons will not subject the karaoke venue to the LET.⁴³ Such treatment comports with the manner in which disc jockeys in Nevada are handled under the LET. As noted previously, entertainment venues are not subject to the LET when disc jockeys merely introduce recorded music, make general interest

announcements to patrons, and encourage patron participation.⁴⁴

Fashion shows, on the other hand, are generally subject to the LET. When the fashion show consists of a person emceeing the event and making announcements about what the models are wearing, the show is subject to the LET. If the models move continuously through the audience and the event does not have an emcee making announcements, the event would be exempt from the LET.⁴⁵

Recently, Las Vegas resort hotels have conducted, or have had lessees conduct, bikini contests/spokesmodel contests which on the surface appear to be similar to fashion shows. When structured properly, however, such contests should be exempted from the LET. If such contests are open to all patrons interested in participating and the participants are not compensated for their participation, the contests are more akin to karaoke than to fashion shows. Fashion shows require advance planning and generally involve paid models wearing designer clothes. Entertainment venues hosting a bikini or spokesmodel contest need to ensure that the rules for the particular event clearly articulate that the event is open to all participants that meet certain basic requirements (e.g. age and gender).

In addition to karaoke and bikini contests, Las Vegas is proud to be the home of flare bartending. Generally bottle juggling and other fancy serving techniques do not qualify as live entertainment under the statute.⁴⁶ But if the bartenders regularly

engage in singing or dancing, the bartender's actions are considered to be live entertainment.⁴⁷ The LET statute does provide guidelines under which to work in order to ensure that bartender performances are not subject to the LET. NRS 368A.090(2)(b)(3) provides that "[o]ccasional performances by employees whose primary job function is that of preparing, selling or serving food, refreshments or beverages to patrons" are excluded from the LET "if such performances are not advertised as entertainment to the public."⁴⁸ This statute provides important guidance to casino operators in that a gaming licensee can have bartenders or food servers occasionally sing, lip synch songs, juggle, or dance and such activity will not subject the gaming licensee to the LET if the occasional performances are not advertised as entertainment to the public.

Additionally, there is an LET exclusion if a gaming licensee has table game dealers either sing, lip synch, or dance (e.g. the "Dealertainers" at Imperial Palace). Under the LET provisions, performances at a licensed gaming establishment that take place outside of "nightclubs, lounges, restaurants or showrooms" and which performances "enhance the theme of the establishment or attract patrons to the areas of the performances" are excluded from the LET "as long as any seating provided in the immediate area of the performers is limited to seating at slot machines or gaming tables."⁴⁹ Therefore,



performances on the casino floor that add to the theme of the gaming establishment or that draw casino patrons to the areas of the performance are excluded from the LET if no additional seating specifically designated for the performance is provided by the gaming establishment.

Lastly, over the past few years the number of "celebrity" appearances at nightclubs has substantially increased. While individuals may debate and discuss the reason why such appearances are necessary and if they actually draw crowds (one cannot help but ask if people are really drawn to nightclubs for an opportunity to hang out with Kevin Federline or Heidi Montag and Spencer Pratt from the MTV show *The Hills*), it is important for gaming licensees, and more directly nightclub operators, to implement certain procedures to ensure that such appearances do not subject cover charges and beverage sales to the LET. As noted above, disc jockeys performing their normal functions (e.g. introducing recorded music and making announcements to the nightclub's patrons) are excluded from the LET.⁵⁰ Additionally, dancing by patrons to recorded music is not considered live entertainment subject to the LET.⁵¹ Therefore, if the "celebrity" host merely welcomes patrons to the nightclub, introduces songs, and dances next to the patrons, the "celebrity" appearance would not be subject to the LET.

However, if the nightclub and "celebrity" host plan the celebrity appearance to include a performance, the nightclub or casino operator, as the case may be, are subject to the LET and would be taxed on the cover charges and beverage sales attendant to that celebrity appearance. Therefore, if the nightclub operator or casino operator wants to prevent the "celebrity" hosted event from being subject to the LET, it is very important that the appearance agreement between the venue and the



celebrity clearly delineate what the “celebrity” host has been engaged to do. Language should be included in the appearance agreement that the “celebrity” host is only to make general comments to the crowd and may introduce music. Exclusions should be included in the agreement that the “celebrity” host is not to perform a musical or dance set. While it is not practical to prevent an impromptu performance (for example, there is always a chance that Kevin Federline will sing “PopoZão” if goaded into doing so by the nightclub patrons), by having an appearance agreement with exclusionary language that clearly provides that the “celebrity” host is not to sing or perform is an advantage for the venue operator or gaming licensee should any dispute arise as to the imposition and collection of the LET.

Conclusion

Given Las Vegas' status as the undisputed “Entertainment Capital of the World,” it makes perfect sense to utilize the entertainment options that abound in the Las Vegas Valley as a source of tax revenue for Nevada. Since enacted in 2003, the LET has generated in excess of \$32 million in tax revenue for the State, with almost \$11 million collected in fiscal year 2006-2007.⁵² While the LET has generated substantial tax revenue for the State, the LET statutes and administrative code provisions set forth numerous exclusions and are, at times, difficult to decipher and understand. Therefore, it is important for businesses subject to the LET (whether it is casino operators, nightclub owners, or restaurant owners) to consult a Nevada attorney familiar with the LET provisions in order to ensure proper compliance with the applicable laws. **NGL**

¹ Wikipedia, The Entertainment Capital of the World, available at http://en.wikipedia.org/wiki/Entertainment_Capital_of_the_World (last modified May 20, 2008).

² Unlike the four cities touted as “Entertainment Capital of the World” on Wikipedia, Branson is the only location in which the venerable and topical comedian Yakov Smirnoff serves as goodwill ambassador and which provides visitors with an opportunity to see the raucous “Baldknobbers Jamboree Show.”

³ Minutes of the Senate Committee on Judiciary, Sixty Seventh Session on June 21, 1993, p. 2, available at https://www.leg.state.nv.us/67th/93minutes/S_JD_621.html (last visited June 17, 2008).

⁴ Id.

⁵ Id.

⁶ Merriam-Webster Online Dictionary, “Definition of Cabaret” available at <http://www.merriamwebster.com/dictionary/cabaret> (last visited on June 13, 2008).

⁷ NRS 463.401 was repealed effective January 1, 2004.

⁸ NEV. Rev. Stat. 463.401 (repealed Jan. 1, 2004).

⁹ Id.

¹⁰ Id.

¹¹ Nevada Attorney General, “Gaming Casino Entertainment Tax NRS 463.401 does not apply to rock concerts held on the premises of a gaming establishment where the concert is held in an outdoor stadium or in an auditorium separate from casino lounges or showrooms”, 85-17 Op. Nev. Att’y Gen. at p. 67 (November 12, 1985).

¹² Nevada Legislative Counsel Bureau Fiscal Analysis and Research Divisions, “Revenue Plan Fact Sheet: 20th Special Session 2003” (August 2003), found at <http://www.leg.state.nv.us/lcb/research/RevenueFactSheet.pdf> (last visited June 13, 2008).

¹³ See NEV. Rev. Stat. 368A.180 (2007).

¹⁴ NEV. Rev. Stat. 368A.140(1)-(2) (2007).

¹⁵ NEV. Rev. Stat. 368A.360 (2007).

¹⁶ NEV. Rev. Stat. 368A.090(1) (2007).

¹⁷ See NEV. Rev. Stat. 368A.090(2)(a) (2007).

¹⁸ Id. at (2)(a)(1)-(3).

¹⁹ Id. at (2)(a)(6).

²⁰ Id. at (2)(a)(7).

²¹ Id. at (2)(a)(9).

²² See NEV. Rev. Stat. 368A.090(2)(b) and 368A.200(5)

(2007).

²³ NEV. Rev. Stat. 368A.090(2)(b)(2) (2007).

²⁴ Id. at (2)(b)(3).

²⁵ Id. at (2)(b)(4).

²⁶ Id. at (2)(b)(5).

²⁷ NEV. Rev. Stat. 368A.200(5)(c), (e), (i), and (n). The LET statutes were amended by the Nevada Legislature in 2005 by Assembly Bill 554 and Senate Bill 3. One of the main revisions affecting licensed gaming establishments was the reduction in the number of seats in the live entertainment venue in order to avoid taxation. The LET statutes enacted in 2003 provided that gaming establishments licensed for less than 51 slot machines, less than 6 table games, or any combination within those limits would not be subject to the LET if the facility had a seating capacity of less than 300. Pursuant to NRS 368A(5)(e), the live entertainment must now take place in a venue with less than 200 seats in order to avoid taxation. See Dennis K. Neilander and Mark A. Clayton, "Roll Call: Nevada 2005 Nevada Gaming Legislation" (June 10, 2005) available at <http://www.theiaga.org/tglweb/tglbg/?p=11>.

²⁸ Pursuant to NRS 368A.200(7), maximum occupancy means, in the following order of priority, either: (1) the maximum occupancy of the facility as determined by the State Fire Marshal or the local governmental agency; (2) "the maximum occupancy of the facility designated in any permit required to be obtained in order to provide the live entertainment;" or (3) the actual seating capacity of the venue hosting the live entertainment.

²⁹ The document can be found at http://www.gaming.nv.gov/documents/pdf/let_faq.pdf.

³⁰ NAC 368A.410(1)(a) (2004).

³¹ "Frequently Asked Questions (FAQs) about the Live Entertainment Tax," p. 3, available at http://www.gaming.nv.gov/documents/pdf/let_faq.pdf (last visited June 16, 2008).

³² Id.

³³ NRS 368A.200(3) (2007).

³⁴ See NEV. Rev. Stat. 368A.180 (2007).

³⁵ NAC 368A.420(1)(f) (2004).

³⁶ "Frequently Asked Questions (FAQs) about the Live Entertainment Tax," p. 4 available at http://www.gaming.nv.gov/documents/pdf/let_faq.pdf (last visited June 16, 2008).

³⁷ Id.

³⁸ NAC 368A.490(1) (2004).

³⁹ Id.

⁴⁰ See NAC 368A.100(5).

⁴¹ "Frequently Asked Questions (FAQs) about the Live Entertainment Tax," p. 9 available at http://www.gaming.nv.gov/documents/pdf/let_faq.pdf (last visited June 16, 2008).

⁴² See NEV. Rev. Stat. 368A.090(2)(b)(6) (2007).

⁴³ Id.

⁴⁴ NEV. Rev. Stat. 368A.090(2)(a)(9) (2007).

⁴⁵ Id. at p. 10; see NEV. Rev. Stat. 368A.090(2)(b)(3) (this exclusion only applies to facilities with at least 51 slot machines and/or at least 6 table games).

⁴⁶ Frequently Asked Questions (FAQs) about the Live Entertainment Tax," p. 9 available at http://www.gaming.nv.gov/documents/pdf/let_faq.pdf (last visited June 16, 2008).

⁴⁷ Id.

⁴⁸ NEV. Rev. Stat. 368A.090(2)(b)(3) (2007).

⁴⁹ NEV. Rev. Stat. 368A.090(2)(b)(4) (2007).

⁵⁰ NEV. Rev. Stat. 368A.090(2)(a)(9).

⁵¹ See Chairman Dennis Neilander, "Letter re: Senate Bill 8 Adoption of Live Entertainment Tax Regulations" (Dec. 22, 2003) available at http://gaming.nv.gov/documents/pdf/industry_ltr_041.pdf.

⁵² Nevada Dept. of Taxation's Annual Report for Fiscal Year 2006-2007, p. 37 available at <http://tax.state.nv.us/documents/AnnualReport2007.pdf> (last visited June 18, 2007).

