

## Scholarly Commons @ UNLV Boyd Law

---

Nevada Supreme Court Summaries

Law Journals

---

12-4-2014

### Summary of NV Energy v. Nev. Dept. of Taxation, 130 Nev. Adv. Op. 93

Ashleigh Wise  
*Nevada Law Journal*

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

---

#### Recommended Citation

Wise, Ashleigh, "Summary of NV Energy v. Nev. Dept. of Taxation, 130 Nev. Adv. Op. 93" (2014). *Nevada Supreme Court Summaries*. 836.

<https://scholars.law.unlv.edu/nvscs/836>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

*NV Energy v. Nev. Dept. of Taxation*, 130 Nev. Adv. Op. 93 (Dec. 4, 2014)<sup>1</sup>

ADMINISTRATIVE LAW: MINING TAX EXEMPTIONS  
CONSTITUTIONAL LAW: DORMANT COMMERCE CLAUSE REMEDIES

**Summary**

The Court determined that NRS 372.270 is not severable because the legislative intent of the statute was to protect local mines and the exemption does not extend to all mine and mineral proceeds. The Court also determined that violations of the dormant Commerce Clause are remedied by compensating for the negative impact to the claimant as measured by the unfair advantage provided to the claimant's competitors.

**Background**

NV Energy owns and operates two coal powered electricity-generating plants in Nevada. There is not enough coal in Nevada to sustain coal-powered energy. NV Energy obtains all of its coal from mines outside Nevada, which subjects NV Energy to excise taxes<sup>2</sup> on the coal obtained for the electricity plants. Coal mined in Nevada is subject to taxation under NRS Chapter 362 and has a sales and use tax exemption under NRS 372.270.

NV Energy argued the NRS 372.270 exemption for locally produced mine and mineral proceeds discriminates against interstate commerce in violation of the dormant Commerce Clause. NV Energy petitioned the Nevada Department of Taxation for a refund of \$25,932,735. The Department denied the refund request and an administrative law judge and Nevada Tax Commission upheld the denial.

NV Energy petitioned the district court for judicial review of the administrative decision denying its requests for a refund. NV Energy argued that to remedy the interstate discrimination then the Department would have to pay NV Energy a full refund. Furthermore, NV Energy argued that the court should sever only the unconstitutional language from NRS 372.270 rather than strike the statutory exemption in its entirety. The district court reversed the decision of the administrative law judge, struck NRS 372.270 in its entirety but refused to reward NV Energy a refund because there was no injury to redress.

**Discussion**

*The district court correctly struck NRS 372.270 in its entirety*

NRS 372.270 provides that “[t]here are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS.” The contested language is “which are subject to taxes levied pursuant to chapter 362 of NRS.” NV Energy argued in favor of judicial preference to uphold legislation and severing the final clause. The Department argued that the appropriate remedy is to strike statute as per se invalid.

---

<sup>1</sup> By Ashleigh Wise.

<sup>2</sup> See NEV. REV. STAT. § 372.185(2) (2013).

There is a judicial preference in favor of severability if it is possible to strike only the unconstitutional provisions.<sup>3</sup> Before severing language from a statute a court must determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent. It is clear that NRS 372.270 could be given legal effect if severed.

Proceeds from Nevada mines are subject to Chapter 362's net proceeds tax, while proceeds of minerals purchased out-of-state and used in Nevada are subject to Chapter 372's use tax. The Department is prevented from imposing any additional taxes on minerals that are subject to NRS Chapter 362's net proceeds tax until those proceeds lose their identity as proceeds. Accordingly, NRS 372.270 expressly exempts minerals subject to Chapter 362's net proceeds tax from also being taxed under Chapter 372's sales and use tax.

Despite minimal legislative history the Legislature originally enacted the exemption statute to avoid taxing the proceeds of mines already subject to the net proceeds tax, avoiding double taxation. Moreover, an attorney general opinion published at the time of the enactment of the statute, stated that the exemption was specifically limited to minerals already subject to taxation under Nevada's tax for net proceeds of minerals, and that minerals not subject to the net proceeds tax were not exempt.<sup>4</sup> Because of the legislative history, the narrowness of the exemption is essential to the purpose of the statute; therefore, NRS 372.270 is not severable.

*The district court did not err in refusing to award NV Energy a refund*

To satisfy due process requirements, courts must provide "meaningful backward-looking relief" to correct taxes paid pursuant to an unconstitutional scheme.<sup>5</sup> A meaningful backward-looking relief places a taxpayer who has suffered an unconstitutional deprivation in the same position as its competitors who were favored by an unlawful tax exemption. This method gives taxpayers a fair opportunity to challenge the validity of an imposed tax and gives taxpayers a clear and certain remedy.<sup>6</sup> This process ensures that the tax imposed on the taxpayer does not violate the dormant Commerce Clause by taxing in a way that discriminates against interstate commerce.<sup>7</sup>

NV Energy argued that a full refund is the only appropriate remedy to unlawful taxes paid pursuant to a dormant Commerce Clause violation. The Court disagreed and stated that a refund is merely one remedy and other remedies will equally satisfy due process. Furthermore, a refund is generally not awarded when there is no actual injury.

Under a tax scheme, a central consideration is whether competitors are treated equally or whether the tax scheme effects actual discrimination. Therefore, to have a dormant Commerce Clause injury, the party injured must have a competitor who benefited from the discriminatory tax scheme for the injured party to merit a monetary remedy. If a tax is actually assessed and does not discriminate against interstate commerce, the tax is lawful and does not violate due process.

---

<sup>3</sup> See NEV. REV. STAT. 0.020(1) (2013); *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001).

<sup>4</sup> See 55-76 Op. Att'y Gen. 120 (1955).

<sup>5</sup> *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 31 (1990).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

NV Energy and its competitor's all purchased coal out of state. Therefore, NV Energy and its competitor's paid the same tax. No competitor gained a competitive advantage, nor did NV Energy suffer a disadvantage. The exemption violates the dormant Commerce Clause but the use tax itself is not unconstitutional. Thus, the tax NV Energy complains about is lawfully assessed.

### **Conclusion**

NRS 372.270 is not severable because it avoids double taxation for mineral proceeds as intended by the Legislature. Furthermore, since NV Energy has not experienced an actual injury from the dormant Commerce Clause violation, NV Energy is not entitled to a full refund of taxes paid. The Court affirmed the district court's order.