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Summary of Déjà vu Showgirls v. Nev. Dept. of Taxation, 130 Nev. Adv. Op. 73

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Déjà vu Showgirls v. Nev. Dept. of Taxation, 130 Nev. Adv. Op. 73 (Sept. 18, 2014)[1]

CONSTITUTIONAL LAW: LIVE ENTERTAINMENT TAX

Summary

Exotic dancing establishments sought a declaration that Nevada's Live Entertainment Tax (NLET) violates the First Amendment to the U.S. Constitution because it singles out small groups based on the content of their speech and taxes them in an effort to suppress their ideas. The Supreme Court of Nevada found that NLET does not discriminate on the basis of speech, target a small group of speakers, or threaten to suppress viewpoints or ideas in violation of the First Amendment because appellants failed to show that NLET is not rationally related to a legitimate government purpose.

Background

In 2003, the State Legislature enacted NLET, imposing up to a ten-percent excise tax on admission fees, refreshments, and merchandise provided at certain live-entertainment facilities.[2] In its original form, NLET contained ten exemptions based on a number of factors, including location and size of a facility, entity status of a provider, and the type of entertainment provided, among other things. Since enacting NLET, the Legislature has amended the tax on multiple occasions, allowing for various exemptions and exceptions of certain types of live-entertainment.[3]

Beginning in 2006, appellants challenged NLET as being facially and as-applied unconstitutional in violation of the First Amendment. Appellants also sought an injunction against its enforcement, and a refund of all taxes paid under the statute. In 2008, the Eighth Judicial District Court consolidated the appellants' claims and dismissed the as-applied challenge for lack of subject matter jurisdiction.

Discussion

I.

In Nevada, a taxpayer generally must exhaust all administrative remedies before a district court may properly have subject matter jurisdiction over a state tax claim.[4] The Court recognizes three possible exceptions to this rule when: administrative proceedings would be futile, statutory interpretation is contested, or the facial constitutionality of a claim is at issue.[5] Although appellants agreed that they did not exhaust their administrative remedies, they claimed that their as-applied challenge was improperly dismissed by the district court because their challenge involved a constitutional issue. The Court noted the appellants failed to distinguish between

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[2] More specifically, NLET imposes a 10% tax rate for facilities having a maximum occupancy of less than 7,500 persons and a 5% tax rate for facilities having a maximum occupancy of 7,500 persons or more. NEV. REV. STAT. § 368A.200(1)(a–b) (2013).

[3] *See generally* NEV. REV. STAT. §§ 368A.090, 368A.200 (2013).

[4] State v. Scotsman Mfg. Co., Inc., 109 Nev. 252, 254, 849 P.2d 317, 319 (1993).

[5] *Id.* at 255, 849 P.2d at 319.

facial constitutional challenges, which may bypass the administrative exhaustion requirement, and as-applied constitutional challenges, which necessarily hinge on factual determinations properly found by the administrative agency.[6] Here, because appellants' as-applied constitutional challenge hinges on factual determinations not yet made, the Court found that appellants were required to pursue administrative remedies, and affirmed the district court's dismissal of the as-applied challenge.

II.

The Court then considered whether NLET is facially unconstitutional for violating free speech rights.

A.

Appellant's argued that, under Murdock[7], NLET violates the First Amendment because it directly taxes live entertainment, which they asserted is categorically protected under the First Amendment. The court rejects this argument for two reasons. First, the tax at issue in Murdock was a flat license tax whereas NLET is an excise tax and Murdock was later held to apply only "where a flat license tax operates as a prior restraint on the free exercise of religious beliefs."[8] Second, NLET is not a tax on live entertainment. It imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring at live-entertainment facilities. Thus, NLET does not operate as a prior restraint on constitutionally protected activities.

B.

A taxation statute that [1] discriminates based on the content of speech, or [2] that targets small groups based on speech, or [3] that threatens to suppress speech, will trigger a test of strict scrutiny.

First, the appellants argued that NLET discriminates against certain taxpayers by taxing adult-oriented entertainment, while exempting family-oriented entertainment. The Court began its discussion by emphasizing that "a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas."[9] The test for discrimination is two-fold: primarily, the court looks to the statute's language, and second, it will consider the differences in the speech of those who are and are not being taxed. Here, the Court found no language in the statute referring to the taxpayer's message. In addition, the Court found that while NLET does have exemptions for certain live-entertainment facilities, both exempt and non-exempt facilities bring diverse messages which span the adult- and family-oriented spectrum. Based on the statutory language and the messages of those who are and are not taxed, the Court found that NLET does not discriminate against taxpayers based on the content of their speech.

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[6] *See* Malecon Tobacco, L.L.C. v. State ex rel. Dep't of Taxation, 118 Nev. 837, 841, 59 P.3d 474, 477 (2002).
[7] Murdock v. Pennsylvania, 319 U.S. 105 (1943).
[8] Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 389 (1990).
[9] Leathers v. Medlock, 499 U.S. 439, 450 (1991).

Second, the appellants argued that NLET targets a small group of speakers by forcing them to bear the full burden of the tax through its exemptions of certain other taxpayers, thereby encouraging censorship. The Court disagreed, finding that in 2004, over ninety live-entertainment facilities including raceways, nightclubs, performing arts centers, gentlemen's clubs, sporting facilities, and one-time event facilities were subject to NLET. Given the broad base of taxpayers subject to NLET, the Court found that the tax does not impermissibly target a small group of speakers, and therefore does not pose a danger of censorship.

Finally, the appellants claimed that because the Legislature created certain exemptions and exceptions to the NLET, the specific purpose behind the tax is to suppress speech. The Court found that this claim ignored the idea that "[i]nherent in the power to tax is the power to discriminate in taxation," and that unless "a classification is a hostile and oppressive discrimination against particular persons and classes," it will not require heightened scrutiny.[10] Here, the Nevada Legislature's decision to exempt and exclude certain facilities from an otherwise broadly applicable tax does not indicate an intention or danger of suppressing particular ideas.[11]

Conclusion

The Court found that strict scrutiny does not apply because NLET does not discriminate based on the content of speech, target a small group of speakers, or threaten to suppress ideas. Instead, the Court applied rational basis review and found that the tax is constitutional because appellants failed to demonstrate that NLET is not rationally related to a legitimate government purpose.

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[10] *Id.* at 451–52 (internal quotations omitted).

[11] *See generally* NRS Chapter 368A.