STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHERIDAN HOLLOW INCORPORATED	:	DECISION DTA NO. 819585
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1999 through November 30, 2001.	:	

Petitioner Sheridan Hollow Incorporated, 90 North Pearl Street, Albany, New York 12207, filed an exception to the determination of the Administrative Law Judge issued on June 23, 2005. Petitioner appeared by its president, Stephen J. Waite, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition and petitioner filed a letter in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on January 18, 2006 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the admission charges, for entry onto the third floor of the Big House Brewing Company, collected by petitioner from the Big House's patrons are subject to sales tax pursuant to Tax Law § 1105(d), (f)(1) or (3).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Since July 1, 1996, petitioner, Sheridan Hollow Incorporated ("petitioner" or "Sheridan Hollow"), has operated a restaurant and brew pub known as the Big House Brewing Company ("the Big House") located at 4 - 6 Sheridan Avenue, in Albany, New York. On December 17, 1998, petitioner began operating a restaurant and brew pub known as the Big House Grill ("the Grill") on Wolf Road, in Colonie, New York. On April 15, 2001, petitioner began operating the Speak Easy Deli ("the Deli") located at 90 North Pearl Street,[1] in Albany, New York.

The Big House occupies a three-story building containing over 10,000 square feet of space plus a basement. When the facility first opened in 1996, all three floors of the Big House operated as a bar and restaurant with a seating capacity of 350 that offered two menus, i.e., a pub style menu and a formal dining menu. However, the Big House's service offerings changed prior to the commencement of the audit period.

The character and service offerings on the first floor have changed little since the facility first opened in 1996. The main room of the first floor consists of approximately 3,400 square feet with another 2,200 square feet added by a side room, i.e, the part of the first floor of 90 North Pearl Street connected to the Big House. The first floor consists of a large square bar with seating for approximately 48 patrons, with a smaller bar in the side room that seats a more limited number of patrons. The remainder of the floor space on the first floor is occupied by

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[1] Located on the corner of North Pearl Street and Sheridan Avenue, 90 North Pearl Street is also known as 2 Sheridan Avenue. Approximately 2,200 square feet of the first floor of 90 North Pearl Street is connected to the Big House.

booths and tables at which patrons can sit and purchase food and either alcoholic or nonalcoholic beverages, restrooms and the "Brew House" containing brewing equipment used in the production of petitioner's micro brewed beers. A pub style menu is offered on the first floor and service is provided by wait staff. The character of the basement has remained unchanged since the opening of the Big House in 1996. It is used for the storage of food and supplies and also houses additional brewing equipment and small administrative offices. Patrons are not allowed in the basement and it is reserved strictly for employee use.

The character and service offerings on the second floor have changed little since the facility first opened in 1996. Consisting of approximately 3,400 square feet of space, the second floor contains the Big House's kitchen facilities, as well as additional booths and tables for patron seating. Patrons can order pub style food and alcoholic or nonalcoholic drinks on this floor, with service provided by wait staff. In addition, there is a game room and other meeting rooms on the second floor. The second floor can be accessed in any of three ways. First, a set of wooden steps connects the two floors and is available to patrons wishing to traverse the two floors. Second, an elevator mainly used for handicap access connects the first two floors. Lastly, a set of fire stairs connects the floors, which staircase is used only in emergency situations.

Unlike the first two floors, the third floor of the Big House has undergone substantial change since the facility first opened in 1996. At that time, the third floor, consisting of approximately 3,400 square feet of space, housed the facility's main dining room containing 50 to 55 tables and 10 or more booths, with seating for approximately 200 people. In addition, the third floor also contained restrooms. Utilizing the dramatic views provided by the windows on

the Sheridan Avenue side of the facility, the third-floor dining room was designed to provide a more formal dining experience, and a graduate of the Culinary Institute of America was employed as chef. Unlike the first two floors of the Big House that featured a pub style menu, the third-floor dining room featured a formal menu, with ambience and offerings similar to that of other high-end Capital District restaurants. A full contingent of wait staff served patrons on this floor and full bar service was available similar to that on the other two floors. Since there was neither a bar nor a kitchen on the third floor, a dumbwaiter was utilized to move food and drink between floors. When the Big House first opened in 1996, no entertainment offerings were featured on the third floor and services were limited to the sale of food and drink. No admission charges were imposed. The wooden steps, elevator and fire steps also allowed access between the second and third floors. It is noted that from the time the Big House opened until the present time, absent an emergency, all patrons, except for those patrons with handicaps, must use the wooden steps that connect the three floors.

For a period of time after opening, the Big House experienced success with the two- menu format. Eventually, financial considerations forced petitioner to reconsider the format of the Big House. At some point, petitioner attempted to introduce entertainment on the third floor along with fine dining. However, that proved to be disastrous because patrons who dined late had their meals disrupted by the entertainment. Ultimately, it was decided to shut down the third-floor dining room and all food and restaurant services were suspended at that time. Prior to the audit period, all tables and booths were removed, with the exception of three booths that could not be removed because of structural reasons. Chairs remained stacked along the walls of the third floor. As noted above, the area of the third floor is approximately 3,400 square feet. Of that

area, approximately 2,000 square feet became open space with a hardwood floor, once the tables and booths were removed. The remainder of the space, an elevated mezzanine level ("mezzanine") where the restrooms (containing about 300 square feet of space) and a small slop closet were located, was carpeted. For a brief period of time, the third floor was closed.

At some time prior to the beginning of the audit period, petitioner decided to reopen the third floor. At that point, a small stage about 7 feet by 12 feet in size was constructed in the wood floor open space area and a sound system was installed on the third floor. In addition, a small bar measuring approximately 12 feet in length and 4 feet in width was installed on the third floor mezzanine. This bar was stocked with draft beer, liquor, soda and bottled water and was equipped with a cash register that was not tied into the computer system used to record sales of food and beverages (alcoholic and nonalcoholic) on the other two floors of the Big House. No chairs were placed around the bar. Food was no longer served on the third floor and no wait staff or bar maid was employed to serve patrons on the floor. Patrons on the third floor were required to purchase their beverages directly at the third floor bar. An entrance door was placed on the second floor at the bottom of the third floor stairwell used by patrons to access the third floor.

Prior to and during the audit period, patrons were admitted to the third floor by payment of an admission charge to a Big House employee stationed at the base of the stairwell to the third floor and passing by another Big House employee stationed at the top of the stairs at the entrance to the third floor. Payment of the admission charge entitled a patron to admission only; drinks were not included in the admission charge. Once admitted to the third floor, patrons could purchase beverages at the third-floor bar, but could not leave the third floor to buy a drink and

reenter without paying an additional admission charge. A patron wishing a beverage on the third floor had to purchase it at the third-floor bar. The beverage offerings on the third floor were limited to draft beers, liquor, mixed drinks, soda and bottled water, all of which were served in plastic cups. Drinks could not be purchased elsewhere and brought to the third floor. Nor could food be purchased on the other two floors of the Big House and brought to the third floor.

Prior to and during the audit period, admission charges collected by the Big House employee at the base of the stairs to the third floor were not rung up on a cash register. Rather, the Big House employee put the collected admission charges into a bank bag with a zipper on it. After the Big House employee stopped collecting admission charges for the evening, the bank bag, containing the collected admission charges, was given to the night manager. The next day it was turned in to the operations manager. The collected admission charges were counted and recorded in the Big House's general ledger as "door." This procedure continued after the audit period.

On or about November 2, 2001, the Division assigned an auditor to conduct a sales tax field audit of Sheridan Hollow for the period March 1, 1999 through November 30, 2001. Shortly thereafter, the auditor sent a two-page sales tax questionnaire containing 13 questions to petitioner. Robert J. Brunelle, treasurer/chief financial officer of Sheridan Hollow, prepared Sheridan Hollow's response to the questionnaire and returned it to the Division on or about December 4, 2001. Question number 3 on the questionnaire asks "[w]hich, if any of your sales or services are tax exempt?" In response, Mr. Brunelle wrote "[c]over charges for live musical performances;" "[w]hole sale [sic] of brewed beer to other restaurants for resale;" "[l]ease of room for special events" and "[c]oupon sales & sales discounts to employees."

An appointment letter dated January 17, 2002 and setting an appointment at petitioner's office for April 16, 2002 was sent by the auditor to Mr. Brunelle. The letter requested that all of the corporation's books and records pertaining to its sales and use tax liability for the audit period be made available on the appointment date. The stated audit period was March 1, 1999 through November 30, 2001. The letter referenced an attached records requested list which set forth the records to be produced as follows:

> sales tax returns, worksheets, canceled checks, Federal income tax returns (1120's or 1065's or 1040's), NYS corporation tax returns, general ledger, general journal and closing entries, sales invoices, all exemption documents supporting non-taxable [sic] sales, chart of accounts, fixed asset purchase/sales invoices, expense purchase invoices, merchandise purchase invoices, bank statements, cancelled checks and deposit slips for all accounts, cash receipts journal, cash disbursement journal, the corporate minute book, financial statements, depreciation schedules, guest checks and cash register tapes and the SLA license.

On January 22, 2002, petitioner's president, Stephen J. Waite, executed a consent on behalf of the corporation extending the time for determination of sales and use taxes for the period March 1, 1999 through May 31, 1999 until June 20, 2002. Subsequently, on that date Mr. Waite executed a consent on behalf of the corporation extending the time for determination of sales and use taxes for the period March 1, 1999 through August 31, 1999 until September 20, 2002.

At the written request of petitioner's president, the field audit appointment was rescheduled for May 29, 2002. The auditor met with Mr. Brunelle at the Big House on that date. During the field audit appointment, Mr. Brunelle, along with an unnamed Big House employee, provided the auditor with a tour of a portion of the premises, including the third floor. During this tour, Mr. Brunelle described the third floor as a dance area. Mr. Brunelle provided some of petitioner's books and records for the auditor to review and discussed the nature of the three

establishments operated by Sheridan Hollow. Since Sheridan Hollow's sales records were partially computerized, the auditor was provided with, among other documents, a chart of accounts for the Big House, i.e., a list of all the accounts petitioner maintained as support for its financial statements, and a computer printout of the Big House's general ledger. Mr. Brunelle informed the auditor that since the Big House's sales were downloaded at the end of the day to the mainframe computer in the basement, Sheridan Hollow did not keep the cash register detail tapes for each cash register. The auditor was provided with records from the mainframe concerning sales. All available exemption certificates and expense purchase records for the entire audit period were provided to the auditor. The auditor reviewed the documents provided and noted an entry in the Big House's general ledger identified as "door." In response to the auditor's inquiry concerning this entry, Mr. Brunelle explained that this general ledger entry was the door charge for admission to the Big House's third-floor dance area. The auditor also was not provided with any records showing the dates the third floor was open, the nature of the music provided or sales of beverages from the third-floor bar. Petitioner failed to provide any cash register tapes for any of the three establishments for the entire audit period, records of door charges for the period March 1, 1999 through August 31, 1999 and exemption certificates for the period September 1, 1999 through November 30, 1999.

During the field audit appointment, on May 29, 2002, Mr. Brunelle, as chief financial officer and treasurer of Sheridan Hollow, provided Sheridan Hollow's written response to a questionnaire containing 11 questions. Question number six on the questionnaire contains multiple questions concerning entertainment and any cover charges for such entertainment. Within question number six is a two-part question pertaining to any price increase for

entertainment during the audit period. To this two-part question, Mr. Brunelle responded yes, there was a price increase for entertainment during the audit period and further responded that the "cover charge varies based on timing, entertainment, etc." Also within question number six is a two-part question that asks "[w]as there a cover charge? If Yes, Amount $." Mr. Brunelle affirmatively responded that there was a cover charge and further responded that the amount of the cover charge "varies."

After concluding that the sales records supplied to him by petitioner were sufficient and complete, the auditor was able to perform a detailed audit of petitioner's sales. The auditor determined that the Grill, strictly a restaurant, did not have any problems with its sales. Based upon the records he reviewed, he concluded that the Deli was correctly taxing its sales. However, neither the Grill nor the Deli was saving its cash register detail tapes.

The auditor then reviewed the nontaxable sales listed in the Big House's general ledger and all exemption certificates available. Based upon his review of all documentation supporting the Big House's sales to exempt organizations, the auditor concluded that $8,054.00 in claimed nontaxable sales to exempt organizations during the period September 1, 1999 through November 30, 1999 were not supported by exemption certificates and, therefore, were taxable. He determined additional sales tax due for the period September 1, 1999 through November 30, 1999 in the amount of $644.32 on these disallowed nontaxable sales to exempt organizations. Based upon the information provided, the statements of Mr. Brunelle, the auditor's personal observation of the premises and his research of the Tax Law, the auditor concluded that the door cover charges collected by the Big House during the audit period were subject to tax. Since no records of door receipts were provided for the first two quarters of the audit period, i.e., March

1, 1999 through May 31, 1999 and June 1, 1999 through August 30, 1999, the auditor used the amount of door cover receipts reported in the Big House's general ledger for the corresponding two quarters in the year 2000 in his calculation of door cover receipts for the audit period March 1, 1999 through November 30, 2001 and determined that door cover charges in the amount of $364,754.00 were subject to tax for this audit period. He further determined that additional tax in the amount of $29,180.32 was due on these additional taxable sales of $364,754.00. The auditor computed total additional taxable sales of $372,808.00 and additional sales tax due of $29,824.64 for the period March 1, 1999 through November 30, 2001 on both door cover charges and disallowed exempt sales.

In addition to reviewing petitioner's sales records, the auditor also reviewed Sheridan Hollow's expense purchase records. He deemed these records to be adequate and reviewed same utilizing a detailed method. Based upon his review of petitioner's expense records, the auditor discovered additional taxable expense purchases of restaurant supplies, equipment and repairs in the amount of $13,523.00 and additional use tax due in the amount of $1,081.84 for the audit period.

A review of the Division's Tax Field Audit Record ("audit log") and Field Audit Report - Sales and Use Tax ("audit report") indicates that the auditor issued a Statement of Proposed Audit Change for Sales and Use Tax (form AU-346) to Sheridan Hollow on May 30, 2002 that proposed additional tax due in the amount of $30,906.48 plus minimum interest. Further review of the audit log indicates that, on the same date, the auditor sent petitioner the related work papers and information supporting the conclusion that the door charges were taxable.

On or about July 1, 2002, Sheridan Hollow's president, Stephen J. Waite, disagreed in writing with the proposed audit change that subjected the Big House's third-floor cover charges to tax. The basis of Mr. Waite's disagreement was that the admission fee was for the sole purpose of viewing a musical performance and was therefore exempt from sales tax pursuant to the Tax Law § 1101(d)(12) definition of roof garden, cabaret or other similar place.

On July 3, 2002, in a second request letter addressed to Mr. Brunelle, the auditor requested, among other documents, cash register detail tapes for the entire audit period, records of the cover charges for the period March 1, 1999 through August 31, 1999 and exemption certificates supporting nontaxable sales for the period September 1, 1999 through November 30, 1999. He also scheduled a field audit appointment for July 10, 2002 at 9:15 A.M. In this letter, the auditor also wrote, in pertinent part, as follows:

> You indicated on the AU-346 that you disagreed with the taxability of cover charges where the 'sole purpose was to view a musical performance.' However, if you read the advisory opinion that I sent you (TSB-A-82(2)S), you will see an almost identical situation to your own. That restaurant sold tickets for live performances and allowed patrons to buy drinks and food. It did not require patrons to buy any food, refreshments, or merchandise. The mere fact that one could buy any of these items made the admission taxable. You have a bar that patrons may buy from, in the same room where the performances are made. Patrons may buy food and have it sent upstairs to the room. Therefore, you are a roof garden and the admissions are taxable. . . .
>
> Also, please send me the correct figures for the periods March 1, 1999 to August 31, 1999 for cover charges, as they were not provided to me when I did the audit. There was also $8054 in unsupported untaxed sales to possible exempt organizations in the period September 1, 1999 to November 30, 1999. If you have support for these, send me [sic] it to me within the next two weeks. If the sales were exempt I will make any appropriate adjustments.
>
> Please sign and return a copy of this letter in the enclosed envelope, to confirm the audit appointment date and location, I do not plan to actually go to your business location unless you think it is necessary, but please send the above information to me in the mail as soon as possible.

The records requested a second time were not provided to the auditor. No additional documentation was supplied to the auditor.

By letter dated July 11, 2002, addressed to former Department of Taxation and Finance Commissioner Arthur J. Roth, Mr. Waite again expressed Sheridan Hollow's disagreement with the proposed assessment of sales tax. In this letter, Mr. Waite sets forth the basis for petitioner's disagreement with the Division's proposed assessment of sales tax on the admission charges. Mr. Waite wrote that Sheridan Hollow doing business as the Big House conducts this aspect of its business in the following manner.

> At about 11:30 p.m. on weekends, the Big House provides some form of musical entertainment on [its] third floor. An admission fee of $2.00 to $5.00 per patron is charged to offset the cost of the musical performance. This fee is charged at the entrance to the third floor, and not at [the Big House's] front door. We do not have a cover charge to access the remaining floors of the establishment.
>
> The cost and type of any beverage which can be purchased from a service bar on the mezzanine level off the third floor is identical to the cost and type of the same beverage served on other floors. There are no tables situated on the third floor, and there is no wait staff assigned to such area serving tables. The admission fee does not entitle the payor of such fee to any product served by the Big House. In addition, the only time the third floor is open to the public is when a musical performance is staged. . . .
>
> Big House is unlike local establishments such as McGreary's that charge a cover to enter their premises. We have ensured that the admission fee charged is directly attributable to the musical performance. Patrons attending the Big House enter for free, and can purchase products for the same price throughout our facility. If, however, any patron wishes to view a musical performance, he must pay an admission fee for that purpose.

On July 26, 2002, the Division issued to petitioner a Notice of Determination (notice number L-021328608-1) asserting additional sales and use taxes due in the amount of $30,906.48 for the period March 1, 1999 through November 30, 2001, plus interest in the

amount of $4,472.11, for a current balance due of $35,378.59. The computation section of the Notice of Determination contained the following explanation: "Based on our audit of your records, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law."

At the hearing, petitioner's president stated that it was contesting only the imposition of sales tax on the Big House's third-floor admission charges. Petitioner is no longer disputing the assessment of additional sales tax in the amount of $644.32 on claimed nontaxable sales to exempt organizations for the period September 1, 1999 through November 30, 1999 and additional use tax in the amount of $1,081.84 on recurring expense purchases for the period March 1, 1999 through November 30, 2001.

On occasion, patrons will dance during the entertainment performed on the Big House's third floor.

At the hearing, Mr. Waite admitted that records existed that identified the dates on which the third floor was open during the audit period; the specific entertainment that performed on the third floor on each of those dates; the number of patrons admitted to the third floor on each of those dates and the amount of the third-floor admission fee charged each patron on each of those dates. He also admitted that records existed that identified the type, number and cost of each beverage purchased by patrons at the third-floor bar during the audit period. However, he did not bring any of these records to the hearing.

Shortly before the conclusion of the hearing, both parties were asked by the administrative law judge whether they wished to submit any additional evidence either at that time or post-

hearing. Both parties declined to submit any further evidence. The record was then closed at the conclusion of the hearing.

Petitioner submitted a two-page analysis of the monthly and quarterly revenue allegedly generated from the Big House's third-floor sale of beverages and the revenue allegedly generated from third-floor admission charges, during the period March 1, 1999 through November 30, 2001. Mr. Waite claimed that he prepared this analysis from Big House records shortly before the hearing. None of the source records used to prepare this analysis were submitted into the record.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The issue in this matter, the Administrative Law Judge observed, is whether the third-floor admission charges collected by petitioner from the Big House's patrons are subject to sales tax. The Administrative Law Judge found that live entertainment or dancing are forms of amusement (***see, Matter of Antique World***, Tax Appeals Tribunal, February 22, 1996), and the Big House's third floor is a place of amusement under Tax Law § 1105(f)(1). Mr. Waite admitted that third-floor patrons sometimes dance to the entertainment provided. In addition, Mr. Brunelle described the third floor as a dance area. Further, the Administrative Law Judge observed, petitioner does not contest that it operated the third floor as a place of amusement and that the admission charges were for an amusement. Rather, it is petitioner's position that the admission charges are exempt from the imposition of sales tax by Tax Law § 1105(f)(1) because the entertainment provided consists of "musical arts performances."

The Administrative Law Judge noted that statutory exemptions are strictly construed against the taxpayer, so petitioner must demonstrate not just that its interpretation is reasonable,

but that its interpretation is the only reasonable interpretation of the exemption provision (***see***, ***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). Petitioner claimed that it collected admission charges for entertainment consisting of live musical acts or professional DJs who incorporated their own acts into the music they played and encouraged audience participation. Petitioner claimed that all admission charges collected were only for performances that qualify as musical arts performances. However, the Administrative Law Judge pointed out that at the hearing, petitioner provided only the testimony of Mr. Waite as evidence to support its claim that it presented musical arts performances. Mr. Waite testified generally that live musical acts, including, among others, jazz musicians and rap artists, and professional DJs performed on the Big House's third floor during the audit period. However, Mr. Waite was unable to identify most of these performers or the specific dates on which particular performances occurred during the audit period. Mr. Waite claimed during his testimony that the taxpayer had records that identified who the performers were and when they performed during the audit period, but Mr. Waite did not bring any of these records with him to the hearing. The Administrative Law Judge noted that petitioner failed to submit any of these records into evidence. At the conclusion of the hearing, petitioner was given a further opportunity to provide documentary evidence in support of Mr. Waite's testimony, post-hearing, but it declined to do so. Moreover, the Administrative Law Judge pointed out, even if petitioner was able to prove the amount of receipts generated from performances of live musical acts, it has failed to present any legal support for its interpretation that a DJ playing recorded music, performing an act and encouraging audience participation constitutes a musical arts performance. The Administrative Law Judge noted, Tax

Law § 1101(d)(5) defines a dramatic or musical arts admission charge as "[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a *live* dramatic, choreographic or musical performance" (emphasis added). The sales tax regulations, in 20 NYCRR 527.10(b)(2), also require that a musical arts performance be *live.* The Administrative Law Judge found that DJs play tapes, compact discs or other prerecorded music; they do not perform live music. The Administrative Law Judge also noted that 20 NYCRR 527.10(d)(2) provides that variety shows, magic shows and similar performances do not constitute dramatic or musical arts performances. The Administrative Law Judge found, based upon Mr. Waite's description of the manner in which these DJs allegedly performed, i.e., incorporating an act into their presentations of prerecorded music and encouraging audience participation, that the performances by these DJs constitute variety shows or similar performances which are not musical arts performances (***see,*** Tax Law § 1101(d)(5); 20 NYCRR 527.10[d][2]). The Administrative Law Judge found that petitioner failed to meet its burden of proof pursuant to Tax Law § 1132 on this issue and concluded that the third-floor admission charges it collected from the Big House's patrons are determined to be taxable under Tax Law § 1105(f)(1).

The Administrative Law Judge also concluded that petitioner's admission charges are taxable pursuant to Tax Law § 1105(f)(3) which provides that a sales tax shall be imposed on "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state." A roof garden or cabaret includes a cabaret or similar place which furnishes a public performance for profit, but not exclusively live dramatic or musical arts performances, in conjunction with the selling of food and refreshments, so long as the serving or selling of food and refreshments is

incidental to such performances (***see***, Tax Law § 1101[d][12]). The Division's regulations expand on this definition to provide that a roof garden, cabaret or similar place is "[a]ny room in a hotel, restaurant, hall or other place where music and dancing privileges or any entertainment, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise" (20 NYCRR 527.12[b][2][ii])

From this, the Administrative Law Judge found that the third floor of the Big House constitutes a cabaret or other similar place where a public performance is provided for profit. Petitioner argued that the third floor of the Big House does not fall within the definition of roof garden, cabaret or other similar place because the Big House's sale of refreshments is merely incidental to the live musical arts performances provided on the third floor.

The Administrative Law Judge pointed out there is a presumption that all of petitioner's receipts are subject to tax until the contrary is established and the burden of proof is on petitioner. Petitioner was required to maintain records of every sale, amusement charge and receipt from admission (***see***, 20 NYCRR 533.2). In addition, the Administrative Law Judge observed, petitioner was required to maintain records to substantiate any exemption, exclusion or exception claimed and to present records kept in a manner suitable to determine tax due (***see***, ***Matter of On the Rox Liqs. v. State Tax Commn.***, 124 AD2d 402, 507 NYS2d 503, ***lv denied*** 69 NY2d 603, 512 NYS2d 1026).

Petitioner seeks the benefit of the exemption provided in Tax Law § 1101(d)(12) which like all tax exemptions must be strictly construed. Therefore, petitioner bears the burden of demonstrating that it comes within the reach of the exemption. As noted earlier, Mr. Waite testified that the only entertainment provided on the third floor of the Big House during the audit

period consisted of live musical acts and DJs who incorporated acts and encouraged audience participation during their presentations of prerecorded music. Petitioner failed to submit any documentation concerning the performances provided on the third floor during the audit period. Therefore, the Administrative Law Judge found it was impossible to verify petitioner's claim that the only entertainment performed on the Big House's third floor was live musical acts and the performing DJs. The Administrative Law Judge observed that even if petitioner's unsupported claim is correct and both live musical acts and DJs performed on the Big House's third floor during the audit period, Mr. Waite's description of the manner in which the DJs allegedly performed, i.e., incorporating an act and encouraging audience participation during their presentations of prerecorded music, requires the conclusion that their performances were variety shows or similar performances that do not qualify as *live musical arts performances* (***see,*** 20 NYCRR 527.10[d][2]). The Administrative Law Judge found that any receipts generated from admission charges for performances on the third floor by DJs during the audit period would not qualify for the exemption pursuant to Tax Law § 1101(d)(12). The Administrative Law Judge determined that the lack of documentation made it impossible to determine which receipts, if any, may have been generated from live performances during the audit period versus those revenues generated by DJ's playing prerecorded music. The Administrative Law Judge found that since petitioner failed to prove which, if any, of the receipts generated from third-floor admission charges during the audit period were generated from performances by live musical acts, all receipts generated from the Big House's third-floor admission charges during the audit period are taxable (***see,*** Tax Law § 1132[c][1]).

The Administrative Law Judge observed that to qualify for the exemption under Tax Law § 1101(d)(12), that even if petitioner had offered sufficient evidence to establish the amount of receipts generated from admission charges and attributable to live musical performances during the audit period, it would also be necessary for it to prove that its sales of refreshments were merely incidental to its provision of entertainment on the Big House's third floor. In support of its assertion that the third-floor refreshment sales were merely incidental, petitioner submitted a two-page analysis of the monthly and quarterly revenue prepared by Mr. Waite (Exhibit "1"). This document was allegedly based on petitioner's records from the Big House's third-floor admission charges and sales of beverages generated on the third floor during the audit period. Mr. Waite testified that he prepared this analysis shortly before the hearing.

The Administrative Law Judge found Mr. Waite's analysis to be unreliable as evidence. She stated that a review of his analysis showed that it includes sales figures for admission charges allegedly generated in the months of March 1999 through August 1999, the six months comprising the two sales tax quarters for which petitioner failed to provide admission charge sales records to the auditor. While petitioner claimed that it kept careful records of revenue generated from admission charges and third-floor beverage sales during the audit period, no source documents were offered in evidence at hearing. Therefore, the Administrative Law Judge found that it was not possible to verify the accuracy of either the amount of monthly revenue that petitioner claims was generated on the third floor from admission charges and beverage sales or the monthly percentage of total third-floor revenue attributable to beverage sales during the audit period. In addition, given the lack of supporting documents in the record and Mr. Waite's inability to recall dates on which jazz performances took place during the audit period, the

Administrative Law Judge gave little credence to Mr. Waite's testimony. The Administrative Law Judge concluded that petitioner failed to prove the amount of monthly revenue generated by the Big House from third-floor beverage sales during the audit period. It has also failed to prove that the Big House's third-floor sales of refreshment were merely incidental to its provision of entertainment. Therefore, the third-floor admission charges determined upon audit to have been collected from the Big House's patrons were subject to tax pursuant to Tax Law § 1105(f)(3).

The Administrative Law Judge next addressed the Division's argument that the admission charges were subject to tax pursuant to Tax Law § 1105(d) which provides:

> (i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (*except those receipts taxed pursuant to subdivision (f) of this section*):
>
> (1) in all instances where the sale is for consumption on the premises where sold (emphasis added).

The Administrative Law Judge rejected this argument noting that, since she had already determined that the third-floor admission charges collected by petitioner from the Big House's patrons were taxable pursuant to Tax Law § 1105(f)(1) and (3), such receipts could not be held taxable under Tax Law § 1105(d).

ARGUMENTS ON EXCEPTION

Petitioner on exception argues, as it did below, that the third floor of the Big House was used for the presentation of musical performances, some live, some by a DJ. As such, petitioner claims that its third floor receipts from admission charges are exempt from tax under Tax Law

§ 1105(f)(1) and (3). Petitioner urges that the auditor had access to its records and that its records were complete. Further, petitioner claims that the Division failed to rebut Mr. Waite's hearing testimony. Petitioner argues that Mr. Waite's analysis of Big House receipts should have been given greater weight.

The Division continues to argue that petitioner's records of its sales were incomplete and unverifiable. When the audit commenced, it appeared to the auditor that the premises was merely a dance hall.[2] Later, it appeared that some of its receipts may be eligible for exemption from tax. However, the receipts and other documents provided to the auditor were not sufficient to substantiate exemption from tax.

Mr. Waite claims he has the source documents that would verify the information contained in his summary analysis of receipts for the third floor, but he did not bring them to the hearing.

The Division points out that petitioner at hearing did not prove that any amount of its receipts were attributable to admission charges to live artistic musical performances as opposed to DJs playing recorded music. Further, petitioner has failed to prove that its beverage sales on the third floor were merely incidental. The Division agrees with the Administrative Law Judge's determination that Mr. Waite's summary of receipts was unreliable because he produced no source documents to substantiate any of the amounts shown on the summary.

OPINION

The burden of proof is on petitioner to show that it is exempt from the tax imposed by Tax Law § 1105(f)(1) and (3). At hearing, the only evidence petitioner introduced bearing on the issue was presented by Mr. Waite's testimony and Mr. Waite's summary of receipts. Mr. Waite

[2]Mr Waite acknowledged at oral argument that dancing was one of the uses for the third floor.

offered no source documents into evidence to establish petitioner's claim of exemption from tax. Mr. Waite said he had these source documents, but they are "[n]ot with me today" (Hearing Tr., p. 51). Mr. Waite said that although such documents did exist, he did not bring records showing: 1) events that were held on the third floor; 2) when it employed a live band; 3) when it employed a DJ; 4) the names of particular DJs or the names of live bands that were employed (***see***, Hearing Tr., pp. 51-52). Mr. Waite's testimony and the summary he prepared a week before the hearing which purported to show the percentages of revenue that were being generated from the sale of beverages on the third floor versus the revenue generated from admission charges to the third floor does not rise to the level of clear and convincing evidence (***Matter of Blodnick v. New York State Tax Commn.***, 124 AD2d 437, 507 NYS2d 536) and cannot sustain petitioner's burden of proof in the absence of source documents, e.g., cash register tapes, guest checks, to support it. There is no way for us to determine, based on petitioner's evidence, what the third floor was being used for on any given night during the audit period, the type of entertainment offered, if any, or the receipts taken in from third-floor beverage sales or admission charges to the third floor.

Therefore, we affirm the determination of the Administrative Law Judge. Petitioner offered no evidence below or argument on this exception which would justify our modifying the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sheridan Hollow Incorporated is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitioner of Sheridan Hollow Incorporated is denied; and

4. The Notice of Determination dated July 26, 2002 is sustained.

DATED: Troy, New York
July 13, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner