

STATE OF NEVADA  
DEPARTMENT OF TAXATION

In the Matter of: ) Use Tax Refund Requests/  
 ) Sales Tax Deficiencies on  
Boyd Gaming Corporation Group, ) Complimentary Meals  
 )  
Petitioner. ) FINDINGS OF FACT, CONCLUSIONS  
 ) OF LAW AND FINAL DECISION

This matter came before Dena James Smith, Administrative Law Judge, for hearing, consideration, and decision after Boyd Gaming Corporation Group ("Taxpayers") filed Petitions for Redetermination ("Petitions") contesting 1) the Department of Taxation's ("Department's") denials of Taxpayers' use tax refund requests and 2) the Department's sales tax Deficiency Notices dated January 29, 2010. Taxpayers' Petitions were timely filed and the determination of the merits of those Petitions is properly within the jurisdiction of the undersigned Administrative Law Judge of the Department of Taxation.

An evidentiary hearing was held on September 9, 2010 in Henderson, Nevada. John S. Bartlett, Esq. represented Taxpayers at the hearing. Steve Deviney of Chartwell Advisory Group, Ltd. also appeared on behalf of Taxpayers. David Krasn, Vice President of Tax, and Laura De La Cruz, Director of Loyalty Programs, appeared and testified under oath on behalf of Taxpayers.

Blake Doerr, Deputy Attorney General, and Vivienne Rakowsky, Deputy Attorney General, represented the Department. Jim Kilby, Expert Witness, appeared and testified on behalf of the Department.

Prior to the hearing, the parties submitted Pre-hearing Statements. Following the hearing, the parties compiled the stipulated Exhibits and submitted them as the Joint Production ("JP"). The parties also submitted Post-hearing Briefs. The Pre-hearing Statements, JP, and Briefs have been made part of the record.

ISSUES

1. Are Taxpayers entitled to a refund of use taxes paid on complimentary meals for patrons and employee meals during the period January 1, 2000 through June 30, 2008?<sup>1</sup>

2. Did the Department properly assess sales tax on Taxpayer's complimentary meals for patrons and employee meals during the period January 1, 2000 through June 30, 2008?

SUMMARY

Taxpayers are entitled to a refund of the use taxes paid on employee meals and sales tax was improperly assessed on those meals. Sales tax was properly assessed on the meals sold to patrons as complimentary meals. However, the Department shall not assess an amount greater than the use tax paid by Taxpayers based on the principle of equitable estoppel and the statute of limitations.

The following Findings of Fact, Conclusions of Law and Final Decision, as required by Nevada Revised Statutes ("NRS") 360.390 and Nevada Administrative Code ("NAC") 360.170, are based on the testimony and exhibits presented by the parties in this matter.

FINDINGS OF FACT

1. Beginning in January 2004, the following casinos, which are part of Boyd Gaming Corporation or are subsidiaries thereof, filed requests for the refund of use taxes paid to the Department: Barbary Coast, California Hotel & Casino, Eldorado Inc., Fremont Hotel & Casino, Gold Coast Hotel & Casino, Joker's Wild, Main Street Station,

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<sup>1</sup> The parties agree that if use tax refunds are due, the amounts reflected in the spreadsheet at JP 1923-1926 are the correct amounts for the refunds.

1 Orleans Hotel & Casino, Sam's Town Hotel & Casino, Stardust Hotel & Casino,  
2 Suncoast Hotel & Casino, South Coast Hotel & Casino.<sup>2</sup> Cumulatively, the properties  
3 filed eighty (80) refund claims. The use taxes in question were paid to the Department  
4 during the period January 1, 2000 through June 30, 2008. The use taxes were remitted  
5 on food purchased for use in complimentary meals served to patrons and meals served  
6 to employees.

7 2. During the period in question, Taxpayers offered gambling in the form of slot  
8 machines and table games in Clark County, Nevada. Taxpayers also made retail sales  
9 of prepared meals and other tangible personal property. Taxpayer purchased  
10 unprepared food from vendors on which sales tax was not paid. Taxpayer subsequently  
11 prepared and served that food in its restaurants and employee dining room. Taxpayer  
12 collected and remitted sales tax on the meals which were sold in its restaurants.  
13 Taxpayer also accrued and paid use tax on the food which was prepared and then  
14 served in the employee dining room or served as complimentary meals to its patrons.  
15 The use tax was based on the purchase price of the food used in those meals.

16 3. The Department held the Taxpayers' refund requests in abeyance while the  
17 Nevada Supreme Court considered a similar issue in Sparks Nugget, Inc. v. State of  
18 Nevada ex rel. Dept. of Taxation, 179 P.3d 570 (2008). Following the Court's decision  
19 in March 2008, the Department denied the Taxpayers' requests for refund and, on  
20 January 29, 2010, issued Deficiency Notices to the Taxpayers for sales tax on the  
21 prepared meals served to employees and as complimentary meals to patrons.  
22 Taxpayers filed Petitions for Redetermination disputing the Department's refund denials  
23 and Deficiency Notices. Taxpayers maintained that they were due a refund of the use  
24 taxes paid pursuant to the Sparks Nugget decision. Further, they argued that the sales  
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26 <sup>2</sup> Due to the properties' common ownership and the similarity of the issues, the claims were consolidated for purposes of this hearing and decision.

1 tax deficiencies could not stand because: 1) the transactions in question did not meet  
2 the definition of a taxable sale; 2) the sales tax deficiencies were barred by the statute  
3 of limitations; 3) the sales tax deficiencies violated Taxpayers' due process rights<sup>3</sup>; and  
4 4) the Department was estopped from assessing sales tax on the transaction because  
5 the Department advised the Taxpayers that use tax, rather than sales tax, was due on  
6 the transactions. The administrative hearing followed.

#### 7 **Complimentary Meals for Patrons**

8 4. Taxpayers established exchange systems which they called player's clubs.  
9 The player's clubs, named Club Denaro, Club Coast, Player's Gold, and Prime  
10 Rewards, were used by various of the casino properties during the period in question.<sup>4</sup>  
11 The player's clubs were central to Taxpayers' marketing efforts. The programs were  
12 systems of exchanging information and gaming from patrons for benefits from the  
13 Taxpayers. Under these systems, members of the player's clubs were rewarded with  
14 points for providing personal information about themselves, information about their  
15 gaming activity, and engaging in certain amounts and types of gaming activity. Over  
16 time, these programs evolved and became more specific regarding the exchange of  
17 rewards for gaming activities.

18 5. Taxpayers did not charge their patrons for membership in the player's clubs.  
19 To establish membership in the player's clubs, the patron provided his or her personal  
20 identification information to Taxpayers' employees. The patron then received a player's  
21 card which represented the patron's membership in that player's club. The patron  
22 agreed to allow the casino to track the patron's gaming activity through the use of the  
23 player's card. A patron received the best hotel room rates and reduced prices at the  
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26 <sup>3</sup> Taxpayers' arguments and the case law and standards provided by Taxpayers are not applicable to this case because there is no retroactive application of a new statute.

<sup>4</sup> 'B Connected' is the current name for the player's club which is used at all of Taxpayers' properties.

1 buffet for merely joining the player's clubs.

2         6. Under the player's program, the patrons were required to engage in slot  
3 machine gaming in order to earn "reward points" in their player's club accounts. The  
4 rewards points could later be exchanged for benefits from Taxpayers.<sup>5</sup> In Taxpayers'  
5 valuation system, one dollar (\$1) played in a gaming machine equaled one (1) reward  
6 point. The reward points awarded for slot machine play were accumulated on a "coin-  
7 in" basis, or the amount of money put into the slot machines by the patrons.<sup>6</sup> Patrons  
8 could view their total rewards point balance earned from slot machines. Points were  
9 transferable from one member of the players' club to another. The rewards points could  
10 generally be redeemed by a patron at the rate of six hundred (600) points per dollar  
11 when patrons used them to purchase complimentary meals. In order to obtain a  
12 complimentary meal, a patron would 1) swipe his or her players' club card at the  
13 restaurant, or 2) print a voucher for the meal at a self-service kiosk, or 3) obtain a  
14 voucher from an authorized employee of Taxpayer. The patron could use as many  
15 points as the patron wished toward the purchase of a meal. If the patron elected to use  
16 less points than the meal cost, the player would pay the difference in cost.

17         7. In order to earn rewards from Taxpayers in table games, the patron was  
18 required to show his or her players' club card at the table games and ask Taxpayers'  
19 personnel to rate his or her play. To rate the patron's play, the dealer estimated the  
20 patron's length of play time and average bet. That information was later entered into  
21 the e-Table computer program owned by Taxpayers which calculated the patron's rating  
22 on table games. Then, when a patron asked for a complimentary meal based on his or  
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25 <sup>5</sup> Taxpayers offered patrons various benefits for which rewards points could be exchanges including cash,  
merchandise, and meals. Only meals are at-issue in this matter.

26 <sup>6</sup> "Coin in" means Taxpayers' patrons earned rewards points based on the amount of money they  
wagered or put into the game. In some previous versions of the player's clubs, patrons were rewarded on  
a "coin out" basis, or based on the patrons' wins.

1 her table game play, Taxpayers' employees would review the patron's rating earned in  
2 table games in order to determine which rewards could be given to that patron. The  
3 patron's rating also increased the patron's status within the player's club by promoting  
4 the patron to a higher tier within the player's club. The higher the patron's tier, the  
5 greater the benefits available to the patrons. The patron's could not see their play  
6 ratings but they could see their tier within the player's club.

7 8. In addition to the player's club discussed above, some select employees of  
8 Taxpayers had authority to give "discretionary comps." No points were required to be  
9 taken from a patron's account in exchange for the meals if the meals were a  
10 discretionary comp. Discretionary comps could be used for new customers, to ensure  
11 customer satisfaction, or as a reward for extensive play. There were also administrative  
12 comps within the discretionary comps category which were given to vendors or for  
13 administrative purposes. The Director of Loyalty Programs believes the discretionary  
14 comps accounted for only one percent (1%) of comps awarded by Taxpayers.  
15 However, the Vice-President of tax believes that discretionary comps vary from zero to  
16 40% of the comped meals provided to patrons, depending on the property in question.  
17 Regardless of the opinions of Taxpayers' employees as to the amount of discretionary  
18 complimentary meals which Taxpayers' employees awarded, the players' program  
19 requirements and the internal directives of Taxpayers indicate that all rewards points  
20 and comped meals are based on gaming activity or "play." Stipulated Exhibits at 982  
21 through 1033.

22 9. The players' club was part of an extensive marketing program. Taxpayers  
23 believed the player's clubs encouraged player loyalty. Taxpayers publicized their  
24 player's clubs and made their patrons aware that the patrons must gamble at one of  
25 Taxpayers' locations in order to earn the rewards in question. The marketing materials  
26 explained what the patrons received in return for gaming activity. Taxpayers believed

1 that patrons expected player's clubs in gaming establishments and there was highly  
2 competitive climate with other casinos regarding player's clubs.

3 10. For internal accounting purposes, Taxpayer recorded the retail sales price of  
4 the meal as the value of the comped meal. However, Taxpayer accrued and reported  
5 use tax to the Department on the cost of the food used in the complimentary meal. If the  
6 patron elected to use less points than the meal cost and paid the difference in cost,  
7 Taxpayer assessed sales tax on the amount of cash paid by the patron and accrued  
8 use tax on the portion paid for with reward points. When a patron elected to use his or  
9 her player's points toward a meal at a third-party vendor restaurant, Taxpayers paid  
10 sales tax to the third-party vendor when the third-party vendor billed Taxpayers for the  
11 meals. Taxpayers litigated the issue of whether sales tax was due on complimentary  
12 meals for patrons in Indiana in Horseshoe Hammond v. Indiana Dep't. of State  
13 Revenue, 865 N.E.2d 725 (Ind. T.C. 2007). As a result of the Horseshoe Hammond  
14 case, Taxpayers received a refund on the use tax paid on complimentary patron meals  
15 to the state of Indiana.

16 11. The evidence on the record indicates that overwhelming majority of  
17 complimentary meals were awarded within the parameters of the player's club or  
18 subject to Taxpayers' guidelines for discretionary comps. Although the term  
19 "complimentary" implies that an item was given away, the complimentary meals were  
20 not being given away by Taxpayers. The complimentary meals were not simply given to  
21 any patron as a gesture of good will for which Taxpayers expected nothing in return.  
22 The complimentary meals were directly in exchange for a information and a certain  
23 amount of gambling, as tracked within the player's club or by the table game computer  
24 program. Taxpayers kept detailed and accurate records of the patrons who were  
25 members of the player's club, the points redeemed by each patron, and the retail value  
26 of each meal which was purchased with the patron's points. Taxpayers simply did not

1 award complimentary meals when they had not received something of value or  
2 expected to receive something of value in return.

3 12. The Department advised Taxpayers in many publications and through audit  
4 reports that use tax, as measured by the cost of food to Taxpayers, was the appropriate  
5 tax to be paid on the complimentary patron meals. Additionally, the Department's  
6 philosophy regarding complimentary meals was recorded in regulation NAC 372.350(3).  
7 Following the Nevada Supreme Court's decision in Sparks Nuggett, the Department  
8 changed its position and began assessing sales tax on the retail price of the  
9 complimentary patron meals.

#### 10 **Meals for Employees**

11 13. Taxpayers provide one meal in their Employee Dining Rooms for each  
12 employee during the employee's shift. Employees did not receive meals on days they  
13 do not work. The meals were provided to employees for the benefit of Taxpayers.  
14 Feeding the employees and keeping them on-site reinforced Taxpayers' security and  
15 increased the reliability of the employees. Some employees, who were subject to  
16 collective bargaining agreements, received the meal as part of their negotiated  
17 employment contract and Taxpayers were obligated to pay the employees a minimal  
18 amount (\$1.50 - \$1.75) if the meal was not provided.

19 14. Taxpayers reported the employee meals as fringe benefits for the employees  
20 on its federal income tax returns. Taxpayers were allowed by the Internal Revenue  
21 Service to deduct 100% of the cost of providing those meals.

22 15. Any Finding of Fact hereinafter construed to constitute a Conclusion of Law is  
23 hereby adopted as such to the same extent as if originally so denominated.

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APPLICABLE LAW

16. Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail. NRS 372.105.<sup>7</sup> A sale at retail is a "... sale for any purpose other than resale in the regular course of business." NRS 372.050. A sale is defined as the transfer of tangible personal property for a consideration. NRS 372.060.

17. Consideration is defined as "[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee." Black's Law Dictionary, 7<sup>th</sup> Ed. (1999). "[C]onsideration in the form of money is not essential to a binding contract. A mere promise is sufficient as consideration if it is the result of a bargained for exchange. Moreover, a benefit to the promisor or a detriment to the promisee is sufficient as consideration." Horseshoe Hammond, 865 N.E.2d at 729. In Nevada, "[t]o constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Pink v. Busch, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984), quoting Restatement (Second) of Contracts § 71(1), (2) (1982).

18. The sales tax is imposed on the gross receipts from the retail sales of tangible personal property. Gross receipts is defined as the total sales price of the tangible personal property as "valued in money, whether received in money or otherwise." NRS 372.025(1). Gross receipts do not include cash discounts. NRS 372.025(3)(a).

19. The sales tax is customarily collected by the retailer from the purchaser. However, a retailer's failure to collect the tax from the purchaser does not necessarily extinguish the retailer's liability for the tax. See NRS 372.105, 372.110, and 372.155.

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<sup>7</sup> Corresponding provisions of Nevada law enacted in NRS Chapter 374 have the same requirements and combine to create the total sales and use tax rate.

20. In addition to the sales tax, Nevada imposes a use tax upon consumers for the storage, use or other consumption of tangible personal property in Nevada. NRS 372.185. The use tax rate is equivalent to the sales tax rate. NRS 372.185. The use tax is imposed upon the sales price of the property to the purchaser. NRS 372.185. The use tax is complementary to the sales tax and applies to the person's use or storage of the property unless the person has otherwise paid the sales tax to a Nevada registered vendor.<sup>8</sup> See NRS 372.190. Sales tax and use tax are mutually exclusive taxes, and therefore, only one type of tax may be assessed on a single transaction. See State, Dep't. Taxation v. Kelly-Ryan, Inc., 110 Nev. 276, 280, 871 P.2d 331, 334 (1994) and NRS 372.345 (use tax does not apply to a transaction if sales tax was already collected on that sale).

21. There are various exemptions to the sales and use taxes, including an exemption for food. The Nevada Constitution Article 10 Section 3(A) requires the legislature enact a sales and use tax exemption for "food for human consumption." The Constitution excluded from the exemption "prepared food intended for immediate consumption." *Id.* NRS 372.284 and 374.289 were enacted pursuant to the Constitutional directive and incorporated the language from the Nevada Constitution. As a result, when food is prepared and then sold, Nevada sales tax is imposed on the purchaser of the "prepared food intended for immediate consumption." NRS 372.284.

22. The Nevada Tax Commission ruled in 1974 that use tax "applies to tangible personal property purchased for resale and given away in the form of complimentary food and beverages as a use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business. The taxable cost of the

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<sup>8</sup> Use tax is primarily applicable when tangible personal property avoids the imposition of sales tax at a point of purchase outside of Nevada. See Nevada Tax Commission v. Nevada Cement Co., 116 Nev. 877, 8 P.3d 147 (2000).

complimentary food and beverage includes the cost of the food or beverage and other ingredients, including, but not limited to, napkins, straws, and condiments.” NAC 372.350(3).

23. When calculating the amount of use tax due on meals served to employees by an employer, the Department was required to base the amount of tax due on “the cost of the specific components of those meals if: 1) [t]he meals are furnished on a regular basis on the premises of the employer for the convenience of the employer; and 2) [t]he employer does not charge the employees a specific fixed price per meal. NRS 372.727.

24. When the Department finds that a taxpayer has failed to remit sales tax, the Department is required to issue a Deficiency Notice to that taxpayer setting out the amount of sales tax owed by that taxpayer. NRS 360.300. The Department must issue that determination within three years if the taxpayer has filed tax returns and within eight years if the taxpayer has failed to file the requisite returns. NRS 360.355. When a taxpayer files a request for refund, the time requirements of NRS 360.355 are “tolled until the Department makes a determination whether the taxpayer owes any taxes for the period for which the claim for a refund is filed, or issues and personally serves or mails a notice of a deficiency determination to the taxpayer who files the claim for a refund, whichever occurs later.” NRS 360.357.

25. When a “taxpayer has relied to his or her detriment on written advice provided to the taxpayer by an officer, agent or employee of the Department . . . [t]he Department may waive any tax, penalty and interest owed by the taxpayer.” NRS 360.294.

26. The burden of proof is on the taxpayer to show that it is entitled to a refund of overpaid taxes. See NRS 372.630 through 372.720 and NAC 360.490. The burden is also on the Taxpayer to show that a deficiency determination issued by the Department

is incorrect. See NRS 360.360 through 360.365 and NAC 360.130.

### CONCLUSIONS OF LAW

27. When Taxpayers purchased the unprepared food from its vendors, it was a tax exempt purchase. NRS 372.284. When Taxpayer prepared that food and sold it to its customers, Taxpayer engaged in taxable sales of prepared food. NRS 372.105 and 372.284. For many years, the Department instructed Taxpayers that if Taxpayers prepared food for its employees and for complimentary meals for patrons, Taxpayers would be subject to use tax on the food used in those meals. However, the Nevada Supreme Court decided that if Taxpayers prepare the food but give it away, no taxable event has occurred. See Sparks Nugget, 179 P.3d 570. In other words, the taxable event is the retail sale of prepared food rather than the preparation of the food. Consequently, if Taxpayer's complimentary meals for patrons and employee meals are given away to the patrons and employees, no tax is due on those transactions. However, if the complimentary meals for patrons and employee meals are actually retail sales of the prepared food, sales tax is due on the transactions. Sparks Nugget, 179 P.3d at 575.

28. The definition of a retail sale in Nevada is broad and simply excludes items sold for resale. NRS 372.050. A retail sale requires consideration. *Id.* However, there are no requirements for the amount or type of consideration specified in the statute. Consideration is merely value received which can be pecuniarily measured and does not depend upon a monetary payment. Consideration is simply an exchange of things of value or which provide a benefit. See NRS 372.025; Horseshoe Hammond, 865 N.E.2d at 729; and Pink v. Busch, 100 Nev. at 684.

#### **Patron Meals**

29. The Taxpayers' benefits in this exchange system were recognized and

1 realized through the elaborate player's club program: the gaming revenues and the  
2 accumulation of information about its patrons. The information about its patrons was  
3 valuable to Taxpayers because the information allowed Taxpayers to track how much  
4 they were winning from individual players and to maximize Taxpayers' wins by  
5 constantly adjusting the player's program rewards accordingly. Taxpayers also  
6 recognized and realized a detriment through this same program: they promised to give  
7 up some of their winnings as meals in exchange for the patrons' gaming activity and use  
8 of the player's card. The benefit to the patrons were the meals they claimed with their  
9 reward points. The detriment to the players was the requirement to put a certain  
10 amount of money into Taxpayers' slot machines or to wager a sufficient amount of  
11 money in Taxpayers' table games. But the patrons knew they had to wager money in a  
12 gaming activity in order to receive specific rewards. As Taxpayers' themselves  
13 described it, the players' club took the guess work out of the comp system for the  
14 patrons. The bargained-for exchange happened when patrons participated in the  
15 required gaming activity in order to receive the items or services promised through the  
16 player's club.<sup>9</sup> There was clearly value and detriment on both sides of this bargained-  
17 for exchange, which establishes legally sufficient consideration.<sup>10</sup> Consequently, the  
18 complimentary meals provided to Taxpayers' patrons were sales.

19 30. The sales of complimentary meals to their patrons were made at retail.  
20 Taxpayers were in the business of making sales of prepared food and the meals were  
21 not for resale by Taxpayers' patrons. NRS 372.050. Consequently, sales tax was due

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23 <sup>9</sup> It should be noted, however, that it is not necessary to find a contract in order to conclude that a sale  
occurred. A sale happens when consideration has been exchanged for tangible personal property. NRS  
372.060.

24 <sup>10</sup> The court in the Horseshoe Hammond case found that there was no consideration exchanged between  
25 the casino and the players because the casino was bargaining for continued customer loyalty and the  
awarding of comps was purely discretionary. The current matter differs from the Horseshoe Hammond  
26 case on both of those grounds. Taxpayers rewarded past gaming activity within a rigorous exchange  
system which did not allow their employees discretion with regard to comps. Consequently, the court's  
conclusion in the Horseshoe Hammond matter is not applicable here.

1 on the gross receipts from the comp meals.

2 31. Taxpayer argued that its rewards points are actually like coupons or cash  
3 discounts and, when a customer redeems the points, the amount that the meals are  
4 reduced, even if the cost of the meal is reduced to zero, should not be subject to sales  
5 tax. NRS 372.060. Taxpayer also likened the reward points to winning a prize rather  
6 than a retail sale.<sup>11</sup> However, those arguments are unpersuasive because Taxpayers'  
7 player's club points are not like coupons or cash discounts or prizes. They are the  
8 currency component of the elaborate exchange system established by Taxpayers for  
9 their player's club. The points earned by the players allow the players to make future  
10 demands of the Taxpayers, including complimentary meals.

#### 11 **Employee Meals**

12 32. The Nevada Supreme Court also held in the Sparks Nugget case that meals  
13 given away to employees were not subject to use tax. The Department maintains that  
14 the employee meals served by Taxpayers qualify as retail sales and are subject to sales  
15 tax. The Department maintains that the employees' work was the consideration which  
16 was exchanged for the meals from Taxpayers, a sort of barter transaction. Taxpayers  
17 argue that the meals are merely one of the many benefits provided to employees rather  
18 than individual sales of the meals to the employees.

19 33. The employees' meals are an insignificant part of the employees'  
20 compensation packages. The meals were for Taxpayers' convenience and Taxpayers  
21 were required to feed the employees in order to keep the employees on-site for  
22 extended periods of time. As compared to the benefits Taxpayers receive for providing  
23 the meals to the employees, the benefit to the employees was nominal. Although the  
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25 <sup>11</sup> To support their argument that the rewards points are Taxpayers cite to State of Nevada v. GNLV  
26 Corporation, 108 Nev. 456, 834 P.2d 411 (1992) for the idea that activities within a player's club are  
mandated by contract rather than the result of a legitimate wager and, therefore, are gifts rather than the  
result of gaming activities.

1 Taxpayers have agreed to pay the union employees a small amount in the event a meal  
2 is not served, the limited benefit of the meals to the employees does not support a  
3 finding of consideration. Consequently, the employee meals were a use of the food by  
4 Taxpayers rather than a sale of the food to the employees.<sup>12</sup>

### 5 **Estoppel**

6 34. Taxpayers argued that the Department is equitably estopped from assessing  
7 sales tax on the transactions in question because the Department previously advised  
8 the Taxpayers to remit use tax on the purchase price of the food used in the  
9 transactions in question. The doctrine of equitable estoppel bars one party from taking  
10 a position or making a claim or allegation which is inconsistent with previous statements  
11 or representations made to another party who has relied to his detriment upon those  
12 statements or representations. See Blacks Law Dictionary, 6<sup>th</sup> Ed. (1990).

13 35. As a general rule, the doctrine of estoppel has no application to the state or  
14 its agencies. See Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583 (1994). However, the  
15 Nevada Supreme Court has recognized that “the modern trend permits the application  
16 of equitable estoppel against a government to avoid manifest injustice and hardship to  
17 the injured party.” Southern Nevada Memorial Hospital v. State, Dep’t of Human  
18 Resources, 101 Nev. 387, 390, 705 P.2d 139, 141 (1985). NRS 360.294 authorizes an  
19 estoppel against the State where “a taxpayer has relied to his detriment on written  
20 advice provided to him by an officer, agent or employee of the Department or on an  
21 opinion of the Attorney General.” In the event that a taxpayer can prove estoppel, then  
22 the Department “may waive any tax, penalty or interest owed by the taxpayer.” See  
23 *a/so* NAC 360.702.

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26 <sup>12</sup> This is how the Nevada Legislature characterized the situation when it enacted NRS 372.727.  
Although that statute is moot in light of the Sparks Nugget decision, the Department has offered no  
compelling argument as to why the underlying rationale for the statute should not apply here.

36. The Department's position that complimentary meals for patrons are subject to sales tax is inconsistent with its prior policy that those meals were subject to use tax.<sup>13</sup> However, NRS 360.294 and NAC 360.702 do not provide grounds for refunds, but merely allow the Department to waive tax, penalty and interest which is still outstanding debt, in the interest of equity.

37. In this case, Taxpayers were accruing use taxes to be paid to the Department on the complimentary meals for patrons. Taxpayers accrued the use tax based on their purchase price of the unprepared food because they were following the guidelines from the Department which had been repeatedly provided to Taxpayers and enforced by the Department through audits. Taxpayers only received notification of the Department's new policy of collecting sales tax years after the taxes in question were due. If Taxpayers had been informed before the taxes were due that the Department was changing its long-standing policy, they would have had an opportunity to accrue or collect an amount measured by the retail price of the food. As such, it would be inequitable and unfair for the Department to now assess an additional amount of tax to the Taxpayers. Consequently, a waiver of the sales tax, penalty and interest which was assessed over and above the use taxes which were remitted by Taxpayers is warranted.<sup>14</sup>

### **Statute of Limitations**

38. Taxpayer also argued that the sales tax deficiency determinations issued by the Department are barred by the statute of limitations. NRS 360.355 does require that the Department issue deficiency determinations within three (3) years of the date on

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<sup>13</sup> The Department acted on its long-held interpretation that the meals in question were subject to use tax when it issued its guidelines and did not issue guidance contrary to its knowledge and information at the time. Additionally, Taxpayers, rather than challenging those guidelines, followed them until the Sparks Nugget case.

<sup>14</sup> This decision should not be construed in any way to limit the Department's authority to interpret and re-interpret Nevada's tax laws in the future.



1 which the taxes were due.<sup>15</sup> NRS 360.357 tolls that statute of limitations while a refund  
2 request is pending. NRS 372.357 was not effective until October 2005. Consequently,  
3 there was no tolling statute for twenty-two (22) of the eighty (80) refund requests which  
4 were filed prior to that date. As such, the Department is now barred from assessing  
5 additional taxes, penalties interest on the periods represented by those twenty-two (22)  
6 refund requests. However, the tolling statute was in place for the remaining fifty-eight  
7 (58) refund requests.

8 39. Any Conclusion of Law hereinafter construed to constitute a Finding of Fact  
9 is hereby adopted as such to the same extent as if originally so denominated.

#### 11 FINAL DECISION

12 Based upon the foregoing Findings of Fact and Conclusions of Law, and  
13 GOOD CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED, ADJUDGED  
14 AND DECREED that:

15 1. Taxpayers' complimentary meals to patrons were retail sales and subject to  
16 sales tax.

17 a. The use tax remitted by Taxpayer shall be credited against the sales  
18 taxes due.

19 b. Based on the principle of equitable estoppel and the statute of  
20 limitations, the Department is barred from assessing any additional taxes, penalties, or  
21 interest.

22 2. Taxpayers' employee meals were given away to its employees.  
23 Consequently, no sales or use tax is due on those transactions. A refund shall be  
24 issued for the use taxes paid by Taxpayers on the food used in employee meals.

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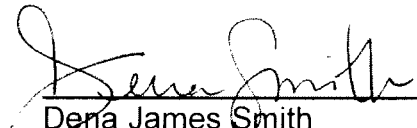
25  
26 <sup>15</sup> The three-year period is applicable in this case because Taxpayers were filing sales and use tax  
returns and there is no allegation of fraud on the part of Taxpayers. NRS 360.355.

APPEAL RIGHTS

You may appeal this decision to the Nevada Tax Commission provided that you file a notice of appeal within thirty (30) days after the date of service of this decision upon you. Although notice of the appeal need not be in any particular format, it must be in writing, must clearly state your desire to appeal this decision, and must be filed with the executive staff of the Department of Taxation within thirty (30) days after the date of service of this decision. In this regard, you are advised to mail or personally deliver any notice of appeal to the attention of Lezlie Helget, Supervising Auditor II, Nevada Department of Taxation, 1550 College Parkway, Suite 115, Carson City, Nevada 89706. Pursuant to NRS 360.245, this decision will become final thirty (30) days after service upon you unless you file a notice of appeal within those thirty (30) days.

All the above general information is provided to you pursuant to NRS 360.2925 and as a matter of courtesy only. You, or your counsel, should ascertain with more particularity the regulatory or statutory requirements pertinent to your further appeal rights.

DATED this 22<sup>nd</sup> day of April, 2011.

  
Dena James Smith  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Findings of Fact, Conclusions of Law and Final Decision in the matter of Boyd Gaming Corporation Group, upon all parties of record in this proceeding as follows:

By mailing a copy thereof via certified mail, properly addressed, with postage prepaid to:

*Certified Mail: 7009 2250 0001 8858 8847*

John S. Bartlett, Esq.  
755 N. Roop St, Ste. 108  
Carson City, NV 89701  
Counsel for Boyd Gaming Corporation Group

*Certified Mail: 7009 2250 0001 8858 8854*

David Krasn  
Boyd Gaming Corporation  
6465 S. Rainbow Blvd.  
Las Vegas, NV 89118

By electronic mail to:

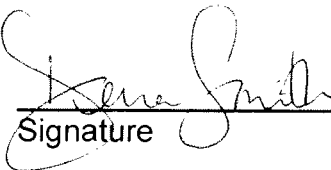
John S. Bartlett, Esq. at [johnsbartlett@verizon.net](mailto:johnsbartlett@verizon.net)

Blake Doerr, Deputy Attorney General, Counsel for Nevada Department of Taxation, at [BDoerr@ag.nv.gov](mailto:BDoerr@ag.nv.gov)

Christopher G. Nielsen, Interim Director, Nevada Department of Taxation

Nevada Tax Commission Members

Dated at Las Vegas, Nevada, this 22<sup>nd</sup> day of April, 2011.

  
\_\_\_\_\_  
Signature