

**MINUTES OF THE JOINT MEETING  
OF THE  
ASSEMBLY COMMITTEE ON TAXATION  
AND THE  
SENATE COMMITTEE ON REVENUE AND ECONOMIC DEVELOPMENT**

**Seventy-Seventh Session  
June 1, 2013**

The joint meeting of the Assembly Committee on Taxation and the Senate Committee on Revenue and Economic Development was called to order by Chairwoman Irene Bustamante Adams at 2:08 p.m. on Saturday, June 1, 2013, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [nelis.leg.state.nv.us/77th2013](http://nelis.leg.state.nv.us/77th2013). In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: [publications@lcb.state.nv.us](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**ASSEMBLY COMMITTEE MEMBERS PRESENT:**

Assemblywoman Irene Bustamante Adams, Chairwoman  
Assemblywoman Peggy Pierce, Vice Chairwoman  
Assemblywoman Teresa Benitez-Thompson  
Assemblyman Jason Frierson  
Assemblyman Tom Grady  
Assemblyman Cresent Hardy  
Assemblyman Pat Hickey  
Assemblyman William C. Horne  
Assemblywoman Marilyn K. Kirkpatrick  
Assemblywoman Dina Neal

**SENATE COMMITTEE MEMBERS PRESENT:**

Senator Ruben J. Kihuen, Chairman  
Senator David R. Parks, Vice Chairman  
Senator Moises (Mo) Denis  
Senator Ben Kieckhefer  
Senator Michael Roberson

Minutes ID: 1355



**COMMITTEE MEMBERS ABSENT:**

Assemblyman Randy Kirner (excused)  
Assemblyman Lynn D. Stewart (excused)  
Senator Greg Brower (excused)  
Senator Debbie Smith (excused)

**GUEST LEGISLATORS PRESENT:**

None

**STAFF MEMBERS PRESENT:**

Russell J. Guindon, Principal Deputy Fiscal Analyst  
Michael Nakamoto, Deputy Fiscal Analyst  
Bryan Fernley-Gonzalez, Committee Counsel  
Gina Hall, Committee Secretary  
Mike Wiley, Committee Secretary  
Olivia Lloyd, Committee Assistant

**OTHERS PRESENT:**

Michon A. Martin, General Counsel, Office of the Governor  
Chris Nielsen, Executive Director, Department of Taxation  
Pete Ernaut, representing the Nevada Resort Association  
Paul J. Moradkhan, representing the Las Vegas Metro Chamber  
of Commerce

**Chairwoman Bustamante Adams:**

I would like to welcome back the Assembly Taxation Vice Chairwoman, Assemblywoman Pierce.

I will open the hearing on Assembly Bill 506. I would like Mr. Nielsen and Ms. Martin to come to the table.

**[Assembly Bill 506](#): Revises provisions governing taxation. (BDR 32-1246)**

**Michon A. Martin, General Counsel, Office of the Governor:**

I want to start by thanking both Committees for taking the time to have this joint meeting to consider this very important piece of legislation.

I will provide some opening remarks, and then I will have Mr. Nielsen go through the mechanics of the settlement that we have negotiated and the necessity of the legislation that you have before you.

In very broad terms, what I would like to indicate and what is so important is that there are two court cases pending before the Nevada Supreme Court, and those two court cases encompass \$233 million in liability to the state. The Governor's position on this is that that type of exposure, if we were to lose, would be absolutely devastating to the state. To resolve this, many parties have been negotiating for many years and have finally been able to come to a resolution. To effectuate this settlement, we need this legislation.

There have been other deals negotiated in the past where this was included. We are talking about \$233 million that is at stake for the State of Nevada, and we appreciate that you are willing to work with all of the parties to effectuate the settlement with legislation.

I will turn it over to our Director of Taxation, Mr. Nielsen, and he will walk you through the particulars.

**Chris Nielsen, Executive Director, Department of Taxation:**

As Ms. Martin just stated, we are here to try to resolve nearly a quarter-billion dollars' worth of tax refund claims that have been hanging over the state for nearly a decade.

Earlier this week the Nevada Tax Commission voted to approve a settlement agreement [([Exhibit C](#) and [Exhibit D](#))] to resolve roughly 98 percent of these refund claims. The settlement agreement, however, is contingent upon Assembly Bill 506 becoming law.

By way of background, historically casinos and restaurants paid a use tax on the cost of food for certain complimentary meals provided to their patrons and employees. Beginning around the year 2000, certain restaurants and casinos filed tax refund claims, arguing that food purchased for such uses is exempt from taxation under the *Nevada Constitution*. The Department of Taxation, Tax Commission, and Second Judicial District Court of Washoe County denied these refund claims.

In 2008 the Nevada Supreme Court reversed the Tax Commission and the lower court in the case called *Sparks Nugget, Inc. v. State ex. rel. Department of Taxation*, 124 Nev. 159, 179 P.3d 570 (2008) ([Exhibit E](#)), and ruled that the use tax on these meals was, in fact, unconstitutional, ordering a refund of the

Sparks Nugget's claim. The Supreme Court left the door open, so to speak, for these meals to possibly be taxable, by indicating in a footnote that sales tax might apply, or could possibly apply, if "consideration could be demonstrated." Based on that footnote, and the *Sparks Nugget* decision, the Department took the position that both patron comps and employee meals are subject to sales tax. This position continued the denial of the pending refund claims and, of course, appeals ensued.

In 2011 and 2012, an administrative law judge ruled that both these complimentary patron and employee meals were subject to sales tax. However, the decision stopped the Department from looking backward in time and collecting any potential back sales taxes.

In 2012 the Tax Commission affirmed the administrative law judge. However, in 2012 and 2013, two different district courts, one in the Eighth Judicial District in Las Vegas ([Exhibit F](#)) and one here in Carson City in the First Judicial District ([Exhibit G](#)), ruled that patron comps are subject to sales tax, but employee meals are not subject to sales tax.

So where do we stand now? Both the state and the parties have applied to the Nevada Supreme Court, and those cases are currently pending. As Ms. Martin said, in the aggregate, the total refund claims of all the current claimants stand at approximately \$233 million, with interest. That interest, of course, is accruing as we speak.

It is estimated that between the patron meals and the employee meals, the split is anywhere between one-third to one-half attributable to employee meals. In other words, of the \$233 million pending refund claims, anywhere from \$78 million to \$116 million is attributable to employee meals, with the balance being attributable to patron comps. The reason for the difference in the range is that every property does business a little bit differently. Some may have more employee comps, some may have more patron comps, and some small restaurants have comps just to the employees.

I submitted to your staff a copy of the 2008 *Sparks Nugget* decision ([Exhibit E](#)). I also submitted to your staff a copy of the two district court decisions. One is the *Harrah's* decision [*Harrah's Entertainment, Inc. Group v. State ex. rel. Nevada Tax Commission*, No. 120C002641B (Carson City Ct. Nev. filed Aug. 7, 2012) ([Exhibit F](#))], which is the decision rendered in the First Judicial District, and the other is a copy of the *Boyd* decision [*Boyd Gaming Corporation v. State Department of Taxation*, No. A-12-656594-J (Clark Cnty. Ct. Nev. filed Feb. 15, 2012) ([Exhibit G](#))], which is the district court decision of the Eighth

Judicial District. I have also provided a copy of the settlement agreement ([Exhibit C](#)) that the Tax Commission provided earlier this week.

As I referenced earlier, this contingent liability has been hanging over the state for years. It began under the Guinn administration, moved to the Gibbons administration, and now it is with Governor Sandoval and this Legislature. There are huge litigation risks for the state, local governments, casino industry, and the restaurant industry. Again, we are talking about nearly a quarter-billion dollars' worth of potential refund claims, which in the worst-case scenario could possibly, or would likely, trigger the need for a special legislative session should this case not be resolved and then it goes to the Nevada Supreme Court, and the state loses, so to speak. With respect to scenarios, as far as what the Nevada Supreme Court would do, that is anybody's guess. I view it as really three possibilities:

- One possibility would be the Nevada Supreme Court would rule that both the patron meals and comp meals are in fact subject to sales tax. In that case the refund claims, presumably, would be denied, and there would be some sort of revenue stream moving forward. I have estimated this revenue stream range, at least as far as the General Fund portion goes, would be anywhere between \$1.3 million and \$4 million per year, depending on the range and depending on whether the court would rule on the basis that the meals would be at cost, which is the lower measure, or at the higher retail value.
- The worst-case scenario, at least from the perspective of the State Treasury, would be that the state and local governments would have to literally write a check for \$233 million.
- The so-called middle scenario, assuming that the Nevada Supreme Court would affirm the two district court decisions, the state and local governments would still be on the hook for approximately \$116 million, with a significantly reduced and somewhat theoretical revenue stream moving forward.

There is much legal uncertainty in this case. The Department prevailed under the use tax earlier in the mid-2000s with the *Sparks Nugget* case; it prevailed with the administrative law judge, with the Tax Commission, at the district court level, and then was reversed by the Nevada Supreme Court. We have something similar right now with the current line of cases. The administrative law judge affirmed the sales tax, as did the Tax Commission, but now we have two courts split on the patron comps and the employee meals, so there is just an awful lot of uncertainty, and we are talking about a lot of money.

Again, the terms of the settlement agreement are contingent upon legislation passing; otherwise it is null and void. The agreement contemplates that the vast majority of the claimants, approximately 98 percent, would withdraw their existing refund claims in exchange for prospective legislation that would make both employee meals and patron meals not taxable. The parties, including all the claimants, the state, and the intervenors (which are the City of Henderson and Douglas County), would withdraw their prospective appeals before the Nevada Supreme Court.

Certain out-of-state businesses would receive a refund of \$4.5 million, with a General Fund impact of approximately \$1.2 million. Certain companies would be allowed to take certain nongaming-related credits going forward, and that amount is \$3.1 million; that has a General Fund impact of approximately \$851,000. These nongaming comps are really related to 2-for-1 coupon scenarios. We are not talking about the point programs that many of the large properties have, where you sign up for a rewards program, you gamble a certain amount, and you accrue so many points, which can be used for purchase in the restaurants for food.

Finally there is also a clawback provision in the agreement, which essentially states that if the Legislature were to pass A.B. 506, and then decide to rescind it within the next two regular legislative sessions, or through January of 2019, the taxpayers would be entitled to damages for a breach of contract that would be prorated depending on when the legislation was rescinded. The damages are not based on the total of \$233 million, but on the tax-only portion of the refund claims, which is approximately \$155 million. For example, if A.B. 506 became law this session and then in 2015 the Legislature reversed course, the taxpayers would be entitled to receive credits on a prorated basis. It would be four-sixths of that \$155 million figure, or approximately \$103 million, and in the same example, if it is 2016 it is three-sixths, 2017 it is two-sixths, et cetera.

I will now go through the legislation itself. Assembly Bill 506 provides, in short, that consideration is deemed to be not received for the complimentary portion of food, meals, and nonalcoholic drinks provided on a complimentary basis to employees and patrons of retailers, which includes restaurants, casinos, et cetera.

In section 1, subsection 2, paragraph (g), the definition of sales price is amended to exclude this complimentary portion of food, meals, and nonalcoholic drinks provided to employees and patrons.

Section 2 does the same thing, but with respect to *Nevada Revised Statutes* (NRS) Chapter 372, which is the state component of the sales tax. Just to reiterate, since we have multiple components of the sales tax, we have multiple chapters that would need to be amended to accomplish what we are trying to do here.

Sections 4 and 5 essentially do the same thing with NRS Chapter 374, the component of the sales tax, and that is the local school support tax portion of the sales tax.

In conclusion, this settlement agreement is contingent upon legislation becoming law, and if effectuated, it would resolve approximately 98 percent of the outstanding refund claims. There would still be a small amount that would be on the table, which are some of the small restaurants and businesses. Some of these are out of business, in bankruptcy, have been bought and sold, and we were not able to get 100 percent of the claimants. Logistically that was not feasible. This deal, if effectuated through this legislation, would resolve 98 percent of the total outstanding claims.

**Chairwoman Bustamante Adams:**

Are there any questions from the members of the Committee?

**Senator Kieckhefer:**

Did you say the potential revenue stream of \$4 million is a combination of both employee meals and comps?

**Chris Nielsen:**

Yes, that is the total. Again, the split is roughly 50/50 between the two, so if one would become taxable and the other not, that revenue stream would decline.

**Senator Kieckhefer:**

If that is the annual estimated revenue that the state would collect, is that about an average of what we did collect in previous years?

**Chris Nielsen:**

I should have made it clear that this tax has not been remitted or counted on in any way since 2008 and the *Sparks Nugget* decision.

**Senator Kieckhefer:**

How did we get to \$233 million in liability, if \$4 million a year is about the average of what we were collecting? It does not seem like a lot, in terms of an exchange of loss of potential revenue for getting rid of the \$233 million liability.

**Chris Nielsen:**

The refund claims began for the year 2000 tax period. Tax was paid all the way through 2008. So over approximately a nine-year period, \$155 million worth of sales or use tax was paid, and hence the refund claims and the \$155 million figure. By dividing roughly \$155 million over a nine-year period, it is about \$16 or \$17 million per year. The reason that changed a little bit was it was under the use tax approach, which is at cost. If this would go to the Nevada Supreme Court and be deemed a sales tax it could still remain at cost, or it could be at the retail value, which is a higher amount. That is why the figures vary a little bit.

**Chairwoman Bustamante Adams:**

Throughout the bill, especially in section 2, it talks about nonalcoholic drinks. Does this also apply to alcohol?

**Chris Nielsen:**

No. Under the *Sparks Nugget* decision, the reason why they decided that the use tax on these types of complimentary food was not subject to sales tax was because of the food exemption in the *Nevada Constitution*, and that exemption does not exclude alcohol. In other words, alcohol would remain taxable as a use tax, and that has never been an issue in the litigation. Clearly, intent here is that if this becomes law, it would just be the meals and nonalcoholic drinks that would not be subject to sales tax and/or use tax.

**Chairwoman Bustamante Adams:**

What is the time frame for the refunds and credits to be completely given back?

**Chris Nielsen:**

We anticipate the refund portion going to the State Board of Examiners, and that would occur the beginning of next fiscal year, probably sometime in July. It just depends on the timing of it. So the refund portion would be fairly soon. The credits would be spread out over the next biennium. It varies how long it will take by property, because it depends on their current tax liability. We anticipate the refund portion and the credit portion would all occur in the next biennium.



**Chairwoman Bustamante Adams:**

Are there any other questions from the members of the Committee? [There were none.] I would like to transition to those in support of A.B. 506.

**Pete Ernaut, representing the Nevada Resort Association:**

We stand in support of this settlement, and it is just that, a true settlement. Literally both sides had equal risk in this, and gain equal protection or equal benefit going forward. There is an old saying in this building that a good deal is when everyone leaves the table relatively unhappy, and I can confirm to you, Madam Chairwoman, we are relatively unhappy.

**Paul Moradkhan, representing the Las Vegas Metro Chamber of Commerce:**

The Chamber would also like to offer its support of A.B. 506.

**Chairwoman Bustamante Adams:**

Are there any questions from the members of the Committee? [There were none.] We will transition to those in the neutral position. [There was no one.] Are there any in opposition to A.B. 506? [There was no one.] I will close the hearing on A.B. 506. Is there anyone here for public comment? [There was no one.] The meeting is adjourned [at 2:32 p.m.].

RESPECTFULLY SUBMITTED:

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Gina Hall  
Committee Secretary

APPROVED BY:

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Assemblywoman Irene Bustamante Adams  
Chairwoman

DATE: \_\_\_\_\_

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Senator Ruben J. Kihuen  
Chairman

DATE: \_\_\_\_\_

**EXHIBITS**

**Committee Name:** Committee on Taxation

**Date:** June 1, 2013

**Time of Meeting:** 2:08 p.m.

<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
A.B. 506	C	Chris Nielsen	Settlement Agreement
A.B. 506	D	Chris Nielsen	Settlement Agreement Exhibits
A.B. 506	E	Chris Nielsen	Sparks Nugget Decision
A.B. 506	F	Chris Nielsen	Harrah's Decision
A.B. 506	G	Chris Nielsen	Boyd Decision