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## Summary of Déjà Vu Showgirls of Las Vegas, LLC v. Nevada Dep't of Taxation, 130 Nev. Adv. Op. 72

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*Déjà Vu Showgirls of Las Vegas, LLC v. Nevada Dep't of Taxation*  
130 Nev. Adv. Op. 72 (Sept. 18, 2014)<sup>1</sup>

ADMINISTRATIVE LAW: JUDICIAL REVIEW

**Summary**

The Court (1) determined the sole remedy for a taxpayer aggrieved by a final decision from the Nevada Tax Commission concerning a tax refund request under NRS Chapter 368A (the Nevada Live Entertainment Tax) is to file a petition for judicial review pursuant to NRS 233B.130 and (2) reaffirmed its judicial estoppel doctrine.

**Background**

In 2006, Déjà Vu Showgirls of Law Vegas, LLC, et al, (“Appellants”) filed suit (Case 1) in the Eighth Judicial District Court seeking a declaration that the Nevada Live Entertainment Tax (“NLET”) was facially unconstitutional, an injunction against its enforcement, and a refund for all taxes paid under the statute.<sup>2</sup>

While Case 1 was pending in district court, Appellants filed individual tax refund requests with the Nevada Department of Taxation (“the Department”), arguing the NLET was facially unconstitutional for violation of the First Amendment. The Department denied the requests and the Nevada Tax Commission (“the Commission”) affirmed.

In 2008, Appellants filed a second de novo action (Case 2) in the Eighth Judicial District Court against the Department and Commission (“Respondents”) challenging the administrative denials of their refund requests. On motion for partial summary judgment, the district court dismissed Case 2 for lack of subject matter jurisdiction. The district court held Appellants had failed to follow proper procedure following the completion of their administrative proceedings by filing a de novo action instead of a petition for judicial review as required by NRS 233B.130. Appellants then brought this appeal.

**Discussion**

*Nevada law required appellants to file a petition for judicial review*

On appeal, Appellants argued their de novo action was proper per NRS 368A.290.<sup>3</sup> However the Court disagreed, siding with Respondents that together the Nevada Administrative Procedures Act (“APA”) and NRS 368A.290 required appellants to challenge their administrative denial through a petition for judicial review.

The APA specifically provides that a party challenging a final decision in a contested administrative proceeding may only do so by filing a petition for judicial review in the

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<sup>1</sup> By Hayley Miller.

<sup>2</sup> An appeal from Case 1 was addressed by the Court in 130 Nev. Adv. Op. 73.

<sup>3</sup> NRS 368A.290 provides that within 90 days after a final decision by the Nevada Tax Commission, the claimant may bring an action against the Nevada Tax Department for the recovery of any part of the denied claim. NEV. REV. STAT. § 368A.290 (2013).

appropriate court.<sup>4</sup> The Court next referenced a previous holding “that all final decisions by the Commission be subject to the provisions of NRS Chapter 233B.”<sup>5</sup> Thus, the APA’s procedures apply to all the Commission’s final decisions, including refund requests under NLET.<sup>6</sup> The Court then reviewed NLET’s relevant NRS provisions noting they confirm the Legislature did not intend for taxpayers seeking refunds under NLET to file a de novo action instead of a petition for judicial review. Accordingly, the district court did not error by determining that it lacked subject matter jurisdiction for Appellant’s de novo challenge.

*The district court correctly declined to apply judicial estoppel.*

Appellants argued that Respondents’ inconsistent actions allowed for the application of judicial estoppel under *Southern California Edison v. First Judicial Court*.<sup>7</sup> However, Respondents claimed the present case was distinguishable from *Edison*, claiming Appellants were never intentionally misled that a trial de novo was an available remedy. Again, the Court agreed with Respondents.

The Court distinguished the case from *Edison*, noting Appellants were unable to prove Respondents made any statements in the course of the judicial and quasi-judicial proceedings that suggested to Appellants the possibility of trial de novo. The record showed that although Respondents may have been vague with their assertions about the correct judicial remedy, their statements did not have the same intentionally misleading character of those made in *Edison*.<sup>8</sup> Whatever ambiguity might have resulted in Appellants’ confusion, it was not the consequence of an underhanded attempt to gain an advantage. Accordingly, the district court did not error by refusing to invoke judicial estoppel.

## **Conclusion**

Under NRS 223B.130 and the APA, the sole remedy for Appellants to contest a final decision of the Nevada Department of Taxation concerning a tax refund request under the Nevada Live Entertainment Tax is to file a petition for judicial review. Appellants incorrectly filed a de novo action to contest the Commission’s final decision. Additionally, judicial estoppel was not applicable in this case because Respondents’ statements regarding judicial remedies were not intentional misrepresentations. The Court upheld the district court’s dismissal for lack of subject matter jurisdiction.

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<sup>4</sup> See NEV. REV. STAT. § 233B.130(1), (2) (2013).

<sup>5</sup> *S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. \_\_\_, \_\_\_, 255 P.3d 231, 235–36 (2011) (upholding exercise of judicial estoppel by the district court to allow an appeal brought de novo instead of as a petition for judicial review to continue after the Commission’s hearing officer and the Nevada Department of Taxation indicated to Edison that trial de novo was available as an avenue for appeal).

<sup>6</sup> See *id.*; NEV. REV. STAT. § 233B.020 (2013); NEV. REV. STAT. § 233B.130(6) (2013).

<sup>7</sup> *Edison*, 127 Nev. at \_\_\_, 255 P.3d at 237–38.

<sup>8</sup> *Id.*