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CLIENT ALERT

**NEVADA SALES AND USE TAX
INTERSTATE COMMERCE EXEMPTION**

by
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A recently published Nevada Supreme Court opinion clarifies the requirements for the application to aircraft of the interstate commerce exemption from Nevada sales and use tax. In *Harrah's Operating Company, Inc. v. Nevada Department of Taxation*, published on March 20, 2014, the Court considered a sales tax refund claim made by Harrah's.

Harrah's purchased four business aircraft. Harrah's took delivery of two of those aircraft in Little Rock, Arkansas and those aircraft were flown to Nevada on their first flight. Harrah's took delivery of the other two aircraft in Portland, Oregon. The first flights of those two aircraft were to Arkansas and California, respectively. Each plane carried passengers on its first flight and carried passengers on a majority of its flights. Furthermore, each plane consistently flew to and from Nevada and was continuously used in interstate commerce after Harrah's took delivery of it.

Harrah's paid Nevada use tax on each of the aircraft. Subsequently, Harrah's requested a refund of the use tax paid on each aircraft based on the position that the aircraft were not purchased for use in Nevada but were instead purchased for use in interstate commerce. The Nevada Department of Taxation denied those refund requests and an administrative law judge of the Department of Taxation affirmed that decision. Harrah's appealed that decision to the Nevada Tax Commission and it upheld the ALJ's decision. Harrah's petitioned the Nevada District Court to review that decision and the District Court denied the petition. Harrah's then appealed that decision to the Nevada Supreme Court.

The Supreme Court held that the two aircraft that made their initial flights in interstate commerce between points outside Nevada were entitled to the benefit of the presumption, created under Nevada law, that Harrah's purchased them for use in interstate commerce. However, the Court held that the benefits of the presumption did not apply to the two aircraft that were flown into Nevada on their first flights. The Court went on to hold that the Department of Taxation had not produced sufficient evidence to overcome the presumption in favor of Harrah's relating to the two aircraft to which that presumption applied and, therefore, that Harrah's was entitled to a refund of Nevada use tax paid on those aircraft.

In its decision, the Nevada Supreme Court reasoned that if an aircraft is used in interstate commerce for a passenger carrying flight between points wholly outside Nevada before the

aircraft's first entrance into Nevada, the first of the two requirements under the presumption statute will be met. Since Harrah's operated two of the aircraft for a passenger carrying flight between points wholly outside Nevada prior to the entry of those aircraft into Nevada, the benefit of the presumption applied to those aircraft.

The Court held further that a first flight between interstate points within and outside Nevada does not qualify an aircraft for the benefit of the presumption that they were purchased for use in interstate commerce and not in Nevada. Therefore, because two of the aircraft that Harrah's purchased were flown directly into Nevada after they were delivered to Harrah's, those aircraft did not receive the benefit of the presumption that Harrah's had purchased them for use in interstate commerce. Those aircraft were therefore subject to Nevada use tax.

The Court was not tasked with interpreting the second prong of the presumption statute, which requires that the aircraft will be used continuously in interstate commerce between points inside and outside Nevada after they are acquired, because the parties had stipulated that Harrah's met that requirement. Therefore, it is likely that the Nevada Department of Taxation will focus more closely on this requirement to challenge the application of the statutory presumption analyzed in this case in future audits of taxpayers that claim their out-of-state aircraft purchases are exempt from Nevada sales and use tax because those aircraft were purchased for use in interstate commerce.

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