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WHITTEMORE GAMING GROUP

August 5, 2015

Mr. Terry Johnson, Member
State Gaming Control Board
555 E. Washington Street
Las Vegas, Nevada 89101

Re: Proposed amendments to NAC 368A.

Dear Member Johnson:

Thank you also for the opportunity to offer the following comments, questions and suggestions on behalf of MGM Resorts International ("MGM") to the Board's draft regulations. (GCB Draft Dated 7/20/2015)("Draft Regulations"). These are in addition to the comments that have been made on behalf of MGM at the various meetings you have accommodated for the industry and for MGM.

At the outset, we want to thank you, Chief Audit Springer and Deputy Attorney General Magaw for your efforts in drafting amendments to the Live Entertainment Tax ("LET") regulations in an effort to create certainty for the Nevada gaming industry as to the appropriate application of LET to activities occurring on the premises of nonrestricted gaming establishments.

The following is a summary of broad comments rather than a section by section review of the Draft Regulation.

I. ADMISSION CHARGES

As you know, an admission charge is defined in SB 266 as the "total amount, expressed in terms of money, of consideration paid for the right or privilege to enter or have access to a facility where live entertainment is provided. ... the term includes ... an entertainment fee, a cover charge, a required minimum purchase of food, beverages or merchandise, a membership fee and a service charge or any other fee or charge that is required to be paid in exchange for admission to a facility where live entertainment is provided." SB 266, Sec. 1.4(2), amending NRS 368A.020.

I think that most would agree that an entertainment fee, cover charge and required minimum purchase of food, beverages or merchandise is pretty clear. The terms "membership fee" and "service charge" are less certain but they must be fees or charges that are "required to be paid in exchange for admission to a facility where live entertainment is provided."

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A. Membership fees

The definition of Membership fee in the Draft Regulation, Sec. 10 (8) "to mean an amount paid for a membership, or other similar item that provides certain amenities, including but not limited to admission to a facility or a facilities where live entertainment is provided" is in our opinion too broad if not limited by other provisions.

The House of Blues Foundation Room, a venue operated at Mandalay Bay, is open to the public but also offers "memberships." The "memberships" offer a number of benefits, only one of which is entry into the venue when there are DJs and other live entertainment.

The Draft Regulation would require Mandalay Bay to remit tax on the full amount of the membership fee if the Foundation Room has one live entertainment event a year. We don't believe that was the intent of the legislation. If the entire amount of a membership fee is considered the admission charge, the illogical result would be that tax is collected on other than live entertainment events.

We request that consideration be given to adding a section that provides that the amount of the LET due will be calculated on the basis of either 1) the value of the number of general admission tickets to a live entertainment event that are provided to a member or 2) the value of the live entertainment compared to the remainder of the items included in the membership fee, similar to the method used for determining the LET due on packages.

B. Service fees.

There is no definition of "service fee" in SB 266. In his testimony, before the Nevada Senate Committee on Revenue and Economic Development, Senator Lipparelli, the main sponsor of the bill, referred to them as "ticket issuance fees."

"Admission fee" is defined in relevant part as a " a service charge or any other fee or charge *that is required to be paid in exchange for admission to a facility where live entertainment is provided.*" The Draft Regulation does not take into account this latter phrase in the statutory definition. Instead the Draft Regulation definition seems to be in conflict with that phrase when it provides that a "fee or charge is considered required even if a person could avoid paying the fee or charge by electing to purchase the admission through another method, from a different seller or a different location." That type of fee does not seem to be required to be paid in exchange for admission to a facility where live entertainment is provided.

We do not believe that the Draft Regulation interpretation in Sec. 10(12) that is mimicked throughout the regulation makes sense in light of the rest of the LET statute.

It is our understanding that the Board does not interpret LET to apply to the following type of transaction:

> MGM sets aside a certain number of tickets in a block for resellers such as Expedia and Vegas.com. When a patron wishes to purchase a ticket, Expedia makes the request to MGM and MGM provides the ticket to Expedia for resale. In those cases, MGM will sell the ticket to Expedia at a discount. Under SB 266, Sec. 3 (3) the tax should be collected at the time the ticket is sold at a discount to Expedia. If Expedia sells the ticket at face value and even includes a service fee, the tax is not due.

The Draft Regulation is not clear that in the case of a "resale" that the LET due is that received by the licensee from the reseller. For instance, Section 18 and 19 of the Draft Regulation both refer to the taxpayers is responsible for the tax, even if another person is "selling or distributing admissions." If those provisions remain in the next version of the Draft Regulation, consideration should be given to clarifying that this language is not intended to require the reseller to collect or remit to the taxpayer additional LET if the reseller adds its own service charge.

Further, I understand that Board interprets SB 266 to require the imposition of LET if a person who chooses to purchase tickets on any of the ticket agent websites such as Ticket Master and is charged a service fee, even if that service fee is not "in exchange for admission to the facility where live entertainment is provided." Let's use the Cirque show as another example:

> A patron comes into Bellagio and buys a $100 ticket to "O" and is charged a $5 service fee. Bellagio pays LET on $105. In that case the service fee is being paid "in exchange for admission" to the "O" show. Another patron purchases the ticket on TicketMaster. TicketMaster charges the patron $100 for the ticket and a $5 service fee. TicketMaster remits to Bellagio the $100 ticket charge. TicketMaster retains the $5 service fee. Bellagio would pay LET on the $100 ticket charge. TicketMaster may also be contractually obligated to give Bellagio a "rebate" on the service fee of $1.

Prior to the Supreme Court's decision in the AEG case, Bellagio paid LET on the $1. After the Supreme Court decision, Bellagio was no longer required to pay LET on the $1 and in fact Bellagio and other MGM entities were given refunds of those overpayments. If the legislature was attempting to change that, which I think it was, then the regulation should be written to clarify that Bellagio, would in my example, be required to pay LET on the $101 it received, not on the $105 paid by the patron.

We recommend that service fee be defined as the amount charged or collected *by the taxpayer*. This proposed amendment would have the additional benefit of not subjecting the licensee and the Board of auditing non-taxpayers. As currently drafted, Sections 18 and 19 of the Draft Regulation requires MGM taxpayers to essentially become auditors of the ticket broker's books and records.

Further, we believe that NRS 368A.240 is relevant to the discussion of both the definition of "service charge" and the record-keeping and auditing requirements of the Draft Regulation. That statute provides that if a taxpayer is unable to collect all or part of an admission charge which were included in the taxable receipts reported for a reporting period, the taxpayer may deduct the amount paid from future payments.

Thus if the taxpayer knows that a ticket agent has sold a ticket for $100, charged a $5 service fee and then the ticket agent does not remit the $105 to the taxpayer but only remits $101 to the taxpayer, the taxpayer hasn't collected the admission charge and therefore is entitled to a deduction. By amending the definition to the amount collected by the taxpayer, the taxpayer and the Board don't have to go through the fiction of requiring the taxpayer to pay taxes on the $105 collected by the ticket agent but not received by the taxpayer and then offsetting the amount paid on future returns.

C. Suite license fees

MGM has been advised that the Board[1] has calculated the amount due from the Orleans (which also has an arena) by dividing the annual suite license price by the number of *all* events to determine an "average" single ticket price and then multiplying the single ticket price by the number of live entertainment events. That amount is then taxed. LET is imposed whether or not the suite holder attends the event. We do not know if that representation is accurate but request that the Board consider such a calculation for suites that may be in locations where the maximum occupancy may be less than 5000.

II. DEFINING LIVE ENTERTAINMENT

Thank you for agreeing to draft further revisions to the Draft Regulation to further refine the definition of "ambient activity" and "performance." I am sure that Mr. Magaw has refined those definitions but offer the following definition of "ambient activity" for your consideration:

> "Ambient activity" means ~~live entertainment~~ a live activity that ~~is presented in the background of a facility in a manner that only~~ primarily serves to enhance

[1] The Department is responsible for collection of LET at the various UNLV event centers. The website for the Thomas and Mack indicate that LET is payable for sporting and other live entertainment events there. The Department has not published how it calculates LET on the rental or licensee fee for the suites at that location.

> or complement the mood, character, quality, tone or atmosphere of the facility at which it is undertaken.

The rational for the use of "live activity" rather than "live entertainment" is that the use of "live entertainment" renders the definition circular. If it is "live entertainment" it can't really be ambient. I suggest that whenever the regulation uses "live entertainment" to define a particular aspect of "live entertainment" that it be amended to provide "live activity."

We would also request an amendment to "Marketing or promotional activity" as follows:

> "Marketing or promotional activity" to mean a live ~~entertainment~~ activity provided for the primary purpose of drawing attention to a particular product, ~~or~~ brand or service. This latter addition is meant to clarify that "bottle service" is marketing or promotional activity.

We look forward to the next draft of the regulation which we understand will include the concepts of a performance being defined as an activity which is the primary reason why the patron purchases admission to the facility. Included within the factors that would be considered would be, among others, whether the activity was advertised or marketed, and for dancing and singing whether it was choreographed.

III. DISPLAY OF ADMISSION PRICE AND TAX

At some locations, such as nightclubs, the admission price fluctuates depending on the evening, the time, and whether the guest is a man or woman or local. There is usually no "ticket" issued for admission. We request that the regulation specifically provide that the requirement for display be satisfied if the price of admission and tax is disclosed on a receipt.

IV. ADVISORY RULINGS AND AUDIT RELIANCE

The Draft Regulations provide that an advisory opinion, unless otherwise specifically stated, applies only to the taxpayer to which it is issued. We would like clarification that an opinion issued to one MGM subsidiary could be relied upon by other MGM subsidiaries. To require each of the MGM subsidiaries to submit a request for an advisory opinion about the same activity would be an expensive and duplicative effort and serve no regulatory purpose.

Further, we would like to understand the concept behind Sec. 18(3) that a licensee may not rely upon audits or review by the Board. If a licensee goes through an audit or review and the Board makes its determination that tax is not due on a particular event, the licensee should be able to rely on that determination.

Again, thank you for your consideration of these comments. We look forward to continuing to work with you on these amendments.

Sincerely,

Ellen F. Whittemore

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