STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAKE GROVE ENTERTAINMENT, LLC	:	DECISION DTA NO. 821297
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 September 1, 2001 through May 31, 2004.	: :	
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Petitioner, Lake Grove Entertainment, LLC, filed an exception to the determination of the Administrative Law Judge issued on March 27, 2008. Petitioner appeared by Irwin G. Klein, P.C. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall, of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was held on January 28, 2009 in New York, York.

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

ISSUES

I. Whether the Division of Taxation's determination that petitioner, Lake Grove Entertainment, LLC, should have remitted sales tax on the full amount charged for certain sales of party packages was proper and should be sustained.

II. Whether the Division of Taxation failed to obtain a valid consent extending the period of limitations on assessment, such that a portion of the assessment at issue must be canceled.

FINDINGS OF FACT

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

Petitioner, Lake Grove Entertainment, LLC ("Lake Grove"), operates a large entertainment complex offering to its patrons: bowling, ice skating, rock climbing, a roller coaster and other rides, "Lasertron," and various games operated by inserted tokens. Food and beverages are also available in various locations at petitioner's premises.

Petitioner's facilities and amenities are available for use by individual purchasers, such that one could arrive and simply pay the particular per use amount to skate, bowl, play the various games, or go on the various rides, and could also purchase food or beverages in the same manner (i.e., for the menu price per item as listed).

Petitioner also sells party packages, which involve the sale of a combination of food and beverage items together with access to or the right to partake in various combinations of the other activities available at petitioner's premises such as the amusement games, unlimited use of the rides, access to and use of the sports activities facilities such as bowling or skating for a specified period of time, and the like. The party packages typically include pizza or hot dogs, soda, ice cream, a number of amusement game tokens, party invitations, thank you cards, balloons for the party table, paper goods and a party host for the length of the party.

The purchase price for a party package is on a per person basis, that is, a predetermined dollar amount per attendee is applied to the number of attendees at the party. The party package price per person varies depending upon the different items included in the particular party package and the length of time of the party. Party packages of longer duration or including more activities are more costly. Additional activities can be added to existing party packages by the

payment of an additional per person fee for each added activity. Each party package has a required minimum number of attendees. Petitioner's advertising materials state that "packages are subject to applicable sales tax."

By a letter dated September 2, 2004, the Division of Taxation ("Division") advised petitioner that a sales tax field audit of petitioner's business operations for the period spanning September 1, 2001 through May 31, 2004 would commence on September 16, 2004. This audit appointment letter, and an attached list of required books and records, advised petitioner that all of the business's books and records pertaining to the audit period, including cash receipts and disbursement journals, general ledgers, sales invoices, purchases invoices, cash register tapes, federal income tax returns, sales tax returns, bank statements, canceled checks and the like should be available for the auditor's review. The letter also advised that additional records and information might be required during the course of the audit.

The auditor reviewed petitioner's books and records, noted the same to be complete and observed that petitioner employed "excellent internal controls" in its bookkeeping system. The auditor noted that gross sales per books were higher than gross sales per sales tax returns since petitioner reported taxable sales as opposed to gross sales on several returns. Nonetheless, the auditor determined that gross sales per books and gross sales per petitioner's federal income tax returns were in agreement, and thus accepted petitioner's gross sales per books.

The auditor's review and analysis of petitioner's party sales revealed that when the sale of a party package is invoiced to a customer the total price for the party package, based on the type and extent of the party and the number of attendees, is listed but no sales tax is shown thereon. Petitioner, instead, internally segregates the taxable and nontaxable portions of the total charge into various cost centers in its general ledger, including a computation of the portion of the

charge deemed to be attributable to food and beverages.[1] Petitioner divides out the sales tax presumed to be included in the taxable portions of the party package price and remits this amount with the filing of its sales tax returns. The auditor advised petitioner that the entire invoice amount charged for an all inclusive party package is subject to tax, totaled the amount of party package sales per petitioner's books and records for the audit period ($1,832,964.00), and calculated tax due thereon in the amount of $157,318.28.

The auditor's review and analysis also revealed sales referred to as group party sales. For these types of sales, the members of the group are entitled to the use of the various rides, games, and other amenities available at the premises as chosen by the group, with petitioner charging a set amount per person times the number of people in the group. Unlike party package sales, these group party sales do not include any food or beverages as part of the predetermined price. Members of the group order food and beverages separately. Subsequent to the group party sale, petitioner divided the tax out of the food and beverage charges and remitted the same with its sales tax returns. Petitioner's invoices for these sales listed the full amount (i.e., the predetermined price per person plus the amount for any food or beverages purchased) but did not list sales tax. The auditor utilized the month of May 2004 as a test month, divided the food and beverage allocated portion of group party sales for the test month ($4,695.00) by the tax rate (1.0875) to arrive at taxable food and beverage sales ($4,317.24), and computed tax due on such taxable sales in the amount of $377.76. The auditor in turn computed tax due of $33.05 on this amount of tax "deemed" charged or included (but not stated or shown on the invoices), and calculated an error rate of .2433 (tax due on deemed but not shown tax [$33.05] divided by total

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[1] There are 20 nontaxable cost center accounts and 9 taxable cost center accounts in petitioner's general ledger.

group party sales for May 2004 [$13,586.00]). This error rate was applied to group party sales for the audit period, resulting in additional tax due in the amount of $1,494.24. The auditor also reviewed petitioner's asset purchases and expense purchases (including repairs and maintenance) and calculated additional tax due in the amounts of $18,380.21 and $31,018.00, respectively, based on these areas of examination.

After allowing a credit for the amount of tax remitted with petitioner's sales tax returns, the auditor determined additional tax due on party package sales, group party sales, asset purchases and expense purchases in the aggregate amount of $208,211.04.

On May 9, 2005, the Division issued to petitioner a Notice of Determination assessing additional tax due for the period September 1, 2001 through May 31, 2004 in the amount of $208,211.04, plus interest. At the hearing, petitioner conceded and agreed that no challenge is raised in this proceeding with regard to the amounts assessed on asset purchases ($18,380.21) or on expense purchases ($31,018.00). Thus, the amount of tax remaining at issue concerns tax on party package sales and group party sales and totals $158,812.52, plus interest.

As part of the audit, the Division obtained from petitioner two documents entitled Consent Extending Period of Limitations for Assessment of Sales and Use Taxes Under Article 28 and 29 of the Tax Law (consents). Each of these consents provided that the assessment of sales and use taxes against petitioner for the period September 1, 2001 through May 31, 2002 could be made at any time on or before June 20, 2005. The first consent, prepared by the auditor and delivered to petitioner on September 13, 2004, was executed for petitioner by Deborah E. Boehler under the title "accounting manager." Ms. Boehler is the individual in petitioner's employ who worked most directly with the auditor during the course of the audit. This consent is dated as signed by Ms. Boehler on September 13, 2004, and is dated as signed thereafter on September 28, 2004 by

J. Sullivan, the auditor's supervisor, on behalf of the Division. This consent is machine stamped as validated by the Division on October 12, 2004.

The second consent, also prepared by the auditor and delivered to petitioner on September 13, 2004, was executed for petitioner by Richard Dannenbaum under the title "CFO" (chief financial officer). This second consent is dated as signed on October 12, 2004 by J. Sullivan, the auditor's supervisor, on behalf of the Division, and is machine stamped as validated by the Division on October 12, 2004. However, review of petitioner's "date signed" section of the second consent reveals that while the handwritten month and day numerals, 10 and 7, respectively, are clear and unambiguous, the handwritten year portion thereof is not so clear and unambiguous. In this respect, the two handwritten numerals denoting the year could reasonably be viewed as being either 01 (i.e., 2001), 04 (i.e., 2004), or 07 (i.e., 2007), and the second such numeral is markedly different in appearance from the day numeral 7 as handwritten immediately before the year numerals. Mr. Dannenbaum did not appear at the hearing but submitted an affidavit that stated, in relevant part, that he signed the consent "with a date 10/7/07," did not sign "with a date 10/7/04," and that "Debbie Boehler, Accounting Manager, did not and does not have the authority to act on behalf of the taxpayer. She is not a member or manager of the LLC. She is not responsible for the financial operations of the business."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's argument that one of the consent forms was signed by an authorized person but reflected a date of execution falling some three years after the act of signing and the other consent form was signed by a person without proper authority to bind petitioner. The Administrative Law Judge noted that the Tax Law and regulations set forth no requirement that the consent document be dated, but rather only require

that the consent be in writing and be executed prior to the expiration of the period of limitations on assessment. The Administrative Law Judge determined that the evidence bears out that the second consent was executed by a person with authority to bind petitioner, was executed prior to the expiration of the period of limitation on assessment, and was in turn accepted and validated by the Division, thus, resulting in a valid extension of the period of limitations.

The Administrative Law Judge determined that petitioner is not involved in distinct nontaxable transactions with respect to its party package customers, but rather offers a single transaction, a party package, consisting of a number of integral component parts. The Administrative Law Judge asserted that the amount of sales tax charged was not "stated, charged and shown separately" on petitioner's customers' invoices. Accordingly, the Administrative Law Judge sustained the Division's assessment of tax on the full amount of petitioner's receipts from party package sales, and on the "tax on tax" portion of the group party sales receipts.

The Administrative Law Judge found that while petitioner utilized the unit price method for individual sales at its food concessions, the unit price method has no applicability with regard to petitioner's party package or group party sales.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues, as it did below, that the portion of the assessment pertaining to the earliest of the three quarterly periods in issue must be cancelled, based on the same arguments as presented to the Administrative Law Judge, i.e.,

a). The consent documents obtained by the Division that extend the period of limitation on assessment are invalid;

b). Petitioner seeks to use the "unit price method" with respect to its sales receipts for party packages; and

c). After taking into account the amount of sales tax remitted, no further sales tax assessment is called for.

In opposition, the Division states that the statute of limitations did not expire prior to the assessment. The Division also argues that petitioner's receipts for group sales parties are properly subject to sales tax. The Division requests that petitioner's exception be denied and the Administrative Law Judge's determination be affirmed.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 1147(c) and 20 NYCRR 535.3(b)(2) provide, in relevant part, that a taxpayer may consent to an extension of the period of limitation within which assessment of additional tax may be made as follows:

> Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

In this case, both of the consent documents were signed by persons authorized to sign on petitioner's behalf and included the extended date by which an assessment for such taxable periods may be issued. The first consent signed by Deborah E. Boehler (petitioner's accounting manager who worked with the Division's auditor during the audit) was dated September 13, 2004, and was returned to, signed and dated as accepted on behalf of the Division. The second consent form signed by Richard Dannenbaum (petitioner's chief financial operator) indicated a date that was illegible, was returned to, signed and dated as accepted on behalf of the Division. Both consents fall prior to the expiration of the period of limitations on assessment for the three

earliest periods in question. Petitioner argues that the consent document would not become effective until such future date written on the consent. We reject this argument. Tax Law § 1147(c) sets forth no requirement that the consent document be dated, but rather only requires that the consent be in writing and be executed prior to the expiration of the period of limitations on assessment. Accordingly, we find that both consents meet these requirements.

To establish a statute of limitations defense, the party raising it must go forward with a prima facie case showing that the waiver was not executed before the expiration of the prescribed period (***see, Matter of Healy, Yonkers, Atlas-Gest, Joint Venture***, Tax Appeals Tribunal, March 3, 1994; ***see also***, ***Matter of The Tides Inn***, Tax Appeals Tribunal, April 2, 1992). We note that petitioner did not affirmatively raise the statute of limitations defense in its petition or at the hearing. Further, petitioner failed to introduce the evidence necessary to present a prima facie case to support such a defense. Mr. Dannebaum did not appear at the hearing and testify as to the date on the consent. Further, his affidavit does not explain his intent in signing the consent by inserting a date after the consent would have expired.

Next, we address petitioner's argument that it used the "unit price method" with respect to its sales receipts for party packages. Tax Law § 1105(a) imposes a sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28 of the Tax Law]."

Tax Law § 1105(d)(i) imposes sales tax, in pertinent part, on:

> 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.

Tax Law § 1105(f)(1) imposes sales tax on:

> Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state . . . except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools.

Tax Law § 1101(d)(2) defines "admission charge" as "the amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor." Tax Law § 1101(d)(10) defines "place of amusement" as "any place where any facilities for entertainment, amusement, or sports are provided."

In the present case, petitioner was in the business of operating an entertainment facility offering bowling, ice skating, rock climbing, a roller coaster, and other rides, Lasetron, and games operated by tokens. One could individually purchase any of the different activities, plus food and beverage, separately or purchase a party package. The party package included pizza or hot dogs, soda, ice cream, game tokens, party invitations, thank you cards, balloons for the party table, paper goods and a host for the length of the party.

Customers who purchased a party package were issued written receipts. However, they were invoiced as a single charge party package. The prices for the party packages were not broken down into taxable and tax-exempt items on the bills presented to the customers or when advertised (Tr., pp. 160-161; Exhibit 3). Petitioner would internally unbundle the receipt into what items were taxable and non-taxable for the sole purpose of remitting sales tax. Sold separately, some of the items would be taxable and some would not.

The regulation at 20 NYCRR 532.1(b)(3) provides that when a customer is given, *inter alia*, any sales slip or receipt or the price paid or payable, the sales tax must be "stated, charged, and shown separately on the first of such document," and that the words "tax included" or words to that effect on the sales slip or receipt are not sufficient to constitute a "separate statement" of

the tax, so that the total amount charged is deemed to be the sales price only. However, it has long been the recognized policy of the Division that where no written receipt is given to a customer, a business establishment can include sales tax in the sales price of the item (the so-called "unit price" method) as long as the customer is made aware of the inclusion of sales tax in the sales price by visibly displaying a placard to that effect to all customers (20 NYCRR 532[b][4]; ***see***, ***Matter of Auriemma***, Tax Appeals Tribunal, September 17, 1992; ***Matter of LaCascade, Inc. v. State Tax Commn.***, 91 AD2d 784 [1982] [unit price method held inapplicable where taxpayer gave each of its customers a written receipt]; ***see also***, ***Matter of Dowd's Beefalo Farms #2***, Advisory Opn., State Tax Commn., March 6, 1981, TSB-H-81[56]S; Sales Tax Memo TSB-M-79[15]S, December 3, 1979). The Administrative Law Judge found credible the auditor's testimony that there were not any placards in the party office that stated the taxable and non-taxable components of the party package (Tr., pp. 129-130; 162). Since no such sign was displayed, the Administrative Law Judge correctly determined that the Division's assessment of tax on the full amount of petitioner's receipts from party package sales, and on the "tax on tax" portion of the group party sales receipts was proper. Further, signs advising that all applicable taxes are included are not sufficient to constitute the separate statement of tax on a receipt as is required (***see***, Tax Law § 1132[a][1]; 20 NYCRR 532.1[b][1], [3].

We have reviewed the arguments raised by petitioner and conclude that the Administrative Law Judge has fully and correctly addressed each of the issues presented. We can find no argument raised by petitioners on exception that would lead us to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Lake Grove Entertainment, LLC is denied;

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

3. The petition of Lake Grove Entertainment, LLC is denied; and

4. The Notice of Determination dated May 9, 2005 is sustained.

DATED:Troy, New York
July 23, 2009

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

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