STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZODIAC LOUNGE AND RESTAURANT	:	DETERMINATION DTA NO. 816523
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, 1994 through August 31, 1996.	:	

Petitioner, Zodiac Lounge and Restaurant, 534 Main Street, New Paltz, New York 12561, filed a petition 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, 1994 through August 31, 1996.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 10, 1998 at 10:00 A.M. The Division of Taxation was allowed to file a response to petitioner's reply brief which was received on April 22, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Robert A. MacKinnon, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq., (Dennis A. Fordham, Esq., of counsel).

ISSUES

I. Whether certain portions of petitioner's testimony should be excluded as contrary to a fact deemed admitted pursuant to petitioner's failure to respond to a Notice to Admit.

II. Whether petitioner was prejudiced by the failure of the auditor to appear at the hearing.

III. Whether the door admission, or cover charge, collected by petitioner from its patrons is subject to sales tax pursuant to Tax Law § 1105(d), (f)(1) or (3).

IV. Whether the Division of Taxation should be estopped from collecting any sales tax determined to be due on the basis of advice petitioner asserts it received from the Division of Taxation that its cover charges were not subject to tax.

V. Whether petitioner has proven reasonable cause for the abatement of penalties and certain interest.

FINDINGS OF FACT

Pursuant to section 307(1) of the State Administrative Procedure Act and section 3000.15(d)(6) of the Tax Appeals Tribunal Rules of Practice and Procedure, the Division of Taxation submitted 24 proposed findings of fact which have been substantially incorporated into these Findings of Fact. They have been supplemented by additional facts to more accurately reflect the record. Where a proposed finding of fact or partial proposed finding of fact has been rejected or substantially altered it is specifically noted except for the application of certain of the proposed facts to the entire audit period which is addressed in Findings of Fact "4" and "5" and Conclusion of Law "A".

Petitioners objections to the proposed findings of fact submitted by the Division and petitioner's proposed findings of facts have been included or specifically noted where the substance of petitioner's comments has not been included. Those portions of the document petitioner labeled proposed findings of fact which were legal argument have been included in Finding of Fact "27".

Hearing Background

1. The Division of Taxation ("Division") on August 17, 1998, mailed to petitioner's representative Robert MacKinnon, a Notice to Admit with a schedule A containing 18 paragraphs of admissions relating to the present matter. The Notice to Admit requested

petitioner to respond within 20 days after service of the notice pursuant to 20 NYCRR 3000.6(b) and CPLR 3123. No response was ever received from petitioner. On October 15, 1998 the Division of Tax Appeals received a letter from the Division stating that a Notice to Admit had been mailed to petitioner's representative on August 17, 1998 at his place of business and that a copy of the notice was attached. The Division then stated that also enclosed was a United States Postal Service return receipt (PS Form 3811) showing that the notice was received at petitioner's representative's office on August 21, 1998.[1] The letter requested that since petitioner's representative had not responded in the 20 days required pursuant to 20 NYCRR 3000.6(b)(2) the Division of Tax Appeals should deem admitted the facts as set forth in the Notice to Admit and petitioner should be precluded at hearing from offering any evidence contrary to those admitted facts. By letter dated October 27, 1998, Chief Administrative Law Judge Andrew F. Marchese of the Division of Tax Appeals stated that petitioner was deemed to have admitted the admissions contained in Schedule A of the notice and would be precluded from offering evidence to the contrary at hearing.

At issue is proposed admission number four of the Division's Notice to Admit which included language stating: "patrons . . . were required to purchase a minimum of one non-alcoholic beverage per hour."

2. Testifying at hearing on behalf of petitioner was Mr. Thomas Mayone, the owner of petitioner.[2] On cross examination during the hearing, the following exchange took place between the Division's representative and the witness Mr. Mayone:

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[1]The PS Form 3811 actually indicated that the Notice to Admit was addressed to petitioner's representative at the address of petitioner. However, since petitioner did not object to the introduction of the Notice to Admit into evidence at the hearing it must be presumed that petitioner's representative did receive it.

[2]Petitioner operated as a sole proprietorship.

> Q Did you require that the patrons buy minimum drink per hour after they entered the establishment?
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> A We have a sign that states that, but we — that's just like a hint, okay. We're not going to ask someone to leave if they don't have one drink per hour. It's a hint. It's more to sway the people, okay, if a guy pays $8 to come in my club and he has one or two beverages, I am not going to ask him to leave if he — in fact, its's not common that someone is there more than one hour, to be honest with you." (Tr., pp. 77, 78.)

3. Mr. Paul Kennedy, Tax Auditor I of the Division, ("auditor") conducted the audit at issue. The auditor did not appear or testify at the hearing. Testifying on behalf of the Division at the hearing was Mr. Sheldon Lippman, Sales Tax Auditor III, who was the auditor's supervisor during part of the audit. The Division did submit an affidavit executed by the auditor. Prior to the hearing the Division submitted to the Division of Tax Appeals, with a copy to petitioner, a Hearing Memorandum indicating that Mr. Lippman would be its only witness and that an affidavit signed by the auditor would be one of its exhibits.

Time Period at Issue

4. Petitioner operated an adult entertainment establishment located in New Paltz, New York during the audit period at issue, December 1, 1993 through August 31, 1996. The Division conducted an audit of petitioner's business for the entire audit period which resulted in the issuance of a Notice of Determination dated May 27, 1997 (notice number L-013570422-7) for additional sales and use taxes due for the period March 1, 1994 through August 31, 1996 in the amount of $16,970.81. This assessment consisted of $11,993.64 in tax, $3,061.49 in penalties, and $2,319.66 in interest.[3] There was no additional tax due for the period December 1, 1993 through March 1, 1994, because as reflected in a Statement of Proposed Audit Adjustment dated

[3]Petitioner signed a consent extending the period of limitations to June 20, 1997 for the period December 1, 1993 through May 31, 1994, on January 8, 1997).

April 3, 1997, the audit determined that a credit was due petitioner for that period of $317.11 in tax and $86.87 in interest for a total credit of $403.98.[4]

5. The Field Audit Report submitted by the Division explained the conduct of the audit as follows:

> Additional sales tax of $10,695.88 was determined on audit. Sales Tax returns are completed using bank deposits made into 3 separate bank accounts. Bank deposits are then totaled plus cash withdrawls[sic] made by the owner and bartender are added back to determine the quarterly gross receipts. Admission charges are then subtracted from gross receipts as vendor believed all admissions were exempt from sales tax. Finally vendor subtracted out loan payments which are claimed as deposits for cash advances and loans. This total would be their gross sales.
>
> In the course of the audit we recalculated gross sales and taxable sales for the entire audit period in detail. We subtracted out the loan deposits from the bank deposits added back several checks made out to cash and not deposited into bank accounts as claimed and added all nontaxable sales (door admissions) in arriving at the additional taxable sales of $138,011.30.
>
> Purchases were examined in detail. Additional purchases in the amount $12,653.31 were determined taxable for the cleaning of the establishment. The additional tax due for expenses is $980.65.

There were three bases for the imposition of additional tax during the audit period: 1) the adding to taxable sales of certain checks claimed to be cash advances and loans but made out to cash and not deposited in a bank account as asserted by petitioner;[5] 2) the failure to pay sales tax on cleaning services; and, 3) the failure to pay sales tax on the cover charges. The first two were apparently at issue over the course of the entire audit period and make up the entire amount of the additional tax asserted for the period December 1, 1993 through August 31, 1994.

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[4]Petitioner's requested Finding of Fact that the audit period did not commence until January of 1995 is rejected as inconsistent with the documentary evidence.

[5]These amounts have not been disputed by petitioner and are therefore, not at issue in the present matter.

The third basis for the imposition of tax was petitioner's failure to pay sales tax on its admission charges. Petitioner remitted sales tax on door admission fees for the first three quarters of the audit period (i.e., December 1, 1993 through August 31, 1994) and stopped remitting sales tax on its door admission charges with the quarter beginning September 1, 1994. Therefore, the proposed Findings of Fact submitted by the Division dealing with the issue of the taxability of the admission charges have been revised so that they do not refer to the entire audit period, but rather only to that portion of the audit period for which the charges are at issue (i.e., September 1, 1994 through August 31, 1996).

Admission charges for the period September 1, 1994 through August 31, 1996

6. On May 16, 1996, just prior to the commencement of the current audit, the auditor conducted an observation of petitioner's business during its operating hours. The auditor observed that the establishment had a sign posted outside its door that stated there was a minimum age requirement of 18 years, a $5 door fee, with no readmission, and that patrons were required to buy a minimum of one nonalcoholic beverage per hour. After the auditor paid the $5 door fee and entered petitioner's establishment, he was immediately asked what drink he wished to purchase.

7. The adult entertainment featured was nude female dancing. Nude dancers would individually come on stage and dance for 20 minutes each, while a disc jockey or emcee played music. Mr. Mayone testified that whether there was to be a theme to a dance was determined by the emcee. He also testified that the dancers would tell the disk jockey or emcee what songs to play while they danced and in what order. Patrons would throw cash on stage while the women danced. Patrons also had the option of obtaining a photograph with a woman dancer for $10.00, a lap dance in the back room for $60.00, and a couch dance for $120.00.

8. Zodiac collected $5.00 door admission fees from its patrons during the audit period.

9. Patrons were encouraged to purchase a minimum of one nonalcoholic beverage per hour. Patrons could also purchase peanuts and potato chips. The ratio of refreshment sales to total gross sales for the entire audit period was 48%. On either side of the premises, there was a bar and a dance stage. The majority of space was devoted to tables and chairs for patrons to use while they consumed their refreshments and watched the entertainment.

10. Subsequent to the auditor's observation visit, the Division issued a written request dated August 29, 1996 to inspect all of petitioner's books and records for the audit period at issue. The audit was conducted as described in Finding of Fact "5". Then, on October 7, 1996, the auditor sent to Thomas Reis, petitioner's then representative, a letter with a set of the work papers that delineated the tentative sales tax found due.

11. In response to the auditor's proposed determination that the business had underreported its taxable receipts, petitioner's attorney, Robert MacKinnon, wrote a letter, dated October 25, 1996, to the auditor stating that no sales tax was due on the admission fees to the club. Mr. MacKinnon stated that petitioner's entertainment consisted solely of dance routines and was, therefore, exempt under an example within the New York State Tax regulations pertaining to admission fees to a theater in the round featuring exclusively dance routines. Mr. MacKinnon further stated that Mr. Thomas Harms, Mr. Mayone's accountant, had called the auditor's office approximately one year ago and was advised that sales tax did not apply to petitioner's admission charge and, based on this advice, petitioner had not collected sales tax on its admission charges.

12. In reply to Mr. MacKinnon's letter of October 25, 1996, the auditor sent him the advisory opinion in the matter of Tralfamador Cafe (TSB-A-95[42]S), concerning the imposition

of sales tax under section 1105(f)(3) on admission to roof gardens, cabarets or other similar places.

13. On April 3, 1997, the auditor sent Mr. MacKinnon a letter forwarding a Statement of Proposed Audit Adjustment (AU-3).

14. A prior sales tax field audit of petitioner was conducted for the period December 1, 1987 through November 30, 1991. As a result of a criminal investigation stemming from that prior sales tax audit, petitioner's owner, Thomas Mayone, pled guilty in July 1994,[6] to petit larceny with respect to criminal nonreporting of sales tax for that prior period. Mr. Mayone was required to make restitution of $25,000 of sales tax trust monies. These monies included sales tax due on door admissions. During the prior sales tax field audit, the Division never told petitioner that its admission charges were nontaxable receipts.

15. Mr. Mayone testified that in January of 1994 petitioner's business format changed from a business that served alcoholic beverages and provided entertainment consisting of topless dancing to a business that served nonalcoholic beverages and provided entertainment consisting of totally nude dancing. Prior to the change in business the admission charge was $6.00 and included one drink. After the change in business the admission charge was $5.00 and did not include a beverage.

16. At hearing, Mr. Mayone alleged that several weeks before he first started the nonalcoholic adult entertainment program, he visited an unidentified club in Albany managed by a friend. Mr. Mayone further alleged that his friend, about one month before Mr. Mayone started

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[6]The Division's proposed finding states that it was in October of 1994. Mr. Mayone's testimony on cross-examination and an internal Division document concerning the criminal case introduced into evidence by the Division both indicate that Mr. Mayone pled guilty on July 15, 1994.

his nonalcoholic adult-entertainment program, became his full-time employee. Mr. Mayone testified,

> In the course of a conversation he said, 'gee, Tom, I guess you won't have to pay sales tax on your door anymore. I said, 'what are you talking about.' He said that the club he was working for, and he knew other clubs in the Albany-Schenectady Tri-City area, that didn't pay the door charge, also. And I said, 'boy, I didn't realize that. I wasn't even contemplating that, but that's a nice break for a change.' (Tr. p 69.)

17. At hearing, Petitioner gave neither testimony nor an affidavit from Mr. Mayone's alleged but unidentified friend and employee who purportedly provided advice about the sales tax status of admission fees.

18. At hearing, Mr. Mayone alleged that he told his accountant, Mr. Harms, that he had been told that door admissions were not subject to sales tax. Mr. Mayone also alleged that Mr. Harms, in his presence, called a general information number at the Division from Mr. Mayone's living room. The only details which Mr. Mayone gave as to the substance of Mr. Harms's telephone call was that Mr. Harms explained that Zodiac was an all-nude, juice, exotic entertainment club. Mr. Mayone further alleged that he heard Mr. Harms say that the Division employee advised that no sales tax was due on such door admission fees.

19. At hearing, Mr. Mayone did not recall the following details of the alleged telephone call: (1) what specifically Mr. Harms asked of the Tax Department; (2) the exact date of the telephone call to the Tax Department; (3) with whom in the Department Mr. Harms spoke; (4) whether Mr. Harms mentioned in his call the fact that Zodiac provided food and drink; (5) whether Mr. Harms told the Department that the refreshment receipts constituted between 40 and 50 percent of the total receipts; (6) whether Mr. Harms told the Division that tables and chairs

were provided for patrons to drink their refreshments while they watched the entertainment; and (7) whether Mr. Harms told the Department that patrons were required to purchase beverages.

20. At hearing, Mr. Mayone's accountant, Mr. Harms, alleged that he believed that he made the call at issue to the Division in January or February of 1994, but that he did not have any record of the exact date. Mr. Harms further alleged that what he told the Division in asking the sales tax question was: "[t]hat it was an adult entertainment club, it had dancers, and there was no - they received nothing for the cover charge except admission to the club, nothing to drink; would the cover charge be taxable [?]"

21. At hearing, Mr. Harms also testified that he did not provide the Division with any of the following information when making the alleged inquiry: (1) the patrons were required to buy a minimum number of drinks per hour; (2) the establishment provided tables and chairs for use by patrons while they consumed their beverages and watched the entertainment; and (3) the client had been previously audited. Mr. Harms also testified that he did not discuss the possibility of obtaining something in writing from the Division.

22. While Zodiac disputes whether its entrance admission fees were subject to sales tax, Zodiac does not dispute the amount assessed on such admission charges if the receipts were taxable.

Cleaning Services

23. Also at issue are certain expense payments (recorded in petitioner's disbursements ledger for the audit period) to two cleaning services determined by the auditor to be payments subject to sales tax. In his October 7, 1996 letter (***see***, Finding of Fact "13"), the auditor sent to Mr. Reis a letter with a set of the work papers that delineated the tentative sales tax found due.

In this letter, the auditor stated that he would need to see invoices for the cleaning service expenses at issue showing tax was collected and paid to New York State.

24. In his April 3, 1997 letter (***see***, Finding of Fact "13"), the auditor stated that the cleaning expenses for the period January 1, 1996 through August 31, 1996, were projected using the total tax due for cleaning and maintenance from 1994 and 1995 dividing by the number of months (24) and multiplying this by 8 for the number of months in 1996. The cleaning expenses for the period January 1, 1996 through August 31, 1996 were extrapolated because the records were unavailable.

25. The Division did not assess Zodiac for additional withholding taxes on the cleaning service expense payments for the audit period as alleged by petitioner's attorney. In actuality, the Division assessed Zodiac additional sales tax on the cleaning service payments.

26. While Zodiac disputes its legal liability as to whether it owes sales tax on the cleaning expenses, Zodiac does not dispute the amount assessed on cleaning services if Zodiac does owe tax thereon.

SUMMARY OF THE PARTIES' POSITIONS

27. Petitioner argues that the failure of the Division to produce the auditor at the hearing precluded petitioner from cross examining the auditor. Furthermore, petitioner argues that it was reasonable for petitioner to rely on advice it received during a telephone conversation with a Division employee that its admission charges were not taxable since petitioner had changed its business format so that patrons no longer received a drink with their admission and petitioner had been told by someone else in the nude juice bar business that many such businesses did not pay sales tax on their admission charges. Petitioner argues that music for the performances was

provided by the dancers and was an integral part of their routine, not just background music. In any event petitioner urges that there exists reasonable cause for the cancellation of penalties and interest.

28. The Division first argues that Mr. Mayone's testimony at the hearing regarding whether or not patrons were required to purchase one drink per hour is precluded because of petitioner's failure to respond to a Notice to Admit which included a proposed admission that patrons were required to do so. Substantively, the Division argues that petitioner's admission charges are taxable under Tax Law § 1105(d), (f)(1),(3). Furthermore, that petitioner's estoppel argument fails because Mr. Mayone's testimony was not credible, that none of the testimony provided sufficient detail regarding the asserted telephone conversation to impose estoppel against the Division, that under petitioner's circumstances it was not reasonable for petitioner to rely on this advice and that petitioner did not in fact rely on the advice since it continued to report its admission fees as taxable for another nine months.

CONCLUSIONS OF LAW

A. Petitioner in this matter failed to respond to a Notice to Admit served by the Division. The effect of such failure is that "the party is deemed to admit each of the matters as to which an admission was properly requested" (20 NYCRR 3000.6[b][2]). Pursuant to the letter of Chief Administrative Law Judge Marchese, petitioner was then precluded from offering evidence contrary to the matters that were deemed admitted. Proposed admission number four of the Division's Notice to Admit included language which stated: "patrons . . . were required to purchase a minimum of one non-alcoholic beverage per hour." On cross examination during the hearing the following exchange took place between the Division's representative and the witness Mr. Mayone:

> Q Did you require that the patrons buy minimum drink per hour after they entered the establishment?
>
> A We have a sign that states that, but we — that's just like a hint, okay. We're not going to ask someone to leave if they don't have one drink per hour. It's a hint. It's more to sway the people, okay, if a guy pays $8 to come in my club and he has one or two beverages, I am not going to ask him to leave if he — in fact, its's not common that someone is there more than one hour, to be honest with you." (Tr., pp. 77, 78.)

Petition's testimony will not be excluded for several reasons. First, petitioner did not seek to offer this testimony on direct examination. The Division, knowing that the fact that patrons were required to purchase one beverage per hour had been deemed admitted, chose to ask the question on cross examination. The witness was under oath and was required to answer the Division's question truthfully regardless of petitioner's failure to respond to the Notice to Admit. Second, a careful reading of the testimony indicates that it is more in the nature of a qualification of the admitted fact and not really contrary evidence. An Administrative Law Judge has the authority to "at any time, allow a party to amend or withdraw any admission on such terms as may be just." (20 NYCRR 3000.6[b][3].) Under the circumstances of this testimony I have amended petitioner's admission to state that petitioner encouraged, rather than required, patrons to purchase one beverage per hour (***see***, Findings of Fact "6" and "9").

B. Petitioner argues that it was precluded from cross examining the auditor due to the failure of the Division to produce him at the hearing. Petitioner could have subpoenaed the auditor to appear at the hearing, but chose not to do so (***see***, ***Matter of 3 Guys Electronics***, Tax Appeals Tribunal, September 9, 1988). In this case petitioner was specifically informed, through the Division's hearing memorandum, that the Division did not intend to call the auditor and intended to introduce an affidavit from the auditor. Therefore, petitioner was on notice that a

subpoena needed to be issued to ensure the attendance of the auditor, and petitioner's failure to obtain the attendance of the auditor was caused by its own inaction.

C. The major issue to be addressed is whether the admission charges collected by petitioner from its patrons were subject to sales tax. Tax Law § 1105(f)(1) provides 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 race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances, or live circus performances, or motion picture theaters, and 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.

In ***1605 Book Center v. Tax Appeals Tribunal*** (83 NY2d 240, 609 NYS2d 144, ***cert denied*** 513 US 811, 130 L Ed 2d 19) 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. 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 too see the performance. In determining that the coins so deposited were taxable, the Court of Appeals stated:

> Notably, there can be no doubt that 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. (***1605 Book Center v. Tax Appeals Tribunal***, ***supra***, 83 NY2d at 245, 609 NYS2d at 147.)

Clearly petitioner's place of business is a place of amusement under the statute. Further, petitioner does not appear to argue that its place of business does not constitute a place of

amusement rather that it is not covered by the statute because the entertainment provided consists of "dramatic or musical arts performances," an argument that was not specifically addressed by the Court of Appeals in ***1605 Book Center v. Tax Appeals Tribunal*** (***supra***). Dramatic or musical arts performances are further defined in Tax Law § 1101(d)(5) as admission charges "for admission to a theater, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance." During the course of the audit, petitioner in particular pointed to an example of an exempt musical arts performance set forth in 20 NYCRR 527.10(d) as follows:

> Example 4: A theater in the round has a show which consists entirely of dance routines. The admission is exempt since choreography is included within the term musical arts.

However, at the hearing petitioner provided no evidence at all about the routines of its nude dancers to indicate that the routines were choreographed dance routines.[7] Furthermore, petitioner made no arguments, much less presented evidence, to support a finding that its place of business constituted "a theater, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance." (Tax Law § 1101[d][5].) Petitioner has therefore, failed to meet its burden of proof pursuant to Tax Law §1132 on this issue and the admission charges it collects from its patrons are determined to be taxable under Tax Law § 1105(f)(1).

D. 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,

[7]Mr. Mayone's testimony that the dancers selected their own music does little to indicate the nature of the performances.

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.

While petitioner's place of business constitutes a cabaret or "similar place" where a public performance is staged for profit, it must also be determined that petitioner's sales of refreshments are more than incidental to its provision of entertainment. The Division is correct in looking 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 Tralfamador Cafe*** [TSB-A-95(42)S]; ***Matter of Empire Management and Productions*** [TSB-A-96(9)S]). In determining whether sales of refreshments are only incidental to the furnishing of entertainment, one of the primary factors reviewed in the Federal cases is the ratio of sales for refreshments to gross sales (***see***, ***Roberto v. United States***, 357 F Supp 862, ***affd*** 518 F2d 1109; ***Dance Town U.S.A. v. United States***, 319 F Supp 634). In the present case petitioner's refreshment sales constitute 48% of its total sales. This percentage by itself illustrates that the selling of refreshments was not merely incidental to petitioner's business, but was an integral part of that business (***see***, ***Dance Town U.S.A. v. United States***, ***supra***). Furthermore, petitioner's policy of encouraging its patrons to purchase at least one drink per hour — evidenced by the sign posted on the door which stated that patrons were required to purchase one drink per hour and the auditor's observation that upon entering petitioner's premises he was immediately asked what drink he wished to purchase — is further evidence that the selling of refreshments was not merely incidental to petitioner's business. Finally, the fact

that a majority of the space in petitioner's establishment is occupied by tables and chairs arranged for the purpose of allowing patrons to consume refreshments while watching the entertainment, is also indicative of the fact that petitioner's refreshment sales were more than incidental to its business (***see***, ***Dance Town U.S.A. v. United States***, ***supra***). Therefore, petitioner's admission charges were also subject to tax pursuant to Tax Law § 1105(f)(3).

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

Since it has been determined that the admission charges collected by petitioner from its patrons were taxable pursuant to Tax Law § 1105(f)(1) and (3), such receipts cannot be held taxable under Tax Law § 1105(d).

F. Petitioner argues that it was entitled to rely on assertions it received during an alleged telephone call between its accountant and the Division. While not invoking the phrase, petitioner is arguing that the Division should be estopped from asserting sales tax on its admission charges because during a telephone conversation with a Division employee at a general information number, the employee stated that such charges would not be subject to sales tax.

The doctrine of estoppel, while it may be invoked against a government agency, is done so sparingly (***see***, ***Matter of Wolfram v. Abbey***, 55 AD2d 700, 388 NYS2d 952, 954; ***Matter of Sheppard-Pollack, Inc. v. Tully***, 64 AD2d 296, 409 NYS2d 847, 848), especially when the

governmental agency involved is charged with the administration of taxes (***Matter of Turner Constr. Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78, 80). Estoppel may be invoked against such an agency based only on exceptional circumstances (***Schuster v. Commissioner***, 312 F2d 311, 62-2 US Tax Cas ¶ 12,121). The Tax Appeals Tribunal has utilized the following questions in determining whether the doctrine of estoppel should be applied to the Division under the facts of a particular case: whether a taxpayer relied upon the advice of the Division, whether such reliance was reasonable and whether such reliance was detrimental to the taxpayer (***see***, ***Matter of Maximilian Fur Co.***, Tax Appeals Tribunal, August 9, 1990; ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988).

Assuming that the telephone call took place as petitioner asserts, petitioner has not proven that it relied on the advice it asserts it received. The testimony indicates that the phone call was placed sometime in January or February of 1994, which according to Mr. Mayone's testimony coincided with the change in the form of petitioner's business from an establishment serving alcoholic beverages with topless female dancing to a nude juice bar. Mr. Mayone consistently held out this point in time as the time when in his mind the admission charges were no longer subject to tax. Yet, petitioner did not report any nontaxable sales until the sales tax period commencing on September 1, 1994. Therefore, petitioner has not proven that it relied on any advice received during such a phone call. Having determined petitioner did not rely on the advice it asserts it received from the Division, the Division is accordingly not estopped from asserting tax in this matter.

G. Pursuant to Tax Law § 1145(a)[8] penalties, and the amount of interest that exceeds the amount of interest prescribed by law may be remitted if the failure to pay tax is due to reasonable cause and not due to wilful neglect. The burden is on petitioner to prove that it falls within this standard, and I find that petitioner has failed to meet this burden. Petitioner has offered no evidence that would allow me to find that it was reasonable not to collect and remit tax on the admission charges.

Petitioner asserts that it was reasonable to believe tax was not due on the admission charges once the business became a nude juice bar because: patrons no longer received a beverage with their admission charge; petitioner was informed other nude juice bars did not collect sales tax on admission charges; and Mr. Mayone's personal accountant had called a general information number at the Division and been told the admission charges were not taxable.

Whether or not a beverage was included with the admission charge is irrelevant, since what is being taxed is the admission charge itself (Tax Law § 1105[f][1], [3]). Also, whether or not petitioner was told by Mr. Mayone's friend or petitioner's employee that other nude juice bars did not collect sales tax on admission charges is also irrelevant. Petitioner has pointed to no legal authority that supports a finding of reasonable cause based on being told by someone in a similar business that he did not consider a certain charge taxable. I also do not find reasonable petitioner's reliance on the phone call it asserts occurred between Mr. Harms, Mr. Mayone's personal accountant, and the Division. The witnesses were not even sure what telephone number they called, who they spoke with, or exactly what was said during this conversation. Petitioner

[8]Since petitioner did not allege any unwarranted time delay caused by the Division, or reliance on any written advice of the Division, the provisions of Tax Law § 3008 regarding interest will not be discussed.

did not think it necessary to request a written answer to its question as to whether approximately one-half of its gross sales were taxable, when such sales had previously been considered taxable. While petitioner claims to have relied on advice from the Division that its admission charges were not taxable, it did not start reporting any nontaxable sales until almost nine months after the asserted telephone conversation took place. Under these circumstances it cannot be found that petitioner could have reasonably relied on advice received during a telephone conversation.

H. Petitioner paid for cleaning services during the course of the audit period. Petitioner argues that it was assumed the vendor included the charge for sales tax in billing petitioner and, in any event, such tax is properly recoverable from the vendor. Petitioner's own records did not indicate that sales tax was paid on the cleaning services at issue. At hearing petitioner offered no evidence tending to prove that sales tax was paid when it paid for the cleaning services. Having not proven that the tax was paid at the time of the transaction, petitioner, as the customer, remains liable for the tax (Tax Law § 1133).

I. The petition of Zodiac Lounge and Restaurant is denied and the Notice of Determination is sustained.

DATED: Troy, New York
October 7, 1999

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE