IN THE SUPREME COURT OF THE STATE OF NEVADA

DESERT PALACE, INC., DOING BUSINESS AS CAESARS PALACE, A NEVADA CORPORATION,
Appellants,
vs.
NEVADA GAMING COMMISSION,
Respondent.

No. 61168

FILED

FEB 21 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER OF REVERSAL

This is an appeal from a district court order denying a petition for judicial review of a Nevada Gaming Commission tax decision. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

I.

Desert Palace, Inc., doing business as Caesars Palace (Caesars), maintains a live entertainment venue called the Colosseum. Caesars retained a third party, AEG, to manage the Colosseum's operation and events. AEG granted another entity, TicketMaster, the right to remotely sell tickets to Colosseum events in exchange for royalties. But, AEG retained the right to sell tickets on-site through Caesars' box office.

Customers who purchase tickets from the box office pay the ticket cost, a Live Entertainment Tax (LET), and a box office fee. Customers who purchase tickets from TicketMaster pay the ticket cost, the LET, and a convenience fee. TicketMaster forwards AEG the full ticket cost, the LET, and 40 percent of the per-ticket convenience fee as royalties. AEG then forwards Caesars the ticket proceeds and collected LET. Caesars remits the LET revenue to the State Gaming Control Board (the Board).

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From 2004 to 2008, AEG did not forward the royalties it received from TicketMaster to Caesars. And, Caesars did not pay any LET on the royalties. The Board determined that the royalties were part of the Colosseum's admission charges and therefore taxable. So, it issued a deficiency determination and assessed additional taxes on AEG's royalties.[1]

Caesars and AEG petitioned the Nevada Gaming Commission (the Commission) for a redetermination, claiming that the convenience fees were "service charges," and thus the royalties they paid were exempt from the LET under NRS 368A.200(2). The Commission denied their petition. Caesars and AEG then petitioned for judicial review in the district court. The district court dismissed AEG's claim for lack of standing and denied Caesars' petition for review. Before this court, Caesars appeals the petition denial.

II.

The district court had statutory authority to grant Caesars' petition if its review of the record revealed that the Commission's decision prejudiced Caesars' "substantial rights." NRS 463.317(3). One way that a Commission decision violates the substantial rights of a petitioner is where it is "[a]rbitrary or capricious or otherwise not in accordance with law."[2] NRS 463.317(3)(e). Caesars challenges the Commission's decision

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[1]The Board also assessed taxes on the "[b]ox [o]ffice charge" that Caesars charges all customers and a "[h]ouse [s]eat charge" that Caesars charges certain customers. Caesars does not dispute these assessments in its appeal.

[2]The Commission insists that subsections (a) through (e) of NRS 463.317(3) are all required elements for judicial review. But NRS

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and the district court's subsequent denial of review under this section.[3] Resolution of its challenge turns on the propriety of the Commission's interpretation of NRS 368A.200. As the Commission conceded at oral argument, our review is de novo. *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006) (establishing that statutory construction is a question of law requiring de novo review).

A.

NRS 368A.200(1) imposes an excise tax on "admission charge[s]." According to the statutory definition, an admission charge is the "total amount . . . of consideration paid for the right or privilege to have access to a facility where live entertainment is provided."[4] NRS 368A.020. But "service charges" that are collected and retained by parties other than "the taxpayer" are not "admission charge[s]." NRS

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463.317(3) plainly identifies these as alternative ways to establish a violation through its use of the disjunctive "or." *See Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (indicating that the Legislature's use of the disjunctive "or" required "one or the other, but not necessarily both"). Thus, reversal is appropriate if any of the five subsections applies.

[3]Caesars also challenges the decision under NRS 463.317(3) subsections (b) and (d), but we need not reach those challenges given that we hold subsection (e) applies.

[4]Caesars encourages this court to adopt a definition of admission charges from foreign case law. But we prefer to look to the definition provided by the provision's drafters. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 406, 215 P.3d 27, 32 (2009) (noting that a defined statutory term is controlling).

368A.200(2)(b).[5] The Commission read this language in such a way that it determined (1) the convenience fees were not "service charges," and (2) even if they were, a "taxpayer," AEG, retained 40 percent of the service charges in royalties. We turn to the plain language of NRS 368A.200 to determine whether the Commission's interpretation is reasonable.

The Legislature did not define "service charges." And so, we look to *Black's Law Dictionary* as we have in the past. *See, e.g., Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. ___, ___, 305 P.3d 887, 893 (2013). *Black's* defines a "service charge" as "a charge assessed for the performing of a service." *Black's Law Dictionary* 1491 (9th ed. 2009). "[S]ervice" is defined as "the act of doing something useful . . . for a fee." *Id.* Here, the convenience fees were assessed for TicketMaster's provision of a useful service—through its website and phone number, TicketMaster allowed an individual to obtain tickets remotely instead of having to pick them up at will call. We detect no ambiguity in the statute. TicketMaster's convenience fees are service charges.

As to AEG's supposed retention of these service charges, the Commission conceded at oral argument that if the parties had contracted to compensate AEG via flat fee, then that flat fee would not be taxable, regardless of whether TicketMaster's convenience charges ultimately

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[5]We agree with the Commission that the broad language "total amount" under NRS 368A.020 implies broad coverage. *See Seput v. Lacayo*, 122 Nev. 499, 503, 134 P.3d 733, 736 (2006) (noting that the inclusion of non-exhaustive list provides a clear indication that the Legislature intended a broad interpretation of the statute), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). But "service charges" are clearly excluded from its scope.

funded its payment. But because the contract between the parties describes AEG's compensation as 40 percent of TicketMaster's per-ticket sales, the Commission claims that AEG, not TicketMaster, retained 40 percent of the per-ticket convenience charge and that the 40 percent is thus subject to taxes pursuant to NRS 368A.200. Regardless of how the parties contractually structured AEC's compensation, as a practical matter the money paid under the contract would come from and go to the same place and for the same purpose: covering the costs of TicketMaster's business with AEG. To read the statute as the Commission does leads to an absurd and textually unsupported distinction. *See State v. Kopp*, 118 Nev. 199, 204, 43 P.3d 340, 343 (2002) (indicating that a statute will be interpreted to avoid absurd results). We decline to adopt such a reading. Thus, we hold that AEG did not "retain" the disputed amount within the meaning of NRS 368A.200.[6]

Under the unambiguous language of 368A.200(2)(b), TicketMaster's convenience fees were service charges. And, TicketMaster, not AEG, retained the charges. The Commission admits that TicketMaster is not the "taxpayer," and the funds are therefore not taxable under 368A.200(2)(b). The Commission's contrary interpretation of the statute is not reasonable, and we reject it. *See Kopp*, 118 Nev. at 204, 43 P.3d at 343.

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[6]We therefore need not reach whether or not AEG is a "taxpayer" under NRS 368A.200(2)(b).

B.

We now turn to whether the Commission's improper interpretation violated Caesars' substantial rights. Where an agency's decision is challenged as arbitrary and capricious, this court will uphold the decision if it is supported by evidence that a reasonable mind might accept as adequate. *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423-24, 851 P.2d 423, 424-25 (1993). We review whether a Commission decision is not in accordance with the law de novo. *See Redmer v. Barbary Coast Hotel & Casino*, 110 Nev. 374, 378, 872 P.2d 341, 344 (1994).

The Commission supported its interpretation with legislative history and policy. But, regardless of its legislative history and policy, an unambiguous statute is only capable of one reasonable interpretation. *State v. Lucero*, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011). And given that NRS 368A.200 unambiguously exempts AEG's royalties, no reasonable mind could read the statute otherwise. Moreover, the Commission's use of legislative history and policy as interpretative tools was in error: an interpreting body may turn to such resources only where a statute's language is ambiguous. *Id.* As discussed, NRS 368A.200 is unambiguous.

In sum, the Commission's interpretation was arbitrary and capricious. And, its reliance on legislative history and policy to get to that interpretation was not in accordance with the law. Thus, it violated Caesars' substantial rights, and judicial review was warranted.

We therefore REVERSE the district court's denial. And, given the unambiguous language of NRS 368A.200, we hold that AEG's royalties were exempt from LET.[7]

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

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[7]Caesars argues that the Commission bore the burden of proof to establish that the convenience fee was not exempt from taxation and that its failure to do so rendered its decision arbitrary and capricious. We agree that the Commission's interpretation of NRS 368A.200 was in error, and under the correct reading, the royalties are exempt. This is established by undisputed facts. No question of the burden of proof is implicated here, and we decline to address the issue.

cc: Hon. Jerry A. Wiese, District Judge
William F. Buchanan, Settlement Judge
Greenberg Traurig, LLP/Las Vegas
Attorney General/Las Vegas
Eighth District Court Clerk