GT GreenbergTraurig

January 13, 2015

Terry Johnson, Member
Nevada Gaming Control Board
555 E. Washington Blvd, Suite 2600
Las Vegas, Nevada 89101

Re: Comments re: Proposed Amendments to NAC Chapter 368A

Dear Member Johnson:

Hakkasan Group, would like to hereby submit its written suggestions and comments regarding the proposed amendments to the Nevada Administrative Code Chapter 368A, dated December 1, 2014, ("Proposed Amendments")[1] as they pertain to the application of Live Entertainment Tax under Nevada Revised Statutes Chapter 368A and Nevada Administrative Code Chapter 368A ("LET").

First, and foremost, we would like to commend the Board Staff for their efforts to clarify the LET provisions, which can be difficult to interpret and comply with. In particular, we compliment the clarification in NAC 368A.410 as to what constitutes "live entertainment status." Amendments to the Nevada Administrative Code will make it easier to calculate, collect, and administer LET.

Exemption Request Procedure

We believe that offering taxpayers a procedure by which they may request an exemption will be very helpful to taxpayers, operators, and Board Staff. However, as currently written, such procedures are only available to restaurants seeking an exemption under NRS § 368A.200(5)(q). To streamline the exemption request process, we suggest that this amendment be revised to incorporate exemption requests made by all venues pursuant to any exemption listed in NRS § 368A.090(b) or NRS § 368A.200(5)(q).

"Ambience"

Pursuant to the current draft of Proposed Amendments, NAC 368A.400 would be revised to include the following definition of "ambience" and "ambient":

> ". . . a live entertainment activity that enhances or complements the mood, character, quality, tone, or atmosphere of a facility and which serves as an unobtrusive accompaniment to the other activities occurring within a facility."

We suggest that the second clause, "…and which serves as an unobtrusive accompaniment to the other activities…" should be deleted. The first clause of the proposed definition is in line with most dictionary definitions of "ambience" and is proper.[2] However, linking the two clauses with "and" means both elements must be established and the second clause adds conditions that are not within the ordinary meaning of the words and impose an unnecessary limitation on the meaning. The phrase

[1] Notice of Informal Workshop and Agenda Regarding the Possible Adoption, Amendment, to Repeal of Regulations Pertaining to Chapter 368A of the Nevada Administrative Code, Nevada Gaming Control Board, available at http://gaming.nv.gov/modules/showdocument.aspx?documentid=9423 (hereinafter, "Notice of Proposed Amendments").

[2] *See e.g.*, *Oxford English Dictionary*, "Ambience" (Online Ed. 2011); *see also Oxford English Dictionary*, "Ambient" (Online Ed. 2011).

"unobtrusive accompaniment" tends to add confusion to the more generally understood meaning of ambience, which is adequately covered in the first clause. Specifically, because common definitions of "unobtrusive" include phrases such as "not attracting attention" and "discreet,"[3] licensees may be put to the burdensome and difficult task of determining what would attract too much attention. For example, a licensee may wish to have a "background musician" such as a piano player or a violinist, but would have to determine whether the musician was "too good," such that he/she may attract attention. Because the second clause will cause continuing confusion as to what constitutes "ambience," and will require ad hoc interpretations, it should be deleted.

"Employee"

In the Proposed Amendments, NAC 368A.400 would be amended to include the following definition of employee:

> ". . . a person who, under an express or implied contract of hire, works in the service of either a licensed gaming establishment or the owner or operator of the facility where live entertainment is provided. The term does not include a bona fide "independent contractor"."[4]

If independent contractors are excluded from the definition of employee, operators cannot, for any of their independent contractors, use the exemptions in NRS § 368A.090(2)(b)(2) and NRS § 368A.090(2)(b)(8) (collectively, the "Employee Exemptions"). Thus, the same activity – for example, occasional dancing by a bartender – would be taxable if done by an independent contractor, but may not taxable if done by an employee.[5] Yet, there is no legislative or regulatory history to suggest intent to exclude independent contractors from the exemptions. The Legislature determined it was appropriate to exempt certain occasional activities by those working for operators, regardless of the form of employment status of the individual. We are not aware of any policy or legislative reason to tax an activity differently based solely on the participant's relationship with an operator.

For reasons external to any taxing considerations, an independent contractor relationship may be preferred or required. However, often times, there is no functional difference between how independent contractors and employees would perform their duties.

When the interpretation of a tax statute is in doubt, the statute must be construed in favor of the taxpayers.[6] In other words, a tax statute may not be expanded by implication.[7] Thus, when a certain activity is taxable, the definition of such activity should be interpreted narrowly so as not to include activity that was not intended to be taxed.

In NRS Chapter 368A, the Legislature defined "live entertainment" to include and exclude certain activities.[8] To avoid including activity that was not intended to be considered live entertainment, the definitional exclusions should be interpreted broadly, in favor of the taxpayers unless there is evidence of legislative intent to the contrary. We have examined the legislative history of the Employee Exclusions and cannot locate any testimony or other legislative history to suggest that the Legislature intended an overly narrow construction of the term "employee."

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[3] *Oxford English Dictionary*, "Unobtrusive" (Online Ed. 2011).
[4] *Id.*
[5] *See id.*; *see also* Nev. Rev. Stat. § 368A.090(2)(b)(2) & § 368A.090(2)(b)(8).
[6] *Id.*
[7] *Id.*
[8] *See* Nev. Rev. Stat. § 368A.090.

Therefore, the exclusion from the definition of live entertainment under NRS §368A.090(2)(b)(2) should be interpreted to include activities partly performed by an independent contractor who fulfills a job role that is functionally equivalent to that of an employee.

Accordingly, we propose the following definition of "employee":

> ". . . a person who, under an express or implied contract of hire, works in the service of either a licensed gaming establishment or the owner or operator of the facility where live entertainment is provided. The term includes an "independent contractor"."[9]

"Incidental"

In the Proposed Amendments, "incidental" is defined as follows:

> ". . . for purposes of NRS 368A.200(5)(q), a live entertainment activity that is:
> (a) Inconspicuous to the patrons;
> (b) Not a primary element of the restaurant's operation activities;
> (c) Not advertised to the public as an attraction to the restaurant; and
> (d) Not the primary reason the public patronizes the restaurant."

We propose that subsections (a), (c), and (d) should be deleted. Subsection (b) is the most critical issue in determining whether an activity is incidental and it can stand on its own.

The proposed definition uses "and" to link the four subparts, so failure to meet one of the subparts results in the loss of a licensee's argument that something is "incidental." As further described below, subsections (a), (c), and (d) are likely to cause confusion because they require analysis and interpretation, which could cause licensees to eliminate otherwise legitimately "incidental" activities for fear of taxation.

First, it is difficult to ascertain the proper application of "inconspicuous" – which literally means "invisible"[10] – in this context. For example, background music provided by violinists and piano players has been determined to be "incidental," regardless of whether the musicians are seen by patrons. Yet, under this prong, it seems as though a restaurant would be subject to LET for this music if the patrons can see the musician.

Second, the prohibition against advertising does not help to delineate whether an activity is "incidental" in this context. If a gourmet restaurant states in its advertising that meals are accompanied by violin or piano music, such statement does not make the music any less "incidental" to the primary business. Patrons will visit gourmet restaurants for the cuisine; the mention of music in an advertisement simply informs patrons that their dining experience will be enhanced by background music. Because the advertising component does not help to define what is "incidental" to a primary business, subpart (c) should be deleted from the proposed definition.

Third, a person's reasons for visiting a venue do not help to explain whether a certain activity is "incidental" to the venue's primary business. Additionally, a restaurant will not be able to determine or explain a patron's reasons for visiting the establishment, let alone prove a patron's *primary* reason for visiting the establishment. This subpart imposes a significant burden on restaurants – it requires restaurants to know and prove a patron's rationale, which, even the patron may not be able to fully articulate.

[9] Notice of Proposed Amendments.
[10] *Oxford English Dictionary*, "Inconspicuous" (Online Ed. 2011).

For the foregoing reasons, subsections (a), (c), and (d) should be deleted from the definition of "incidental."

Overpayment of Taxes

Pursuant to NAC 368A.520(5), "[i]f a taxpayer is unable for any reason to refund an overpayment of taxes, the taxpayer shall pay the overpayment of taxes to the Board." While there are numerous instances in which a taxpayer may have overpaid LET, this provision seems only to apply to overpayments that resulted from the over-collection of LET from patrons. If a venue collected LET from patrons, and the amount collected was later determined to be more than necessary, the venue would try to refund such funds to the patron(s). According to the proposed amendment, if the venue cannot issue a refund, it will submit the refund to the Board. To make clear that the amendment applies to the over-collection of LET from patrons, we propose the following:

> "***If it is determined that the taxpayer has collected from patrons more live entertainment tax than necessary, and the*** ~~[i]f a~~ taxpayer is unable for any reason to refund an overpayment of taxes, the taxpayer shall pay the overpayment of taxes to the Board."

Thank you for your attention to this matter. Please do not hesitate to contact us should you have any questions or concerns.

Sincerely,

GREENBERG TRAURIG
Erica L Greenberg
on behalf of

Michael J. Bonner
Managing Shareholder, Las Vegas Office

cc: *Shirley Springer, Audit Division, Chief*
Joy English, Audit Division, Deputy Chief
Jan Marks, Chief Financial Officer
Derek Silberstein, Vice President of Operations