STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Sheridan Hollow Incorporated, 90 North Pearl Street, Albany, New York 12207, filed 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, 1999 through November 30, 2001.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 15, 2004 at 10:15 A.M., with all briefs to be submitted by December 30, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by its president, Stephen J. Waite, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

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

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

3. The character and service offerings on the first floor have changed little since the facility first opened in 1996. The main room of the first floor consists of approximately 3,400 square feet with another 2,200 square feet added by a side room, i.e, the part of the first floor of 90 North Pearl Street connected to the Big House. The first floor consists of a large square bar with seating for approximately 48 patrons, with a smaller bar in the side room that seats a more limited number of patrons. The remainder of the floor space on the first floor is occupied by booths and tables at which patrons can sit and purchase food and either alcoholic or nonalcoholic beverages, restrooms and the "Brew House" containing brewing equipment used in the production of petitioner's micro brewed beers. A pub style menu is offered on the first floor and

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

service is provided by wait staff. The character of the basement has remained unchanged since the opening of the Big House in 1996. It is used for the storage of food and supplies and also houses additional brewing equipment and small administrative offices. Patrons are not allowed in the basement and it is reserved strictly for employee use.

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

5. Unlike the first two floors, the third floor of the Big House has undergone substantial change since the facility first opened in 1996. At that time, the third floor, consisting of approximately 3,400 square feet of space, housed the facility's main dining room containing 50 to 55 tables and 10 or more booths, with seating for approximately 200 people. In addition, the third floor also contained restrooms. Utilizing the dramatic views provided by the windows on the Sheridan Avenue side of the facility, the third-floor dining room was designed to provide a more formal dining experience, and a graduate of the Culinary Institute of America was employed as chef. Unlike the first two floors of the Big House that featured a pub style menu, the third-floor dining room featured a formal menu, with ambience and offerings similar to that

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

6. For a period of time after opening, the Big House experienced success with the two-menu format. Eventually, financial considerations forced petitioner to reconsider the format of the Big House. At some point, petitioner attempted to introduce entertainment on the third floor along with fine dining. However, that proved to be disastrous because patrons who dined late had their meals disrupted by the entertainment. Ultimately, it was decided to shut down the third-floor dining room and all food and restaurant services were suspended at that time. Prior to the audit period, all tables and booths were removed, with the exception of three booths that could not be removed because of structural reasons. Chairs remained stacked along the walls of the third floor. As noted above, the area of the third floor is approximately 3,400 square feet. Of that area, approximately 2,000 square feet became open space with a hardwood floor, once the tables and booths were removed. The remainder of the space, an elevated mezzanine level ("mezzanine") where the restrooms (containing about 300 square feet of space) and a small slop closet were located, was carpeted. For a brief period of time, the third floor was closed.

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

8. Prior to and during the audit period, patrons were admitted to the third floor by payment of an admission charge to a Big House employee stationed at the base of the stairwell to the third floor and passing by another Big House employee stationed at the top of the stairs at the entrance to the third floor. Payment of the admission charge entitled a patron to admission only; drinks were not included in the admission charge. Once admitted to the third floor, patrons could purchase beverages at the third-floor bar, but could not leave the third floor to buy a drink and reenter without paying an additional admission charge. A patron wishing a beverage on the third floor had to purchase it at the third-floor bar. The beverage offerings on the third floor were limited to draft beers, liquor, mixed drinks, soda and bottled water, all of which were served in plastic cups. Drinks could not be purchased elsewhere and brought to the third floor.

Nor could food be purchased on the other two floors of the Big House and brought to the third floor.

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

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

11. An appointment letter dated January 17, 2002 and setting an appointment at petitioner's office for April 16, 2002 was sent by the auditor to Mr. Brunelle. The letter requested that all of the corporation's books and records pertaining to its sales and use tax liability for the audit period be made available on the appointment date. The stated audit period

was March 1, 1999 through November 30, 2001. The letter referenced an attached records requested list which set forth the records to be produced as follows:

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

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

13. At the written request of petitioner's president, the field audit appointment was rescheduled for May 29, 2002. The auditor met with Mr. Brunelle at the Big House on that date. During the field audit appointment, Mr. Brunelle, along with an unnamed Big House employee, provided the auditor with a tour of a portion of the premises, including the third floor. During this tour, Mr. Brunelle described the third floor as a dance area. Mr. Brunelle provided some of petitioner's books and records for the auditor to review and discussed the nature of the three establishments operated by Sheridan Hollow. Since Sheridan Hollow's sales records were partially computerized, the auditor was provided with, among other documents, a chart of accounts for the Big House, i.e., a list of all the accounts petitioner maintained as support for its financial statements, and a computer printout of the Big House's general ledger. Mr. Brunelle informed the auditor that since the Big House's sales were downloaded at the end of the day to

the mainframe computer in the basement, Sheridan Hollow did not keep the cash register detail tapes for each cash register. The auditor was provided with records from the mainframe concerning sales. All available exemption certificates and expense purchase records for the entire audit period were provided to the auditor. The auditor reviewed the documents provided and noted an entry in the Big House's general ledger identified as "door." In response to the auditor's inquiry concerning this entry, Mr. Brunelle explained that this general ledger entry was the door charge for admission to the Big House's third-floor dance area. The auditor also was not provided with any records showing the dates the third floor was open, the nature of the music provided or sales of beverages from the third-floor bar. Petitioner failed to provide any cash register tapes for any of the three establishments for the entire audit period, records of door charges for the period March 1, 1999 through August 31, 1999 and exemption certificates for the period September 1, 1999 through November 30, 1999.

14. During the field audit appointment, on May 29, 2002, Mr. Brunelle, as chief financial officer and treasurer of Sheridan Hollow, provided Sheridan Hollow's written response to a questionnaire containing 11 questions. Question number six on the questionnaire contains multiple questions concerning entertainment and any cover charges for such entertainment. Within question number six is a two-part question pertaining to any price increase for entertainment during the audit period. To this two-part question, Mr. Brunelle responded yes, there was a price increase for entertainment during the audit period and further responded that the "cover charge varies based on timing, entertainment, etc." Also within question number six is a two-part question that asks "[w]as there a cover charge? If Yes, Amount $." Mr. Brunelle affirmatively responded that there was a cover charge and further responded that the amount of the cover charge "varies."

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

16. The auditor then reviewed the nontaxable sales listed in the Big House's general ledger and all exemption certificates available. Based upon his review of all documentation supporting the Big House's sales to exempt organizations, the auditor concluded that $8,054.00 in claimed nontaxable sales to exempt organizations during the period September 1, 1999 through November 30, 1999 were not supported by exemption certificates and, therefore, were taxable. He determined additional sales tax due for the period September 1, 1999 through November 30, 1999 in the amount of $644.32 on these disallowed nontaxable sales to exempt organizations. Based upon the information provided, the statements of Mr. Brunelle, the auditor's personal observation of the premises and his research of the Tax Law, the auditor concluded that the door cover charges collected by the Big House during the audit period were subject to tax. Since no records of door receipts were provided for the first two quarters of the audit period, i.e., March 1, 1999 through May 31, 1999 and June 1, 1999 through August 30, 1999, the auditor used the amount of door cover receipts reported in the Big House's general ledger for the corresponding two quarters in the year 2000 in his calculation of door cover receipts for the audit period March 1, 1999 through November 30, 2001 and determined that door cover charges in the amount of $364,754.00 were subject to tax for this audit period. He further determined that additional tax in the amount of $29,180.32 was due on these additional taxable sales of $364,754.00. The auditor computed total additional taxable sales of $372,808.00

and additional sales tax due of $29,824.64 for the period March 1, 1999 through November 30, 2001 on both door cover charges and disallowed exempt sales.

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

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

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

20. On July 3, 2002, in a second request letter addressed to Mr. Brunelle, the auditor requested, among other documents, cash register detail tapes for the entire audit period, records of the cover charges for the period March 1, 1999 through August 31, 1999 and exemption

certificates supporting nontaxable sales for the period September 1, 1999 through November 30, 1999. He also scheduled a field audit appointment for July 10, 2002 at 9:15 A.M. In this letter, the auditor also wrote, in pertinent part, as follows:

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

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

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

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

23. On July 26, 2002, the Division issued to petitioner a Notice of Determination (notice number L-021328608-1) asserting additional sales and use taxes due in the amount of $30,906.48 for the period March 1, 1999 through November 30, 2001, plus interest in the amount of $4,472.11, for a current balance due of $35,378.59. The computation section of the Notice of Determination contained the following explanation: "Based on our audit of your records, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law."

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

additional use tax in the amount of $1,081.84 on recurring expense purchases for the period March 1, 1999 through November 30, 2001.

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

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

27. Shortly before the conclusion of the hearing, both parties were asked by the administrative law judge whether they wished to submit any additional evidence either at that time or post-hearing. Both parties declined to submit any further evidence. The record was then closed at the conclusion of the hearing.

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

CONCLUSIONS OF LAW

A. Tax Law § 1105(f)(1) imposes the sales tax on "[a]ny 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 . . . dramatic or musical arts performances. . . ." A "place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement or sports are provided" (Tax Law § 1101[d][10]). Tax Law § 1132(c)(1) provides, in pertinent part, as follows:

> For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, . . . and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge . . . is not taxable hereunder shall be upon the person required to collect tax or the customer.

B. The sales tax regulations, 20 NYCRR 527.10, concerning admission charges, in pertinent part, provide for the following:

> (a) *Imposition*. (1) A tax is imposed upon any admission charge, in excess of 10 cents, to or for the use of any place of amusement in this State.
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> * * *
>
> (b) *Definitions.* (1) Admission charge. (i) The amount paid for admissions, season ticket or subscription to any place of amusement, including any service charge and any charge for entertainment or amusement or for the use of the facilities therefor.
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> * * *
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> (2) Dramatic or musical arts admission charge. Any admission charge to a theater, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.
>
> (3) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided. Such places include without

limitation (i) a theatre of any kind, concert hall, opera house, or other place where a performance is given. . . .

(4) The following definitions apply to all taxes imposed under subdivision (f) of section 1105 of the Tax Law, the regulations for which appear in this Part, and in sections 527.11 and 527.12 of this Part.

(i) Amusement charge. Any admission charge, dues or charge of a roof garden, cabaret or other similar place.

(ii) Patron. Any person who pays an amusement charge or who is admitted without payment and who is required to pay the tax imposed under subdivision (f) of section 1105 of the Tax Law.

* * *

(d) *Admissions excluded from tax.* . . . (2) Charges for admission to dramatic or musical arts performances are excluded from tax. Dramatic and musical arts performances do not include variety shows, magic shows . . . and similar performances.

Example 3: An organization sponsors a blue grass festival in which country singers and instrumentalists will perform. The admissions are exempt since they are admissions to a musical arts performance.

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.

Example 5: A show is composed of several acts in which performers dressed as story-book characters, appearing with musical accompaniment, portray scenes from books, and invite audience participation. This does not qualify as a dramatic or musical arts presentation.

C. The issue is whether the third-floor admission charges collected by petitioner from the Big House's patrons are subject to sales tax. Live entertainment or dancing are forms of amusement (***see, Matter of Antique World, Inc.***, Tax Appeals Tribunal, February 22, 1996). Clearly, the Big House's third floor is a place of amusement under Tax Law § 1105(f)(1). Mr. Waite admitted that, on occasion, third-floor patrons dance to the entertainment provided. In addition, Mr. Brunelle described the third floor as a dance area. Further, petitioner does not

contest the determination that it operated the third floor as a place of amusement and that the admission charges were for an amusement. Rather, petitioner contends that the admission charges are exempt from the imposition of sales tax by Tax Law § 1105(f)(1) because the entertainment provided consists of "musical arts performances."

Statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision provides his entitlement to the exemption (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027; ***Matter of Blue Spruce Farms v. New York State Tax Commn.,*** 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526). Petitioner claims that it collected admission charges for entertainment consisting of live musical acts or professional DJs who incorporated their own acts into the music they played and encouraged audience participation. It contends that all admission charges collected were only for such performances that qualify as musical arts performances. At the hearing, petitioner provided no evidence to support its claim that it presented musical arts performances. Rather, petitioner presented the testimony of Mr. Waite. Although Mr. Waite generally testified that live musical acts, including, among others, jazz musicians and rap artists, and professional DJs performed on the Big House's third floor during the audit period, he was unable to either identify most of these performers or the specific dates on which any performances occurred during the audit period. While Mr. Waite admitted during his testimony that petitioner had records that identified who the performers were and when they performed during the audit period, petitioner failed to submit any of these records into evidence. Further, prior to the conclusion of the hearing, petitioner was given the opportunity to provide additional evidence in support of its claims post-hearing, but it declined to do so. Moreover, even if petitioner were able to prove the amount of receipts generated from

performances of live musical acts, it has failed to present any evidence to support its interpretation that a DJ playing recorded music, performing an act and encouraging audience participation constitutes a musical arts performance. Tax Law § 1101(d)(5) defines a dramatic or musical arts admission charge as "[a]ny admission charge for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance." The sales tax regulations, in 20 NYCRR 527.10(b)(2), also require that a musical arts performance be live. DJs play tapes, compact discs or other prerecorded music, they do not perform live music. In addition, 20 NYCRR 527.10(d)(2) provides that variety shows, magic shows and similar performances do not constitute dramatic or musical arts performances. Based upon Mr. Waite's description of the manner in which these DJs allegedly performed, i.e., incorporating an act into their presentations of prerecorded music and encouraging audience participation, it is clear that the performances by these DJs constitute variety shows or similar performances which are not musical arts performances (***see,*** Tax Law § 1101(d)(5); 20 NYCRR 527.10[d][2]). Petitioner has therefore failed to meet its burden of proof pursuant to Tax Law § 1132 on this issue and the third-floor admission charges it collected from the Big House's 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, cabaret or other similar place in the state." Tax Law § 1101(d)(12) defines a 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.

20 NYCRR 527.12(b)(2)(ii) defines a roof garden, cabaret or similar place as "any room in a hotel, restaurant, hall or other place where music and dancing privileges or any entertainment, are afforded the patrons in connection with the serving or selling of food, refreshment or merchandise."

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

Tax Law § 1132(c) presumes that all petitioner's receipts are subject to tax until the contrary is established and the burden of proving otherwise is on petitioner (***Matter of Grace v. New York State Tax Commn., supra***). 20 NYCRR 533.2 requires petitioner to maintain records of every sale, amusement charge and receipt from admission. In addition, petitioner was required to maintain records to substantiate any exemption, exclusion or exception claimed and to present records kept in a manner suitable to determine tax due (***Matter of On the Rox Liquors, Ltd. v. State Tax Commn.***, 124 AD2d 402, 507 NYS2d 503, ***lv denied*** 69 NY2d 603, 512 NYS2d 1026). Since petitioner seeks the benefit of the exemption provided in Tax Law § 1101(d)(12), which like all tax exemptions must be strictly construed, it bears the burden of demonstrating that it comes within the reach of the exemption (***see, Matter of Grace v. New York State Tax Commn***., ***supra*****).** Mr. Waite testified that the only entertainment provided on the third floor of the Big House during the audit period consisted of live musical acts and DJs who incorporated acts and encouraged audience participation during their presentations of prerecorded music. Petitioner failed to submit any documentation concerning the performances

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

Even if petitioner had established the amount of receipts generated from admission charges to live musical performances during the audit period, it would also be necessary for petitioner to prove that its sales of refreshments were merely incidental to its provision of entertainment on the Big House's third-floor during the audit period to qualify for the exemption pursuant to Tax Law § 1101(d)(12). In support of its assertion that the third-floor refreshment sales were merely incidental, petitioner submitted a two-page analysis of the monthly and quarterly revenue allegedly generated from the Big House's third-floor sale of beverages and the

revenue allegedly generated from the third-floor admission charges during the audit period. Mr. Waite testified that he prepared this analysis shortly before the hearing from Big House records. He claimed that his analysis indicated the percentage of total third floor revenue generated monthly by receipts from beverage sales ranged from a low of 18.3 percent during the month of November 2001 to a high of 32.9 percent during the month of May 2000. For the month of May 2000, Mr. Waite determined total third floor sales revenue to be $4,509.00, i.e., $1,483.00 in beverage sales plus $3,026.00 in admission charges. For the month of November 2001, Mr. Waite determined total third floor sales revenue to be $28,611.00, i.e., $5,229.00 in beverage sales plus $23,382.00 in admission charges. Mr. Waite testified that most patrons attending jazz performances are there to listen to and view the performance and do not as a rule purchase beverages. He claimed that, as a result, there were low beverage sales in some of the months. He could not recall if there were jazz performances on the third floor in either May 2000 or November 2001. I find this two-page analysis to be unreliable and worthless. A review of this analysis indicates that it includes sales figures for admission charges allegedly generated in the months of March 1999 through August 1999, the six months comprising the two sales tax quarters for which petitioner failed to provide admission charge sales records to the auditor. While petitioner claimed that it kept careful records of revenue generated from both the admission charges and third-floor beverage sales during the audit period, it did not submit into the record any of the source records used to prepare this analysis. Petitioner also did not submit into evidence any records concerning the identity of each performer, the number of patrons attending each performance, the amount of the admission charge for each performance and information about the beverages consumed by patrons at those performances, including the type, amount and price of each beverage consumed, during the audit period. Therefore, it is

impossible for me to determine the accuracy of either the amount of monthly revenue that petitioner claims was generated on the third floor from the admission charges and beverage sales or the monthly percentage of total third-floor revenue claimed by petitioner to have been generated from the sale of beverages during the audit period. In addition, given the lack of supporting documents in the record and Mr. Waite's inability to recall dates on which jazz performances took place during the audit period, I do not subscribe any weight to Mr. Waite's testimony concerning the reason why beverage sales were low in some months. Petitioner has failed to prove the amount of monthly revenue generated by the Big House from third-floor beverage sales during the audit period. It has also failed to prove that the Big House's third-floor sales of refreshment were merely incidental to its provision of entertainment. Therefore, the third-floor admission charges collected from the Big House's patrons 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 third-floor admission charges collected by petitioner from the Big House's patrons were taxable pursuant to Tax Law § 1105(f)(1) and (3), such receipts cannot be held taxable under Tax Law § 1105(d).

F. The petition of Sheridan Hollow Incorporated is denied and the Notice of Determination dated July 26, 2002 is sustained.

DATED: Troy, New York
June 23, 2005

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE