

# SPARKS NUGGET: STATE TAX EXEMPTION OF FOOD USED BY CASINOS FOR COMPED MEALS

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In their search for new sources of revenue, states have legalized and sought to tax many kinds of gaming. Forty-eight of the fifty states of the United States permit one or more types of legal gaming.<sup>1</sup> An important technique in casino and some other types of gaming is giving “comps” – complimentary goods or services – to player-customers.<sup>2</sup> A frequent type of comp is free meals on the casino premises or elsewhere. Gaming establishments also often give free meals to their employees.

Comps have been controversial for federal income tax purposes.<sup>3</sup> A recent Nevada case, *Sparks Nugget*, and related cases illustrate that comps also can present important questions as to sales and use taxes in many states.<sup>4</sup>

This Comment describes the *Sparks Nugget* case and its impact. Thereafter, the Comment describes the approaches to statutory interpretation on which the case turned, and it explores possible additional arguments – one for casinos and one for revenue authorities – that were not fully developed in the decision. In my view, on the grounds argued, the case was correctly decided.

## I. THE SPARKS NUGGET CASE

### A. Constitutional and Statutory Framework

Nevada’s sales and use tax structure is similar in relevant respects to other states’ structures.<sup>5</sup> Both the sales and use taxes are excise taxes.<sup>6</sup> The sales tax

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<sup>1</sup> The exceptions are Hawaii and Utah. Kavan Peterson, 48 States Raking in Gambling Proceeds, Stateline.org, May 23, 2006, <http://www.stateline.org/live/details/story?contentId=114503>.

<sup>2</sup> For a discussion of comps generally, see UNLV INTERNATIONAL INT’L GAMING INST., THE GAMING INDUSTRY: INTRODUCTION AND PERSPECTIVES 132-37 (1996).

<sup>3</sup> E.g., *Churchill Downs, Inc. v. Comm’r*, 115 T.C. 279 (2000), *aff’d*, 307 F.3d 423 (6th Cir. 2002); I.R.S. Tech. Adv. Mem. 9641005 (Oct. 11, 1996) (addressing the deductibility by casinos of meal and non-meal comps).

<sup>4</sup> *Sparks Nugget, Inc. v. State ex rel. Dep’t of Taxation*, 179 P.3d 570 (2008) (per curiam), *reh’g denied*, No. 45755 (July 16, 2008).

<sup>5</sup> For discussion of state sales and use taxes generally, see JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION: CASES AND MATERIALS ch. 9 (8th ed. 2005).

is imposed on the retail sale within the state of tangible personal property.<sup>7</sup> Sales for resale in the regular course of business are not subject to the sales tax, which is imposed only on the end user.<sup>8</sup> The use tax is levied on the storage, use, or other consumption of tangible personal property in the state.<sup>9</sup> The use tax back-stops the sales tax by imposing tax on in-state use of non-exempt property that escaped sales tax, for example, because the property was purchased in another state.<sup>10</sup>

Both constitutional and statutory provisions bear on the controversy as to the taxability of food used by casinos for comped meals.<sup>11</sup> The Nevada Constitution provides that “[t]he legislature shall provide by law for . . . the exemption of food for human consumption from any tax upon the sale, storage, use or consumption of tangible personal property.”<sup>12</sup> However, “[p]repared food intended for immediate consumption” is outside the exclusion.<sup>13</sup> The legislature implemented the constitutional command, restating both the general exemption for “food for human consumption” and the “[p]repared food intended for immediate consumption” exception to the exemption.<sup>14</sup>

### B. Facts

Sparks Nugget (the “Nugget”) is a Nevada casino/hotel/resort that buys food for service to patrons.<sup>15</sup> After preparation, some of the food is sold in the Nugget’s restaurants, and some is given away to patrons and employees in the form of complimentary meals.<sup>16</sup> It was uncontroversial that the Nugget, according to statute, did not pay sales tax when it bought the food and that the Nugget properly collected and remitted to the state sales tax on the food it sold.<sup>17</sup> The controversy arose as to the food used for complimentary meals. Disagreeing with the State Department of Taxation and reversing the trial court, the Nevada Supreme Court, with one justice dissenting, held that the Nugget

<sup>6</sup> *E.g.*, *Rapa v. Haines*, 101 N.E.2d 733, 735 (Ohio Ct. of Common Pleas 1951) (use tax) (defining excise tax as a tax imposed on performing an act, engaging in an occupation, or enjoying a privilege) (citing cases).

<sup>7</sup> NEV. REV. STAT. § 372.105 (2009). Nevada’s general sales and use tax is set out in Chapter 372. A similar levy is imposed by Chapter 374 (local school support tax).

<sup>8</sup> *Id.* § 372.050 (2009).

<sup>9</sup> *Id.* §§ 372.185 & 372.190 (2009).

<sup>10</sup> *Id.* § 372.345 (2009); *State ex rel. Nev. Dep’t of Taxation v. Kelly-Ryan Inc.*, 871 P.2d 331, 334 (Nev. 1994).

<sup>11</sup> In some respects, the principles for interpreting constitutions differ from those for interpreting statutes. *See, e.g.*, ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitutions and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 37-41 (1997). The Nevada Supreme Court saw no such differences as relevant to *Sparks Nugget*, and it applied the same principles in construing the two types of text.

<sup>12</sup> NEV. CONST. art. X, § 3(A).

<sup>13</sup> *Id.* at art. X, § 3(A)(2)(a).

<sup>14</sup> NEV. REV. STAT. §§ 372.284(1) & 372.284(2)(d) (2009).

<sup>15</sup> *Sparks Nugget, Inc. v. State ex rel. Dep’t of Taxation*, 179 P.3d 570, 572 (Nev. 2008) (per curiam), *reh’g denied*, No. 45755 (July 16, 2008).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 573.

did not have to pay use tax on the food used for comped meals.<sup>18</sup> The State petitioned the Nevada Supreme Court for rehearing.<sup>19</sup>

While the petition for rehearing was pending, the Nevada Legislature met in special session. Legislation to reverse the *Sparks Nugget* result, Assembly Bill 2, passed the Assembly but died in the Senate. Thereafter, the Nevada Supreme Court denied the State's petition for rehearing.<sup>20</sup> The one justice who dissented in the original decision concurred in the denial of rehearing and stated that, in view of the Legislature's failure to enact Assembly Bill 2, he now accepted the majority's view as to what constitutes a taxable event.<sup>21</sup>

### C. Fiscal Impact

As a result of *Sparks Nugget*, State coffers will be depleted by refunds to the Nugget and other similarly situated establishments, which may claim refunds for overpayments of taxes over the last three years, according to the statute of limitations.<sup>22</sup> The Nugget would be due a refund of about \$1.3 million. Moreover, according to the Department of Taxation, ninety-two other casinos have claimed refunds on the same theory advanced by the Nugget, and these claims total about \$96 million.<sup>23</sup>

Although casino gaming is most prominent in Nevada, it legally occurs in many other states as well. The budgets of such other states – at least those whose sales and use tax regimes resemble Nevada's – could be negatively affected by a similar resolution of the issue. In *Horseshoe Hammond*, the Indiana Tax Court held to the same effect as the Nevada Supreme Court,<sup>24</sup> and the New Jersey courts confronted a somewhat related issue in a different context.<sup>25</sup>

The budgets of most states are currently severely strained.<sup>26</sup> Nevada's budgetary straits are among the most parlous.<sup>27</sup> In this environment, decisions like *Sparks Nugget* and *Horseshoe Hammond* are bitter pills for states with casino gaming to swallow. That being so, the decision of the Nevada Legisla-

<sup>18</sup> See *id.* at 577.

<sup>19</sup> Pet. for Reh'g, No. 45755 (Apr. 14, 2008) (on file with UNLV GAMING LAW JOURNAL).

<sup>20</sup> Order Den. Reh'g, No. 45755, at 4 (Nev. Sup. Ct. July 16, 2008) (Douglas, J., concurring) (on file with UNLV GAMING LAW JOURNAL).

<sup>21</sup> *Id.*

<sup>22</sup> See NEV. REV. STAT. § 372.635 (2009) (in general, establishing a three-year limitations period for filing sales and use tax refund claims).

<sup>23</sup> See Sean Whaley, *Costly Court Decision Rehearing Urged*, LAS VEGAS REV.-J., Apr. 15, 2008, at 1B.

<sup>24</sup> See *Horseshoe Hammond, LLC v. Ind. Dep't of State Revenue*, 865 N.E.2d 725 (Ind. Tax Ct. 2007), *review denied*, 878 N.E.2d 207 (Ind. 2007).

<sup>25</sup> See *Boardwalk Regency Corp. v. Div. of Taxation*, 18 N.J. Tax 328 (N.J. Super. Ct. App. Div. 1999) (agreeing with the New Jersey Tax Court that the complimentary providing of non-alcoholic beverages to casino patrons and employees is a sale for no consideration, so is not a resale of beverages for sales and use tax purposes), *rev'g & remanding on other grounds*, 17 N.J. Tax 331 (N.J. Tax Ct. 1998).

<sup>26</sup> See, e.g., Nicola M. White, *State Tax Revenues Suffer Sharpest Decline on Record*, 53 STATE TAX NOTES 201 (2009).

<sup>27</sup> See, e.g., Ed Vogel, *Gibbons Looks at New Cuts, Possible Special Session*, LAS VEGAS REV.-J., Aug. 11, 2009, available at [http://www.lvrj.com/news/breaking\\_news/52987837.html](http://www.lvrj.com/news/breaking_news/52987837.html) (last visited Feb. 12, 2010); Ed Vogel, *Nevada's Economic Shortfall Growing*, LAS VEGAS REV.-J., May 2, 2009, at 1A - 2A.

ture not to legislatively reverse *Sparks Nugget* is striking. That decision was made twice: during the special session in 2008 and during the subsequent general session in 2009<sup>28</sup> – a general session in which the Nevada Legislature enacted sharp spending cuts in nearly all categories, including popular and important programs.<sup>29</sup> In this environment, the Legislature’s decision to leave *Sparks Nugget* undisturbed indexes the considerable political power of the gaming sector, Nevada’s leading industry.

## II. THE MERITS

As nearly all tax cases are, *Sparks Nugget* was a matter of interpreting texts, here state constitutional and statutory provisions, and one’s opinion of the merits of the decision may depend upon which school of interpretation one finds most persuasive.

In *Sparks Nugget*, the clash between the majority and the dissent involved four interpretational dimensions: text, structure, purpose, and the canon that exemptions from taxation are strictly construed.<sup>30</sup> Although the “plain meaning” principle claimed the lion’s share of discussion in the case, it lacks real persuasive power. The structural argument is the stronger justification for the result reached by the majority.

### A. Plain Meaning

Of the numerous approaches used by courts to interpret constitutional and statutory texts, the “plain meaning” approach is among the most frequently employed.<sup>31</sup> Under that approach, “when the text of a statute is clear, that is the end of the matter.”<sup>32</sup> More formally,

when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.<sup>33</sup>

The Nevada courts tend to be fond, sometimes perhaps overly fond, of the plain meaning canon, and it played a major role in the *Sparks Nugget* case.<sup>34</sup>

<sup>28</sup> Unless the Governor calls a special session, the Nevada Legislature sits only every other year and only for 120 days. NEV. CONST. art. IV, § 2.

<sup>29</sup> See, e.g., Valerie Miller, *Nevada Legislature 2009: Session Concludes with Cuts*, LAS VEGAS REV.-J., June 14, 2009, at 1E, 6E.

<sup>30</sup> See *Sparks Nugget, Inc. v. State ex rel. Dep’t of Taxation*, 179 P.3d 570 (Nev. 2008) (per curiam), *reh’g denied*, No. 45755 (July 16, 2008).

<sup>31</sup> See, e.g., Steve R. Johnson, *Statutes Requiring “Plain Meaning” Interpretation*, 53 STATE TAX NOTES 763 (2009); Steve R. Johnson, *The Use and Abuse of “Plain Meaning,”* 49 STATE TAX NOTES 831 (2008).

<sup>32</sup> SCALIA, *supra* note 11, at 16.

<sup>33</sup> *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

<sup>34</sup> Other Nevada cases using the canon include *Leven v. Frey*, 168 P.3d 712, 715 (Nev. 2007), and *Int’l Game Tech. Inc. v. Second Judicial Dist. Ct.*, 127 P.3d 1088, 1102 (Nev. 2006).

Yet, at the end of the day, it is open to question whether this canon pointed particularly clearly towards a resolution of the controversy.

Both the majority and the dissent in *Sparks Nugget* invoked plain meaning, but in opposite directions. The majority emphasized the constitutional provision, asserting that the “food for human consumption” exemption plainly dictated decision for the Nugget.<sup>35</sup> In contrast, the dissent emphasized the statutory “prepared food for immediate consumption” exception to the exemption as having plain meaning.<sup>36</sup>

In its deployment of plain meaning, the Nevada Supreme Court appears to have failed to heed both its own teaching and the teaching of the United States Supreme Court. First, when – as in *Sparks Nugget* – plain meaning can plausibly be enlisted on both sides of a dispute, meaning may not be plain after all. Indeed, the Nevada Supreme Court had said as much in an earlier case.<sup>37</sup>

Second, the plain meaning canon is associated with the textualist school of statutory interpretation. However, contemporary textualism – what has been called “the new textualism”<sup>38</sup> – goes beyond narrow focus on statutory language in isolation.<sup>39</sup> Instead, the focus is on the words in context. It is context that gives meaning to particular language.<sup>40</sup> Thus, the United States Supreme Court has recognized that ambiguity – or its absence – is a function not just of words but also of context.<sup>41</sup> Context can include separate but related provisions, which, the Court has taught, should be read as a whole.<sup>42</sup> When the provisions enlisted by the *Sparks Nugget* majority and dissent are read together, there is room for more than one construction. Despite its invocation by both sides, “plain meaning” did not resolve this case.

### B. Structure

In light of the importance of context and the relationship between the constitutional and statutory provisions in the case, the structural argument advanced by the majority has greater force than the plain meaning argument. The majority noted that the role of the use tax is to catch otherwise taxable items that had avoided tax at the time of purchase (for example, by being purchased in a different state).<sup>43</sup> Food purchased and eventually used for comped

<sup>35</sup> *Sparks Nugget*, 179 P.3d at 572, 577.

<sup>36</sup> *Id.* at 577 (Douglas, J., dissenting).

<sup>37</sup> *Nev. Power Co. v. Haggerty*, 989 P.2d 870, 878 (Nev. 1999) (“The fact that the dissent views the [statutory language] differently than the majority is ample evidence that reasonable minds can disagree over the definition . . . in the context of this statute.”); *see also Khan v. United States*, 548 F.3d 549, 556 (7th Cir. 2008) (“When there are two plausible but different interpretations of statutory language, there is ambiguity.”).

<sup>38</sup> *See, e.g.*, WILLIAM N. ESKRIDGE, JR., ET. AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 765-98 (4th ed. 2007).

<sup>39</sup> *See, e.g.*, WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 228-29 (5th ed. 2009) (distinguishing between textualism and literalism).

<sup>40</sup> *E.g.*, SCALIA, *supra* note 11, at 37.

<sup>41</sup> *E.g.*, *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

<sup>42</sup> *E.g.*, *Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008).

<sup>43</sup> *Sparks Nugget, Inc. v. State ex rel. Dep’t of Taxation*, 179 P.3d 570, 575 (Nev. 2008) (*per curiam*), *reh’g denied*, No. 45755 (July 16, 2008).

meals does not fit this bill. Such food did not slip through the net of sales taxation. Instead, it was deliberately excluded from taxation by a constitutional provision.<sup>44</sup> Thus, imposing use tax would distort the back-stop function of that tax.<sup>45</sup> This is a substantial argument against imposition of the use tax.

### C. *Legislative Purpose*

The *Sparks Nugget* dissent argued with some force that, via the exemption, the Legislature intended to cover food purchased for preparation and consumption at home, not meals provided (even at no charge) in a restaurant.<sup>46</sup> Similarly, the State in its petition for rehearing heavily emphasized the Legislature's purpose.<sup>47</sup> To the extent that the majority's opinion trenches on the State constitution, not on statutes, the Legislature's purpose arguably is not controlling. In any event, finding the text clear, the majority held that it was inappropriate to consider legislative intent.<sup>48</sup>

In this regard, the majority was tapping into a long line of federal and state cases that has two theoretically distinct strands. One is that purpose is irrelevant if the statutory language is clear.<sup>49</sup> A generation ago, this approach "was honored more in the breach than in the observance," but it has gained strength more recently.<sup>50</sup> The other strand accepts that legislative purpose is important but establishes the statutory language, if clear, as the sole legitimate indicator of such purpose.<sup>51</sup> Although the theories differ, the result is the same: the triumph of text over extra-textual indicators.

However, there are counter traditions congenial to the dissent. Numerous cases have said that, although statutory language is the starting point of construction, it need not blind the court to other indicators of legislative intent.<sup>52</sup> In addition, the discussion above is relevant here as well. If the statutory language lacks a plain meaning – which is the situation in *Sparks Nugget* – resort to extrinsic indicators of meaning is permissible.<sup>53</sup>

### D. "Exemptions Are Narrowly Construed" Canon

Canons of construction are recited aplenty in judicial decisions,<sup>54</sup> but scholarly debate rages as to their utility in actual practice.<sup>55</sup> Undoubtedly,

<sup>44</sup> NEV. CONST. art. X, § 3(A)(1).

<sup>45</sup> *Sparks Nugget*, 179 P.3d at 575.

<sup>46</sup> *Id.* at 578 (Douglas, J., dissenting).

<sup>47</sup> See Pet. for Reh'g, *supra* note 19, at 6-9.

<sup>48</sup> *Sparks Nugget*, 179 P.3d at 576 n.31.

<sup>49</sup> E.g., *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

<sup>50</sup> See, e.g., GEORGE COSTELLO, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2, C.R.S. DOC. NO. 97-589 (updated Aug. 31, 2008).

<sup>51</sup> See, e.g., Steve R. Johnson, *The Two Kinds of Legislative Intent*, 51 STATE TAX NOTES 1045 (2009); SCALIA, *supra* note 11, at 17.

<sup>52</sup> E.g., *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

<sup>53</sup> E.g., *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154-55 (1932).

<sup>54</sup> A leading text has divided canons into three categories: textual canons, extrinsic source canons, and substantive policy canons. ESKRIDGE, ET AL., *supra* note 38, at App. B.

<sup>55</sup> See, e.g., FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 85-101 (2009).

canons are used largely as makeweights in many cases, serving to rationalize decisions made on other grounds rather than being the actual drivers of outcomes.<sup>56</sup> However, it would be an overstatement to assert that this is always the case. Canons may play constructive roles in statutory interpretation if “their importance is not overemphasized – if they are considered tools rather than ‘rules.’”<sup>57</sup>

The *Sparks Nugget* dissent invoked the canon that exemptions from taxation are narrowly construed.<sup>58</sup> This canon has been applied in numerous federal cases<sup>59</sup> and state cases, both in Nevada<sup>60</sup> and elsewhere.<sup>61</sup>

The majority acknowledged that this canon exists, but brushed past it by observing that, although an exemption is read narrowly, it should not be read so narrowly as to “defeat[ ] cases rightly falling within its ambit.”<sup>62</sup> Thus, the majority put the canon back on the shelf – until the court chooses to dust it off in some future case.

### III. ALTERNATIVE THEORIES

#### A. *Argument for the Revenue Authority*

With denial of the State’s petition for rehearing, the question becomes whether the Department of Taxation can find a new or alternative ground on which it can deny the refund claims of other casinos with a respectable chance that the courts of Nevada will uphold the denials. The *Sparks Nugget* majority suggested one possibility, although it did not commit itself to the idea. The majority noted that the Department had relied upon the use tax, not the sales tax. In particular, the Department did not demonstrate that the complimentary meals constituted a transfer of personal property for consideration, a requirement for application of the sales tax. But the majority offered: “we do not foreclose the possibility that complimentary meals such as the ones at issue in this case may be subject to sales tax where consideration is properly demonstrated.”<sup>63</sup>

The State was alert to this signal. In a brief paragraph, the petition for rehearing requested, as an alternative relief to rehearing, that the case be remanded to permit fact-finding as to the sales tax theory.<sup>64</sup> The Nevada Supreme Court properly denied the request for remand because the State had its

<sup>56</sup> See, e.g., Steve R. Johnson, *The Canon That Tax Penalties Should Be Strictly Construed*, 3 NEV. L.J. 495, 496-97 (2003).

<sup>57</sup> COSTELLO, *supra* note 50, at 4.

<sup>58</sup> *Sparks Nugget, Inc. v. State ex rel. Dep’t of Taxation*, 179 P.3d 570, 577 (Douglas, J., dissenting) (Nev. 2008) (per curiam), *reh’g denied*, No. 45755 (July 16, 2008).

<sup>59</sup> E.g., *Comm’r v. Schleier*, 515 U.S. 323, 328 (1995).

<sup>60</sup> E.g., *Jim L. Shetakis Distrib. Co. v. State*, 839 P.2d 1315, 1319 (Nev. 1992).

<sup>61</sup> E.g., *Zebra Techs. Corp. v. Topinka*, 799 N.E.2d 725, 733 (Ill. App. Ct. 2003); see also Steve R. Johnson, *Interpreting State Tax Exemptions, Deductions, and Credits*, 51 STATE TAX NOTES 607 (2009).

<sup>62</sup> *Sparks Nugget*, 179 P.3d at 574 (quoting *Harlan Sprague Dawley, Inc. v. Ind. Dep’t of State Revenue*, 605 N.E.2d 1222, 1225 (Ind. Tax Ct. 1992)).

<sup>63</sup> *Id.* at 575 n.15.

<sup>64</sup> Pet. for Reh’g, *supra* note 19, at 9-10.

chance to make its record on audit and at trial.<sup>65</sup> However, the State presumably could attempt to develop this argument in the other pending refund cases and in future audits, as could revenue authorities in other jurisdictions confronting similar issues.

Nonetheless, there are obstacles to the success of the sales tax theory. First, for the theory to prevail, the courts would have to liberalize the concepts of consideration and bargained-for exchange, at least for tax purposes. The *Sparks Nugget* court noted that consideration is an essential part of a transaction subject to sales tax.<sup>66</sup> The State might attempt to argue that complimentary meals are in consideration for previous play or services or for future play or services, but this could be a hard position to sustain.

Both in Nevada and elsewhere, consideration for sales tax purposes “evolved from the law of contracts.”<sup>67</sup> The *Sparks Nugget* majority cited a non-tax case, *Pink v. Busch*,<sup>68</sup> which held: “To constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>69</sup>

It would be a stretch to say that this “bargained for” element is present in a complimentary meals situation. Casinos may hope for more patronage tomorrow from those they comp today. They may even expect it. However, there is no firm promise. Accordingly, courts in some other jurisdictions have rejected the sales tax theory.<sup>70</sup>

A second problem for a sales tax theory is valuation. With complimentary meals, there is no price to the consumer of the meal by which to calculate the amount of sales tax due. One could attempt to construct some alternative or proxy measure of value, but all such measures would be artificial and imprecise to greater or lesser degrees. Too imaginative an attempt may be hard to square with the sales tax statutes as written.

The *Sparks Nugget* majority virtually invited the Department of Taxation to consider a sales tax alternative to the unsuccessful assertion of use tax on complimentary meals. One may expect the Department and revenue authorities in other states to strive assiduously to develop the facts necessary to sustain such an argument, and there may be situations in which that effort would succeed. It would be surprising, however, if this alternative would be successful across the board.<sup>71</sup>

<sup>65</sup> Order Den. Reh’g, *supra* note 20, at 2-3.

<sup>66</sup> *Sparks Nugget*, 179 P.3d at 575 n.15.

<sup>67</sup> *Monarch Beverage Co. v. Ind. Dep’t of State Revenue*, 589 N.E.2d 1209, 1212 (Ind. Tax Ct. 1992).

<sup>68</sup> *Pink v. Busch*, 691 P.2d 456, 459 (Nev. 1984) (per curiam) (cited in *Sparks Nugget*, 179 P.3d at 575 n.15).

<sup>69</sup> *Id.* at 459 (quoting Restatement (Second) of Contracts § 71(1), (2) (1981)).

<sup>70</sup> *Horseshoe Hammond, LLC v. Ind. Dep’t of State Revenue*, 865 N.E.2d 725, 730 (Ind. Tax Ct. 2007), *review denied*, 878 N.E.2d 207 (Ind. 2007); *Boardwalk Regency Corp. v. Div. of Taxation*, 18 N.J. Tax 328, 330 (N.J. Super. Ct. App. Div. 1999), *rev’g and remanding on other grounds*, 17 N.J. Tax 331 (N.J. Tax Ct. 1998).

<sup>71</sup> For conflicting views of the strength of this alternative argument, compare Jennifer Carr & Cara Griffith, *Possible Outcomes of Nevada’s Complimentary Meals Case*, 48 STATE TAX

*B. Argument for Casinos*

The casino won in *Sparks Nugget* by, ultimately, a unanimous vote of the Nevada Supreme Court. Yet, as seen above, the State may have an additional arrow in its quiver by focusing on sales tax rather than use tax. In addition, the battle remains to be fought in other states. Thus, it is appropriate to ask whether casinos might enlist any other arguments in their support in the event of further controversy.

One possibility lies in another canon. Over several generations, hundreds of cases have held that tax statutes should be construed strictly against the government. That is, if the provisions in question do not clearly support the revenue authority, the taxpayer should prevail.<sup>72</sup> This canon has been largely abandoned at the federal level although it continues to pop up unpredictably.<sup>73</sup>

However, the canon retains vitality in state and local taxation.<sup>74</sup> In most jurisdictions, the canon is a function of case law.<sup>75</sup> In a few jurisdictions – including Nevada – the principle is enshrined in statute.<sup>76</sup>

Given the existence of the pro-taxpayer canon in many states, the question becomes how strong is it? Professor Popkin, a leading scholar of statutory interpretation and taxation, has identified three categories of canons.<sup>77</sup> Canons of the weakest sort are “tie-breakers.” In applying canons of this type, the judge “first relies on everything that is legitimate to interpret legislation and, if the answer is still unclear, the answer tilts in favor of the presumption embodied in the canon.”<sup>78</sup>

On the other end of the spectrum, the most potent category of canons is “strong presumptions.” If the canon in question is of this variety, the judge will “requir[e] a clear statement in the statutory text to reach the specific result overriding the values embodied in the canon. . . . A strong presumption usually cannot be rebutted by legislative history, only by the statutory text.”<sup>79</sup>

Occupying intermediate positions in the spectrum are a variety of “in-between presumptions.” Canons of this type “play some unclear role in the interpretive mix of text, statutory structure, purpose, legislative history, and administrative rulings.”<sup>80</sup>

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NOTES 407 (2008), with Andrew W. Swain & Jennifer E. Gauger, *Casino ‘Comps’: Are Freebies Really Free?*, 49 STATE TAX NOTES 95 (2008).

<sup>72</sup> See Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, 10 NEV. LAW. 15, 15 (Apr. 2002).

<sup>73</sup> E.g., *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) and *id.* at 839 n.1 (Stevens, J., dissenting); *Xilinx, Inc. v. Comm’r*, 567 F.3d 482, 497 (9th Cir. 2009) (Noonan, J., dissenting).

<sup>74</sup> E.g., Steve R. Johnson, *Pro-Taxpayer Interpretation of State-Local Tax Laws*, 51 STATE TAX NOTES 441 (2009).

<sup>75</sup> E.g., *State Tax Comm’n v. Edmondson*, 196 So.2d 873, 875-76 (Miss. 1967); *Atlantic Gulf Cmty. Corp. v. City of Port St. Lucie*, 764 So. 2d 14, 19 (Fla. Dist. Ct. App. 1999).

<sup>76</sup> NEV. REV. STAT. § 360.291.1(o) (2009) (part of Nevada’s Taxpayer Bill of Rights).

<sup>77</sup> WILLIAM D. POPKIN, *INTRODUCTION TO TAXATION* 90 (5th ed. 2008).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

In which category does the pro-taxpayer canon fit? Popkin comments on a famous early federal income tax case, *Irwin v. Gavit*,<sup>81</sup> and opines that the canon may have been seen as a mere tie-breaker by the majority but as a strong presumption by the dissent.<sup>82</sup> Since *Gavit*, at the federal level, “[t]he canon favoring taxpayers, like many canons, has probably undergone change over time. As hostility to taxation has diminished with the rise of the modern welfare state, the canon has probably shifted to a weak presumption.”<sup>83</sup>

The matter stands a bit differently at the state level, however. The strength of the pro-taxpayer canon varies from state to state. Depending on this jurisdiction, it may fall into any of the three categories, including “strong presumption” in some states.<sup>84</sup>

Thus, counsel for a casino in a future *Sparks Nugget*-like case will need to research the strength of this canon in the given state. Even in a “tie-breaker” state, however, this argument is worth including in the taxpayer’s brief. In the event of future litigation of the *Sparks Nugget* issue, it should be an addition to the mix of arguments advanced by casinos.

#### IV. CONCLUSION

The *Sparks Nugget* court held that casinos are not required to pay use tax on food used for comped meals. The case has significant revenue effect for Nevada and might be important precedent for other jurisdictions as casino gaming grows in importance throughout the country.

On the facts developed in the case, *Sparks Nugget* was correctly decided. The opinions in the case considered an array of techniques of statutory interpretation, not all of them equally persuasive. The structural argument—the relationship between the sales tax and the use tax—is the strongest of the rationales for the decision reached. Absent constitutional and statutory change, the main hope for the state to reverse the situation may be to shift to the sales tax as the basis of taxation, but this too will be a hard argument to make.

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<sup>81</sup> *Irwin v. Gavit*, 268 U.S. 161 (1925). Justice Holmes, writing for the Court, addressed the pro-taxpayer canon at page 168. Justice Sutherland, in his dissent, addressed it at 168-69 (citing *United States v. Merriam*, 263 U.S. 179, 187-88 (1923)).

<sup>82</sup> POPKIN, *supra* note 77, at 90.

<sup>83</sup> *Id.* at 90-91. Popkin also suggests that, at the federal level, the canon may be confined to cases involving whether items are includible in income and may not extend to deduction cases. *Id.* at 91. For a more detailed discussion of “change over time” affecting this canon, see generally Johnson, *supra* note 72.

<sup>84</sup> See generally Johnson, *supra* note 74; cf. POPKIN, *supra* note 77, at 91 (“it is hard to be sure how state courts apply the canon to state tax laws”).