SUPREME COURT OF NEVADA

Deja Vu Showgirls of Las Vegas, LLC v. Nevada Department of Taxation

2014 NV 72 · No. 59752 · Decided September 18, 2014

SUMMARY

The Nevada Supreme Court held that taxpayers challenging a final Nevada Tax Commission decision denying Live Entertainment Tax refunds were required to file a petition for judicial review under the Nevada Administrative Procedure Act, rather than a de novo action. The court affirmed dismissal for lack of subject matter jurisdiction and declined to apply judicial estoppel because the respondents had not intentionally misled the appellants regarding the available remedy. The court also affirmed dismissal of claims that were unexhausted or raised for the first time after the administrative proceedings.

CASE DETAILS

COURT	Supreme Court of Nevada
WRITING FOR THE COURT	Douglas, J.
JURISDICTION	Nevada
DECIDED	September 18, 2014
DOCKET	59752
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from dismissal of a de novo tax action for lack of subject matter jurisdiction because appellants failed to file a petition for judicial review under the Nevada Administrative Procedure Act.
STANDARD OF REVIEW	Statutory construction and the applicability of judicial estoppel are reviewed de novo.
PRECEDENTIAL VALUE	Published Nevada Supreme Court opinion; precedential
PARTIES	Deja Vu Showgirls of Las Vegas, LLC, d/b/a Deja Vu Showgirls, Little Darlings of Las Vegas, d/b/a Little Darlings, K-Kel, Inc., d/b/a Spearmint Rhino Gentlemen's Club, Olympus Garden, Inc., d/b/a Olympus Garden, SHAC, LLC, d/b/a Sapphire, The Power Company, Inc., d/b/a Crazy Horse Too Gentlemen's Club, D. K. Westwood, Inc.,

d/b/a Treasures v. Nevada Department of Taxation, Nevada Tax Commission, State of Nevada Board of Examiners

TOPICS

judicial review of agency action | administrative procedure act | tax refunds | exhaustion of remedies | subject matter jurisdiction

PRACTICE AREAS

administrative law | state and local tax | appellate procedure | civil procedure | statutory interpretation

QUESTIONS PRESENTED

1. Whether a taxpayer challenging a final Nevada Tax Commission decision denying a Live Entertainment Tax refund must file a petition for judicial review under NRS Chapter 233B rather than a de novo action.
2. Whether judicial estoppel required the district court to permit the de novo action despite appellants' failure to use the petition-for-review procedure.
3. Whether appellants' as-applied constitutional challenge could proceed when it had not been raised during the administrative proceedings.

HOLDINGS

1. The Nevada Administrative Procedure Act provides the exclusive means of judicial review of a final decision in a contested case involving the Nevada Department of Taxation or Nevada Tax Commission. A taxpayer challenging a final Commission decision concerning a Nevada Live Entertainment Tax refund must file a petition for judicial review under NRS 233B.130, not a de novo action.
2. Filing a de novo action instead of the required petition for judicial review deprived the district court of subject matter jurisdiction and warranted dismissal.
3. Judicial estoppel did not bar dismissal because respondents had not made a misleading representation in a judicial or quasi-judicial proceeding that de novo review would be available.
4. The district court properly dismissed appellants' as-applied challenge because they failed to raise that issue during the administrative proceedings.

KEY QUOTATIONS

> *"Accordingly, the sole remedy for a taxpayer aggrieved by a final decision from the Commission concerning a tax refund request under NRS Chapter 368A is to file a petition for judicial review pursuant to NRS 233B.130."* (at 7)

> *"Accordingly, we conclude that the district court committed no error by refusing to invoke judicial estoppel."* (at 11)

FACTUAL BACKGROUND

Several entertainment businesses challenged Nevada's Live Entertainment Tax and sought tax refunds on constitutional grounds. The Department denied refund requests, and the Nevada Tax Commission affirmed by written order. Appellants then filed a de novo district-court action instead of a petition for judicial review; two appellants also had not exhausted their administrative remedies.

PROCEDURAL HISTORY

Appellants sought refunds and constitutional relief concerning Nevada's Live Entertainment Tax. After the Department of Taxation denied refund requests and the Nevada Tax Commission affirmed, appellants filed a de novo action in district court rather than a petition for judicial review. The district court dismissed Case 2 for lack of subject matter jurisdiction, and the Nevada Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- PERS v. Reno Newspapers, Inc., 129 Nev. __, 313 P.3d 221, 223 (2013)
- S. Cal. Edison v. First Judicial Dist. Court, 127 Nev. __, 255 P.3d 231, 233, 235-38 (2011)
- Kame v. Employment Security Department, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989)
- Leavitt v. Siems, 130 Nev. __, 330 P.3d 1, 5 (2014)
- Malecon Tobacco, L.L.C. v. State ex rel. Department of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002)
- Bongiovi v. Sullivan, 122 Nev. 556, 575 n.44, 138 P.3d 433, 447 n.44 (2006)
- NOLM, L.L.C. v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)
- Deja Vu Showgirls v. State, Department of Taxation, 130 Nev. __, P.3d __ (Adv. Op. No. 73, Sept. 18, 2014)
