STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
677 NEW LOUDON CORPORATION D/B/A NITE MOVES	:	DECISION
	:	DTA NO. 821458
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 December 1, 2002 through August 31, 2005.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued March 12, 2009 with respect to the petition of 677 New Loudon Corporation d/b/a Nite Moves. Petitioner appeared by Andrew McCullough, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a letter brief in reply. Oral argument, at the request of the Division of Taxation, was held on October 14, 2009 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this decision.

ISSUES

I. Whether petitioner has established that the door admissions and fees for private dances it collects from its patrons are not subject to sales tax as an admission charge to a place of amusement pursuant to Tax Law § 1105(f)(1).

II. Whether petitioner has established that the door admissions and charges for private dances it collected from its patrons are not subject to sales tax as amounts paid as charges of a roof garden, cabaret or other similar place pursuant to Tax Law § 1105(f)(3).

III. Whether petitioner has established that the door admissions and charges for private dances it collected from its patrons are not subject to sales tax pursuant to Tax Law § 1105(d)(i), as a cover, minimum, entertainment or other charge made to patrons in an establishment that provides taxable food or beverages.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "5," "6," "8," "9," "10," "12," "13," "14" and "15," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> 677 New Loudon Corporation, doing business as Nite Moves (petitioner) operated an adult entertainment establishment, referred to as an adult juice club, located in Latham, New York, offering semi nude and nude female performances during the audit period at issue, December 1, 2002 through August 31, 2005. Petitioner served only non-alcoholic beverages, including bottled water, soda and juice. Up until 2004, petitioner sold light lunch items, but this was discontinued due to low demand. From that point on, petitioner only sells beverages of a non-alcoholic nature to its customers.[1]

After a request for books and records, the Division of Taxation (Division) determined that petitioner's books and records were adequate for the performance of a detailed audit. The Division audited petitioner's fixed asset purchases and recurring expense purchases in detail and

[1]We have modified this fact to more accurately reflect the record.

determined that there was additional tax due of $4,038.67 on additional expense purchases of $50,483.00 for the period in issue. Petitioner does not dispute this amount.

Pursuant to an executed test period audit method election agreement entered into by the parties, the Division performed a test of petitioner's sales for the quarter ending August 31, 2005. Petitioner's sales were comprised of four categories: 1) door admission fees, for general admission charges; 2) "couch sales" for the service of private dances performed for customers; 3) register sales for non-alcoholic beverages sold; and 4) house fees, for the fees paid by the dancers to the club. The Division determined that petitioner had not paid tax on its door admissions ($64,612.00 for the test period) or its fee for private dances ($321,535.00 for the test period), and the Division maintains that these items are subject to sales tax. Petitioner had collected tax on its register sales of beverages ($68,937.00 for the test period) and was given credit for taxes paid. The Division determined that the house fees ($18,650.00 for the test period) were not subject to tax.

According to the Division, petitioner should have paid tax on test period items totaling $281,665.00[2] at a tax rate of 8% for additional tax for the test period of $22,533.20. Giving the taxpayer credit for taxes paid in accordance with its filed sales tax returns for the same period of $5,077.71, the additional tax due was $17,455.49. The Division divided the additional tax due for the test period by the total gross sales reported by petitioner on its sales tax returns for that quarter, $455,165.00, to determine an error rate of 3.8350%. The Division next multiplied the error rate by the total gross sales reported on petitioner's sales tax returns for the audit period

[2] In a footnote, the Administrative Law Judge observed that the Division omitted August taxable sales in this calculation, wherein the end result would have been $455,084.00 for the test period total, and significantly higher tax for the audit period. There was no explanation provided for this omission. Accordingly, the omission of tax appears to be mathematical errors and has no effect on the notice of determination as issued.

($3,257,417.00) to determine $124,921.94 in additional tax due on sales for the entire period in issue. Then the Division added the additional tax due on expenses purchases of $4,038.67, to arrive at a total additional tax due of $128,960.61.

The Division's audit resulted in its issuance of a Notice of Determination dated February 13, 2006 (notice number L-026619882-9) for additional sales and use taxes due for the period December 1, 2002 through August 31, 2005 in the amount of $128,960.61 plus interest. No penalties were assessed.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The Division's auditor, based on his knowledge of prior similar audits, proceeded on the premise that the admission fees at the door, the private couch dances, and the beverages sold were all taxable (although no additional tax was ultimately found due on beverages). The auditor spoke briefly with petitioner's management and observed the layout of the business prior to its opening. As noted earlier, no additional tax was found due on beverages, public dances or on house fees. However, the auditor found that the only area on which petitioner was collecting tax was for register sales for drinks. The auditor determined that tax should have been charged for the fees on private dances and admission charges at the door and proceeded to calculate the amount of tax due on those areas as well. The auditor did not make observations of either the public (stage) dances or the private couch dances as part of the audit. There is no evidence that petitioner inquired about possible exemptions from sales tax.[3]

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> We note that the audit was commenced in September, 2005.[4] Before beginning the actual audit, the auditor spoke with the taxpayer about the club's operations (***see***, Tr., pp. 30-31). He was informed that patrons paid a $5.00 door fee, and patrons were required to buy a minimum of two non-alcoholic beverages, paid also at the time of admission. Stephen Dick, CFO and manager of petitioner,

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[3]We have modified this fact to more accurately reflect the record.

[4]The test period used for the audit was from June through August, 2005.

> testified that in 2004, when the business was remodeled, a sign advising customers of the two-drink minimum was removed. Although the sign was removed in 2004, the record, including testimony of the auditor and Mr. Dick, shows that the policy requiring the two drink minimum continued. It is a standard practice in the industry, states Mr. Dick, to ask customers to buy their drinks when entering the premises. Mr. Dick testified, however, that he has never had a patron enter the premises only to have a drink (***see***, Tr., pp. 42; 43). Once the customer pays for the two drinks, he can still decline to drink them. The bartenders still ask customers if they would like a beverage, but do not require the purchase of additional drinks to remain in the club (***see***, Tr., p. 70). The cost of beverages was estimated at $3.00 to $5.00 each. The sales of beverages consisted of approximately 15% of petitioner's total sales income, or approximately $460,000.00 during the audit period. Beverage sales were second only to private dances as a profit center for petitioner (***see***, Tr., pp. 18-29).
>
> The admission charge at the door was $5.00 at the beginning of the audit period, and was raised to $8.00 in 2003, and later to the current admission fee of $10.00 ($3.00 before 5:00 P.M.). The admission fee is a general admission to the club to watch the public performances on the main stage.[5]

Petitioner provides entertainment consisting of exotic dancers performing routines in costume, for a portion of the time, and in the nude for the balance of the time that they are on stage. The main stage where the performances take place is 12 feet by 10 feet, with a brass pole from floor to ceiling and a brass rail around the edge of the stage. Petitioner has standards it sets for the costumes worn by the dancers and the dancers generally have several theme costumes to accompany their routines. Dancers choose their own music and are encouraged to enhance the entertainment value by pairing the dance music with the theme chosen.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> Petitioner introduced into evidence three DVDs illustrating various dance techniques. The first was an undated DVD of dance clips taken from YouTube depicting routines that two of petitioner's dancers adapted into their own dance routines. The YouTube DVD was comprised of three pole dance routines, two of

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[5]We have modified this fact to more accurately reflect the record.

which were material from PoleJunkies.com, a Canadian internet site established to teach pole dancing for fitness. Petitioner's dancers often used such sources to incorporate new dance moves and learn new techniques, particularly with pole routines.

The second DVD was of public stage performances (as opposed to the private dance area) at petitioner's place of business. This DVD, entitled "Nite Moves [sic] Routines" was approximately 22 minutes in length and showed dances by two dancers. Each were using pole techniques and dance steps to music.

The last video introduced was taken when the club hosted Miss Nude Capital District in 1998, and had a feature performance, one which utilized props, themes and corresponding steps and music to the themes chosen. This video was introduced as an example of dance performance with a theme, though filmed outside the audit period.[6]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

The dancers are hired from a variety of backgrounds, training and levels of dance experience. Some have no prior experience at all. Some have training in gymnastics, ballet, jazz, or exotic dance and develop their routines within the parameters set forth by the club, advancing their own ability and creativity over time. New steps and routines are learned from watching videos and other dancers.[7]

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

The patron is able to select a particular dancer to perform at table side or to perform a private couch dance, while others are dancing on the stage. Patrons can request a table dance on the open floor area off the stage, partially clothed, in close proximity to a particular customer at their table, for which there is no additional fee payable to the club. Customarily, the dance will result in tips to the dancer, and these tips are not shared with the club. For an additional club charge, patrons can request a private dance in a small private room with the same or another dancer. The private dances, which generate the most income for the club, are performed in the nude in an intimate setting of a small private room with a

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[6]We have modified this fact to more fully reflect the record.

[7]We have modified this fact to more clearly reflect the record.

> chair or couch. There are six small private rooms each with a curtain. They do not have dance poles as does the stage. Petitioner's expert, Judith Lynne Hanna, a cultural anthropologist, testified that she did not observe the private dances at the club. Nevertheless, Dr. Hanna stated that in her opinion the dance routines were very similar to those performed on stage, with the difference that the dancer's focus would be on a particular patron. During the beginning of the audit period, private dances were $20.00 for a three-minute private dance, which petitioner and the dancer shared equally. In the latter part of the audit period, the cost of private dances was raised to $25.00; petitioner received $15.00 and the dancer received $10.00.[8]

House fees, another income category in petitioner's business, represent a fee paid by the dancers as independent contractors to petitioner. This fee is a space rental agreement for the rental of the facility in which to perform. The dancers are afforded the use of the stage, equipment and the dressing area for $25.00 per day, or $30.00 per evening. The Division did not include the house fees in taxable sales.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> Stephen Dick, the CFO and general manager of petitioner, is responsible for the day to-day business management and handles the bookkeeping for petitioner. Mr. Dick also acts as a DJ one afternoon a week, and worked with two dancers who wanted to learn how to make dance moves similar to that seen on the YouTube video. According to Mr. Dick, the young ladies watched the video until they learned how to do the moves and now use the moves in their routines (Tr., p. 51). Mr. Dick testified that he made the YouTube DVD himself, recording routines done by various Canadian dancers. He also made the video entitled "Nite Moves [sic] Routines," in preparation for this litigation. He then sent the videos to Dr. Hanna in Maryland to review for her opinion (***see***, Tr., pp. 55-57). The third DVD entitled "Miss Nude Capital District" was made in 1998. The two latter videos represent dances in the public area of the club (***see***, Tr., pp. 63-67). There were no DVD recordings of private dances.[9]

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[8]We have modified this fact to more accurately reflect the record.

[9]We have modified this fact to omit extraneous material.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> Dr. Judith Lynne Hanna, referred to above, was retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance critic. Dr. Hanna earned her master's and doctoral degree in anthropology from Columbia University, specializing in nonverbal communication and the arts and society.[10] Dr. Hanna has training in several dance genres and has taught dance, as well as college courses on dance theory. Since 1995, Dr. Hanna has been conducting on-site research on exotic dance and adult entertainment. Along with the research approach, she has examined the characteristics and choreography of exotic dance.[11]

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

> Dr. Hanna reviewed and analyzed the three dance videos referred to above, particularly the DVD that contained two dancers performing on petitioner's public stage for about 22 minutes.[12] Dr. Hanna stated as her expert opinion that this video represented choreography, or arrangement, of about 61 different moves with theme and variation patterns with repetition. She identified the use of locomotion, gesture, pole, mirror and floor work at variable levels in response to music.
>
> > I saw a range of movements that were typical of adult entertainment elsewhere, and I saw the individual creativity of the dancers. They used the mirror, they used the pole, they used the floor, they used the tip rail, they used the ledge overhead . . . I saw, also, some interaction with a patron at the tip rail on giving a tip (Tr., pp. 90-91).
>
> Dr. Hanna reviewed two other videos that some of the dancers have used in their routines. On the basis of the above, Dr. Hanna formed and prepared the report of her expert opinion. When she subsequently arrived in the area to testify in this matter, she spent two hours at the club observing six dancers. She also spoke with bartender and former dancer, Michelle Miller. One of the dancers she

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[10]Dr. Hanna's dissertation was on a group's choreography and its meaning and style. She is a senior research scholar in the Department of Dance and an affiliate in the Department of Anthropology at the University of Maryland, College Park, Maryland.

[11]We have modified this fact to more concisely reflect the record.

[12]The DVD entitled "Nite Moves [sic] Routines."

observed did not perform pole work, but instead used a country dance routine, complete with costumes and her own artistic interpretation.[13]

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> Dr. Hanna's report discussed, at great length, dance in general, and exotic dance in great detail. Her report focused on the sequential parts of the performance, the messages of the performer, the skill it takes to perform dance routines, and the psychology of dance and its effect on the viewers. She set forth a description in detail of the choreographed sequence for each dancer on the DVD videos she reviewed for her testimony:
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> > The aesthetic principles, they use unity, variety, repetition, contrast, transitions. So you saw the dancers on the pole, on the floor, midway, you saw smaller movements, you saw larger movements, you saw high quality performances, you saw balance . . . . You have some harmony, and sometimes choreography may have some dissonance, again, to attract attention.
> >
> > [Dance] has a vocabulary, it has certain movements, it has meaning, it has some ambiguity (Tr., pp. 96-97).
>
> Dr. Hanna concluded the "presentations at Nite Moves unequivocally were live, dramatic choreographic performances" (Tr., p. 94 [lines 14-15]).
>
> Dr. Hanna did not observe the dances in the private area of the club but nevertheless insisted on direct and redirect examinations that the dances in the private areas were choreographed performances.[14]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner charged a general admission at the door of its premises as an entrance fee, which permitted a patron to view all of the stage dances, and any table dance performed for that patron or another on the open floor. Further, petitioner charged an additional fee for the private couch

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[13]We have modified this fact to more accurately reflect the record.

[14]We have modified this fact to more accurately reflect the record.

dances. Since the private dance charge would qualify as a charge for additional entertainment, the Administrative Law Judge found that it would be considered an admission charge under the Tax Law.

The Administrative Law Judge observed that it is undisputed that petitioner's place of business is a place of amusement under the statute. Accordingly, petitioner's admission fee and private dance charge would be subject to sales tax under Tax Law § 1105(f)(1), unless it qualified for the exemption as a dramatic or musical arts performance. The Administrative Law Judge found that petitioner satisfied the enumerated exception contained within the taxing statute because the entertainment provided consists of "dramatic or musical arts performances."[15]

The Administrative Law Judge stated that petitioner sought the exemption and introduced evidence of an expert in support of its position. The Administrative Law Judge pointed out that petitioner's evidence included the three DVD videos described above. The videos depicted dance routines that included acrobatic pole maneuvers, which the Administrative Law Judge opined, are no small feat to accomplish.

The Administrative Law Judge found that petitioner met its burden of proof pursuant to Tax Law § 1132 on this issue and that the admission charges it collects from patrons at the door and for the private dances meet the exemption to taxation under Tax Law § 1105(f)(1) and, therefore, are not taxable under this section.

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[15]Petitioner premised its arguments on language in a determination by an Administrative Law Judge in an unrelated matter. We note that such determination does not have precedential value in a proceeding before us (***see***, Tax Law § 2010[5]).

The Division next argued 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."

Other than the existence of the public performance for profit, the Administrative Law Judge noted there are two tests that must be met for petitioner's admission charges to be taxed under this section: its business must be a roof garden, cabaret or similar place, and its beverages must be more than incidental to the performances. The term "cabaret," as used by the Administrative Law Judge, is defined as "a restaurant serving liquor and providing entertainment (as by singers and dancers); a nightclub." The Administrative Law Judge explained that a "roof garden" is a restaurant or nightclub at the top of a building often in connection with or decorated to suggest an outdoor garden. Based on these definitions, the Administrative Law Judge observed that the common denominator between a cabaret and roof garden is that they are both restaurants that also have entertainment. Since petitioner does not serve either alcohol or food, the Administrative Law Judge found that petitioner did not meet the definition of either. The Administrative Law Judge pointed out that if one could establish that petitioner's place of business constitutes a "similar place" where a public performance is staged for profit, it would still be necessary to show that petitioner's sales of refreshments are more than incidental to its provision of entertainment. In the present case, the Administrative Law Judge found that petitioner's beverage sales constitute approximately 14.2% of its total sales, and that this fact was a strong indicator that the sale of refreshments was merely incidental to petitioner's business. Furthermore, the Administrative Law Judge also found the fact that petitioner took down the sign stating a policy of a two-drink minimum, payable upon entrance, is evidence that it no longer

required its patrons to make such purchases. Therefore, the Administrative Law Judge determined that the sale of refreshments was incidental to petitioner's business, and that petitioner's admission charges were not subject to tax pursuant to Tax Law § 1105(f)(3).

The Division next argued, in the alternative, that the admission charges were subject to tax pursuant to Tax Law § 1105(d)(i). In the view of the Administrative Law Judge, this section cannot be applied to the taxation of the admission charges herein. First, in her view, the focus of Tax Law § 1105(d)(i)(1) is to tax food and beverages (the Administrative Law Judge noted that there was no dispute that the beverages in this case were taxable). The Administrative Law Judge stated that if patrons visited petitioner's business because the juice beverages were extraordinary, and happened to experience entertainment while there, this section would then apply. The Administrative Law Judge found that patrons do not frequent petitioner's business for the juice drinks, but rather to see the performers dancing and, thus, the taxation of the admission charges is not provided for here, but rather under section 1105(f)(1) of the Tax Law.

Secondly, the Administrative Law Judge found the proper interpretation of the parenthetical "except those receipts taxed pursuant to subdivision [f] of this section" to Tax Law § 1105(d)(i) is that since it has been determined that the admission charges collected by petitioner from its patrons were subject to tax pursuant to Tax Law § 1105(f)(1), but met the exception contained therein, they cannot be held taxable under Tax Law § 1105(d). Accordingly, the Administrative Law Judge found that the Division erred in taxing the admission charges in this matter under Tax Law § 1105(d)(i).

Having found that petitioner's charges were not subject to tax, the Administrative Law Judge deemed petitioner's constitutional protection arguments moot.

ARGUMENTS ON EXCEPTION

The Division argues on exception, as it did below, that petitioner's admission charges are taxable pursuant to Tax Law § 1105(d)(i)(1); (f)(1) and (3), all of which exist in order to impose sales tax on the receipts for items enumerated by the Tax Law.

Similarly, petitioner continues to maintain that it is exempt from sales tax on its admission charges and private dance performances as admission to a theater featuring choreographed dance performances. Petitioner further states that nude dancing is protected expression under the Constitution and should be recognized as such. Petitioner additionally argues that it is exempt from sales tax on its admissions and private dance performances as an entertainment venue where the sales of refreshments are merely incidental to the performance.

OPINION

The primary focus of this matter is whether the admission fees collected at the door and the couch fees collected for the private dances are subject to sales tax.[16]

The Tax Law presumes that all of a taxpayer's sales receipts are subject to tax until the contrary is established and the taxpayer has the burden of proof in that regard (***see***, Tax Law § 1132[c]). Exemptions from tax are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the statute entitles him to the exemption (***see, Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]).

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[16]It will be recalled that although the sale of beverages exceeded the amount of admission fees at the door, the sales tax on beverage sales was reported and paid and are not an issue here. Whether such beverage sales were incidental to petitioner's business does remain an issue, however.

The facts demonstrate that petitioner operates as an adult juice club where dance performances are performed for its patrons by nude or semi nude females. Live entertainment or dancing are forms of amusement (***see, Matter of Antique World,*** Tax Appeals Tribunal, February 22, 1996).

We first address whether the admission charges collected by petitioner from its patrons were subject to sales tax. Tax Law § 1105(f)(1) provides, as relevant here, that a sales tax shall be imposed 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 for admission to . . . exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances* . . . (emphasis added).

Dramatic or musical arts performances are further defined in Tax Law § 1101(d)(5) as admission charges "for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance." An "admission charge" is defined as "[t]he 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][2]). The term "place of amusement" is defined by Tax Law § 1101(d)(10) as "[a]ny place where any facilities for entertainment, amusement, or sports are provided," which includes without limitation a "theatre of any kind . . . or other place where a performance is given" (20 NYCRR 527.10[b][3][i]). The Division's regulations include an example of an exempt musical arts performance as follows:

> Example 4: A theatre-in-the-round has a show which consists exclusively of dance routines. The admission is exempt since choreography is included within the term musical arts (20 NYCRR 527.10[d][2]).

We reverse the determination of the Administrative Law Judge.

In ***Matter of 1605 Book Center v. Tax Appeals Tribunal*** (83 NY2d 240 [1994], ***cert denied*** 513 US 811 [1994]), the Court of Appeals upheld imposition of sales tax on receipts from peep show booths pursuant to Tax Law § 1105(f)(1) as places of amusement. That case involved two types of live shows. The first included live shows available by coin-operated machines, in private booths that surrounded a stage on which nude or partially nude females performed. The other venue, known as the "fantasy booth," also functioned with a coin deposited in a private booth, allowing a patron to converse with a scantily-dressed woman. In both booths, the patron was separated from the performer by a glass partition that was covered by a curtain or screen. The curtain parted for a set time only after the patron deposited coins in the machine. The peep show booth consisted of separate booths surrounding a stage from which patrons were able to view nude or partially nude females performing. Patrons would enter the booths and deposit coins in a slot, which resulted in a curtain or screen raising to enable the patron to view a live performance or speak with the scantily-dressed woman performing. Petitioner in ***1605 Book Center*** argued that its venue was not a place of entertainment or amusement, but rather that the booths were devices like a juke box or video game. The Court of Appeals rejected this argument and held that the coins so deposited were a fee paid as an admission charge to a place where entertainment is provided and was subject to tax under Tax Law § 1105(f)(1). The Court observed that there could be no doubt that if these patrons observed these live performances with other audience members, rather than private booths, the sales tax would also apply.

Similarly, Nite Moves is an adult juice club and a place where entertainment is provided. This case has many of the same elements as ***1605 Book Center***. Nite Moves provides female performers, either in the public area or private area, who dance and speak with patrons. In some

ways, the setting here is even more intimate than that in ***1605 Book Center***, since here, the customers and the performers actually can touch, and the performers are not merely scantily clad, but often nude. Petitioner does not argue that it is not a place of amusement, but rather that it is excepted by the statute because the entertainment provided consists of dramatic or choreographed musical arts performances. In support of this argument, petitioner presented its expert.

Dr. Hanna based her testimony on her review of the three DVDs and a conversation she had with Michelle Miller, the bartender and former performer at Nite Moves. Dr. Hanna referred in her report and testimony in great detail about herself and her experience. When it came to specifics about what she observed at Nite Moves, her testimony was more limited. She had apparently not visited Nite Moves prior to coming to this area to testify in this matter. As was noted earlier, Mr. Dick sent the three DVDs to her in Maryland to review. In addressing the issue of choreography, generally, she stated:

> The aesthetic principles, they use unity, variety, repetition, contrast, transitions. So you saw the dancers on the pole, on the floor, midway, you saw smaller movements, you saw larger movements, you saw high quality performances, you saw balance . . . . You have some harmony, and sometimes choreography may have some dissonance, again, to attract attention.
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> . . . [D]ance has a vocabulary, it has certain movements, it has meaning, it has some ambiguity (Tr., pp. 96-97).

Dr. Hanna described the exotic dance routines variously as:

> somewhat "risqué" or "naughty" adult play, a fanciful teasing that transgresses social decorum and dress codes in an ambience (sic) ranging from sedate to carnival-like. Exotic dance is erotic fantasy and communication with a display of nudity, disclosure of more skin and different movements than are seen in public, the use of high heels (often six inch stiletto platform shoes) and incorporation of jazz-like, improvisatory movements in routines (Exhibit "7," p.7, ¶ 4).

Dr. Hanna stated, based on her review of the three DVDs that these naughty, risque, playful, teasing, erotic, nude performances at Nite Moves were "live, dramatic choreographed performances" (Tr., p. 94 [lines 14-15]). Dr. Hanna concluded that:

> the presentations at Nite Moves unequivocally were live dramatic choreographic performances. They are in a *theater* that shows only dance routines. The theater actually is a little bit like an off Broadway theater. It's small and it's intimate, it's like theater-in-the-round (Tr., p. 94 [lines 13-19]).

Further, while Dr. Hanna admits that she did not observe the performances in the private areas of the club, she nevertheless insisted, both in her direct and redirect testimony, that the dances in the private areas were also choreographed performances (***see***, Tr., pp. 106-108).

We find, notwithstanding Dr. Hanna's testimony, that petitioner is an adult juice club for adult entertainment and not a theater or theater-in-the-round contemplated by the statute and regulations. This is consistent with Steven Dick's testimony that petitioner is an adult juice club. With regard to whether it is a choreographed performance, we note that the record sets forth how the dancers help each other when they are getting started, how they view other dancers on YouTube and practice the dances they see on the internet. As we use the term here, "choreography" is "the art of composing ballets and other dances and planning and arranging the movement, steps, and patterns of dancers" (Random House Webster's College Dictionary 232 [2nd ed 1997]). We question how much planning goes into attempting a dance seen on YouTube. The record also shows that some of the moves on the pole are very difficult, and one had best plan how to approach turning upside down on the pole to avoid injury. However, the degree of difficulty is as relevant to a ranking in gymnastics as it is dance. Dr. Hanna's view of choreographed performance is so broad as to include almost any planned movements done while playing canned music. To accept Dr. Hanna's stunningly sweeping interpretation of what

constitutes choreographed performance, all one needs to do is move in an aesthetically pleasing way to music, using unity, variety, repetition, contrast, transition.

The private dances are performed in a private area containing a chair or couch. Dr. Hanna said, *inter alia*, that she saw a range of movements typical of adult entertainment elsewhere and that she saw the individual creativity of the dancers. It is unclear how, based on a 22 minute DVD[17], Dr. Hanna could divine a particular dancer's "creativity," as opposed to a dancer on YouTube, for instance, from which the performance may have been copied. Nevertheless, Dr. Hanna's opinion is steadfast in her conclusion and stated the dancers on the "Nite Moves [sic] Routines" DVD "used the mirror, they used the pole, they used the floor" (Tr., pp. 90-91 [lines 24;1]). Yes, and so did the dancers on the YouTube DVD.

Further, the terminology that Dr. Hanna employs in her report and testimony at times appears designed to neatly fit into the statutory exemption language, e.g., that the performances at Nite Moves constitute "live, dramatic musical choreographic performances" (Exhibit "7," p. 14). We also find that Dr. Hanna's credibility is compromised by her insistence, even after admitting that she did not observe any of the private dances, that the areas at Nite Moves set aside for private dances have the same performances as the public area of Nite Moves. We note that the only dances appearing on the DVDs were of the public variety, and one of the DVDs did not involve Nite Moves performances at all. In examining her testimony and the amount of weight it should be given, it was not helpful for Dr. Hanna to state that she knows what occurs in the private areas of petitioner's venue, which she did not herself observe. We find that the certainty with which Dr. Hanna holds to this conclusion, even in the absence of direct knowledge

[17]This is the only DVD made within the audit period that actually contains dancers at petitioner's venue.

or observation of what occurs in the private areas at Nite Moves, undermined her overall testimony.[18]

Additionally, we find Dr. Hanna's testimony overreaching when she testified that petitioner's club was like a theater or theater-in-the-round, again tailoring her testimony to the Division's language in its regulations. We note that Dr. Hanna did not qualify as an expert in what constitutes theater. If we were to place a small stage in our living room, with chairs around it, would it still be a living room? We believe that it would, and petitioner remains an adult juice club where adult entertainment is presented. For the above reasons, we do not find Dr. Hanna's testimony compelling.

As the Court of Appeals stated in ***Matter of 1605 Book Center:***

> there can be no doubt that the sales tax would apply if patrons viewed the same live performance in the company of other audience members in a theater (***see*****,** 20 NYCRR 527.10[b][3]). The booths are factually not taxably distinguishable from a usual theater except for the element of privacy. Accordingly, the fee paid is an admission charge to a place where entertainment is provided (***Matter of 1605 Book Center v. Tax Appeals Tribunal***, ***supra***, 83 NY2d at 245).

Although in the above case, where only private booths were in dispute, Nite Moves involves both live private performances and performances where patrons can view the show along with other audience members. We conclude that admission charges to the private areas of Nite Moves, where petitioner generates the most income, are, from a tax standpoint, indistinguishable from the admission charges to the public areas of the club and both are subject to sales tax pursuant to Tax Law § 1105(f)(1).

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[18]This was exacerbated by the continuous stream of leading questions by petitioner's counsel and the fact that neither the Division's attorney nor the Administrative Law Judge objected to it.

We reject the argument that petitioner's place of business constituted "a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance" for purposes of the tax statute (Tax Law § 1101[d][5]). As the Court stated in ***Matter of 1605 Book Center***, "what was omitted from the exemptions was not intended to be excluded from the otherwise comprehensive taxable sweep of section 1105(f)(1) (citations omitted)" (***Matter of 1605 Book Ctr. v. Tax Appeals Tribunal, supra).***

Petitioner has, therefore, failed to meet its burden of proof pursuant to Tax Law § 1132. We conclude that the admission charges and fees that petitioner collects from its customers for the public and private dances are taxable under Tax Law § 1105(f)(1).

Petitioner's admission charges are also 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." Tax Law § 1101(d)(12) defines roof garden, cabaret or similar place as:

> Any roof garden, cabaret or other *similar place* which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, *so long as such serving or selling* of food, refreshment or merchandise *is merely incidental* to such performances (emphasis added).

We find that petitioner's place of business constitutes a cabaret or similar place where a public performance is staged for profit. Nevertheless, it remains to be determined whether petitioner's sales of refreshments are more than incidental to its provision of entertainment. We look for guidance to Federal case law for assistance in determining the meaning of incidental, since this provision is derived from the former Federal excise tax on cabaret charges (***see***, IRC

§§ 4231, 4232; ***see also***, ***Matter of Empire Mgt. and Prods.*** [TSB-A-96(9)S]; ***Matter of Tralfamadore Café*** [TSB-A-85(42)S]). In determining whether sales of refreshments are only incidental to the furnishing of entertainment, one of the factors to be considered is the ratio of sales for refreshments to gross sales (***see***, ***Roberto v. United States***, 357 F Supp 862 [1973], ***affd*** 518 F2d 1109 [1975]; ***Dance Town, U.S.A. v. United States***, 319 F Supp 634 [1970], ***affd*** 446 F2d 882 [1971]). In the present case, petitioner's beverage sales ($68,937.00) for the three month test period ending August 31, 2005 exceeded the club's door admissions for the test period ($64,612.00). We note further that even after the club was refurbished and the sign setting forth the two drink minimum was removed, the evidence shows the underlying policy remained the same. The club continued to charge for two drinks at the door as late as August, 2005, when the audit commenced. When one considers that the above amounts are for only one tax quarter out of a three year audit period, and that for the audit period, drink sales totaled approximately $460,000.00 or 15% of total sales, it is clear that beverage sales were not merely incidental to this business.

Mr. Dick testified, and we do not doubt, that the club's customers do not frequent the establishment for its drinks. However, while drinks may be incidental from the customer's perspective, that is not the issue. Whether the sale of drinks are incidental relates, in this context, to the extent to which the sale of beverages is a profit center for Nite Moves. In this case, the sale of drinks is second only to private dances as an income source for petitioner. Where, as here, the sales of drinks by petitioner exceed the amounts taken in as cover charges at the door, it would be counter intuitive to view such sales as incidental.

Furthermore, petitioner's policy of requiring customers to purchase at least two drinks was evidenced by the sign posted on the door, which was only removed in 2004,[19] and the testimony of the auditor and Steven Dick himself, who stated that when a patron enters the club, he will be asked if he is ready to "buy your drinks" (Tr., pp. 42, 43, 46). We also note that contrary to Mr. Dicks's implication that petitioner no longer required its customers to purchase drinks after 2004, the record is, at best, contradictory. The audit commenced in September, 2005. The auditor testified that upon entering petitioner's premises, a patron was charged for two drinks as well as the admission charge (***see***, Tr., pp. 30-31). We view it as significant that the auditor's testimony was not challenged on cross examination. We conclude that the club's selling of beverages was not incidental to petitioner's business, but was an integral part of that business. Accordingly, all of petitioner's admission charges, including charges to private areas of the club, are also taxable pursuant to Tax Law § 1105(f)(3) as charges of a cabaret or other similar place that provides its customers with a place for public performance for profit in conjunction with serving beverages not merely incidental to the business (***see***, Tax Law § 1101[d][12]; 20 NYCRR 527.12[b][2][ii]).

The Division also argues 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*):

[19]A year before the end of the audit.

(1) in all instances where the sale is for consumption on the premises where sold; (emphasis added).

We agree with the Division that such charges could be subject to tax under Tax Law § 1105(d) in the alternative. We view the limiting language of Tax Law § 1105(d)(i), limiting tax under this section to receipts not taxed under subdivision "f" of this section, as merely to protect taxpayers against double taxation. Further, we find the Administrative Law Judge erred in opining that this provision would apply only in situations where petitioner's drinks were extraordinary and were the primary reason for patrons to frequent Nite Moves. The Administrative Law Judge completely ignored the broadly inclusive language of subdivision (d), i.e., "*including in the amount of such receipts any cover, minimum, entertainment or other charge* made to patrons . . .(emphasis added)."

Finally, we come to petitioner's constitutional argument, which was not considered by the Administrative Law Judge, inasmuch as it was deemed moot. We address it now summarily. Petitioner appears to argue that if the sales tax here were directed solely at nude dancing in establishments like petitioner's, it would be a denial of its free speech rights and a denial of equal protection. That might be true if those were the facts here, but those are not the facts here. Petitioner has failed to demonstrate that it is being treated any differently than any similarly situated taxpayer.Thus, this argument, too, is rejected.

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

1. The exception of the Division of Taxation is granted;

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

3. The petition of 677 New Loudon Corporation d/b/a Nite Moves is denied; and

4. The Notice of Determination dated February 13, 2006 is sustained.

DATED: Troy, New York
April 14, 2010

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner