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UPDATES TO NEVADA'S LIVE ENTERTAINMENT TAX

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To raise revenue and address its struggling K–12 education system, Nevada legislators made several major changes to the state's tax structure in 2015. These include introduction of the Commerce Tax, which is a gross revenue tax on each business in the state whose Nevada gross revenue exceeds $4 million in a fiscal year, a $1 per pack increase in the tax on cigarettes, and an increase in the state business license fee for corporations from $200 to $500.

Perhaps the most interesting change for gaming and entertainment companies, however, is the modifications to Nevada's Live Entertainment Tax ("LET").

The Old LET

Previously, the LET formula was that facilities with occupancy limits of fewer than 7,500 persons were required to charge the patron a 10% tax on admission, food, and merchandise. Facilities with occupancy above 7,500 persons were taxed at a 5% rate.

Exemptions included:

- Events where all admission proceeds went to a nonprofit organization;
- Facilities without gaming and with a maximum occupancy less than 200;
- Unarmed combat (boxing/MMA);
- Street vendors who sold merchandise outside the venue;
- Live events at trade shows;
- Live entertainment when only musical performers moved about the audience/venue;
- Entertainment provided only in the common area of a shopping mall;
- Entertainment during food or product demonstrations at a shopping mall or craft show;
- Live entertainment as part of an amusement ride (but not the primary reason for the attraction);
- Free entertainment provided in an outdoor area to the public;
- Free entertainment provided as part of a restaurant's ambience;
- Outdoor concerts at nongaming establishments;
- NASCAR races; and
- Minor league baseball games.

The New LET

The Nevada Legislature, with Senate Bill 266, set out to simplify the LET structure and clarify areas which have been too subjective

in the application of the tax. Under the new LET structure, all live entertainment events are taxed uniformly. The new tax rate is a flat rate of 9% of the admission charge to a venue where live entertainment is provided.

There is no distinction based on whether live entertainment was provided by licensed gaming facilities or non-licensed entities or on the size of the facility. The new LET also makes it clear that it is a tax on admission charges. Simply put: if admission is charged and there is live entertainment, the LET will apply. If no admission is charged, the LET does not apply.

There are some previously exempt venues that are now under the LET umbrella. This includes outdoor entertainment on both gaming and non-gaming property, legal escort services, nonprofits that sell more than 7,500 tickets per event, and nonprofits where patrons provide the entertainment if the nonprofit sells more than 15,000 tickets to the event (e.g., the Burning Man festival in northern Nevada).

The subjectivity regarding whether or not the activity at the venue is "entertainment" or merely "ambient entertainment" is also addressed by defining the term "performance" to broadly include a "live entertainment activity" that is not an "ambient activity." The Nevada Gaming Control Board ("Board") felt it was simpler to define the exception than to define the activity of a "performance." There were some comments by taxpayers at the Board's July 23, 2015, LET workshop that the new definition of "ambient activity" – "live entertainment that is presented in the background of a facility in a manner that only serves to enhance or complement the mood, character, quality, tone or atmosphere of the facility" – may still be too unclear. The suggestion is that the term "background" may be confusing where, for example, go-go dancers are up on platforms or stages and that the Board should use a "primary purpose" analysis instead.

Similarly, the revised LET seeks to clarify that events where disc jockeys perform are live entertainment, regardless of whether or not the disc jockey speaks at the event. It does so by adding a definition of "performance by a disc jockey" as "the playing of recorded music, the mixing of audio or the adding of sound, video and lighting effects by a person or group of persons to a patron or group of patrons."

Exceptions and Exemptions

The new LET includes some new exceptions as well. The tax is no longer imposed on amounts paid for food, refreshments, or merchandise sold at the venue (unless the purchase of such items is required as part of the price of admission, e.g., a 2-drink minimum). The tax is also not imposed on amounts paid for access to tables, seats, lounge chairs, or particular areas near a swimming pool (i.e., the LET applies to the cover charge to enter a day club, but not to any extra amount the patron pays to rent a cabana or a lounge chair once inside). The value of admission provided to a patron on a complimentary basis is also excluded from the tax, unless the complimentary admission is associated with a separate purchase that is required for the patron to have access to the facility.

The new LET also does not include license or rental fees for luxury suites, boxes, or similar products at facilities with a maximum occupancy of at least 7,500 persons. Instead, if the license or rental fee includes the admission of a certain number of patrons to a facility where a live entertainment event is provided, the admission charge is an amount equal to the lowest priced admission charge for the live entertainment event multiplied by the number of admissions to the live entertainment event included in the license or rental fee regardless of the number of admissions actually used. For purposes of this calculation, the "lowest priced" admission must be legitimately available for sale to the public.

For venues with less than 7,500-person occupancy, however, the LET must be paid for such license or rental fees. One taxpayer suggested in the Board's July 23 public workshop on the new LET regulations that, for these smaller venues, they should continue to use "historical practices" to calculate that admission charge – which they submitted should be the number of luxury boxes divided by the ticket price times the number of live events. This would produce a similar result as seen for venues with greater than 7,500 seats. Hopefully this issue will be clarified in the final regulations.

Other special exemptions:

- Charitable live entertainment activities where fewer than 7,500 tickets are sold are exempt.
- Venues with fewer than 200 seats remain exempt from the LET.
- NASCAR events will be exempt if they give Nevada a second race weekend.
- Professional sports will be exempt if one of the teams playing in the contest is domiciled in Nevada.
- Combat sports are exempt from the LET, but are subject to the levies imposed by other sections of the law that have oversight by the Nevada Athletic Commission.
- Collegiate sports involving Nevada's schools are exempt, with the exception of the Silver Bowl, which would not be exempted.

"Service Charges"

Perhaps the biggest area of remaining debate is whether or not associated fees or "service charges" are to be included in the LET. The traditional payment of credit card or debit card fees to a financial institution that are unreturned to the venue remain clearly exempt under the revised law.

There is lively debate, however, on the definition of the term "service charge" and what additional "service charges" should and should not be included in the tax.

Senator Lipparelli, who sponsored the LET legislation (Senate Bill 266) in the Nevada Legislature, specifically stated in his testimony on April 7, 2015, in the Senate Committee on Revenue and Economic Development, that SB266 would add clarity to the "service charge" issue and that "service charges associated with the issuance of the ticket — to the extent that you hire someone to issue the tickets — have to be true charges paid out and not returned in any fashion." This language suggests that Ticketmaster fees and other similar charges by third parties who sell and issue tickets would not be included in the

LET, so long as the third-party vendor does not remit these charges back to the venue.

The current Board draft regulations, however, do not adopt the language that was suggested to clarify this issue in SB266. Instead, the draft continues to have language that may be unclear and, in fact, deletes the "service charge" exception to the LET that had previously been found in NRS 368A.

In the Board's LET workshop on July 23, it was clear that there is ongoing disagreement on what should and should not be included in the LET as a "service charge." Taxpayers argued that service charges by Ticketmaster or other third parties should be not taxed as part of the LET when that service charge is not remitted to the venue. They also argued that charges for additional services or amenities, such as special event parking or shuttles to the venue, should not be included in the LET, so long as those charges and services are optional and not required for admission to the venue.

The Board responded that "if the legislature wanted to keep the status quo [of not including such service charges in the LET], why would they delete the service charge exception?" They also commented that they do not want to risk operators "saying that the ticket price is $50 but $48 of this is for parking and only $2 is for admission."

Several taxpayers objected to this and are submitting comments and proposals to amend the language to make it clear that what is being taxed is the admission to the facility, which should not include charges for other purposes, such as convenience fees for purchasing tickets online or having them shipped to the customer.

At this time, there is not another public LET workshop scheduled. The stated goal of the Board is to revise the regulations based on the hearings and any additional written comments they have received and to provide the revised draft for review by the Nevada Gaming Commission and then the Nevada Legislative Counsel Bureau, with the intent to have the new regulations promulgated by October 1, 2015.

The new law makes it clear that noncompliance with the collection and payment of the LET can be considered by the Board to be an unsuitable method of operation by a gaming licensee. The new law also provides for taxpayers to request an advisory opinion from the Board concerning matters relating to the LET.

The effective date of the law is October 1, 2015. The Board recently published a notice to explain how this will affect LET payments. This notice provides that if a taxpayer reports admission ticket sales on an accrual basis (i.e., advanced admission sales are reported in the month of the show/event rather than the month the sales occurred), it must report these sales on its September 2015 tax return or on an earlier month's tax return. All admission charges reported beginning October 1, 2015, will be subject to the new 9% tax rate.