STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAKE GROVE ENTERTAINMENT, LLC	:	DETERMINATION DTA NO. 821297
for Revision of a Determination or for Refund of of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2001 through May 31, 2004.	:	

Petitioner, Lake Grove Entertainment, LLC, 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 September 1, 2001 through May 31, 2004.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 21, 2007 at 10:30 A.M., with all briefs to be submitted by October 1, 2007, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioner appeared by S. Buxbaum & Company, CPA's, LLP (Michael J. Buxbaum, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall, Esq., of counsel).

ISSUES

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

September 28, 2004 by J. Sullivan, the auditor's supervisor, on behalf of the Division. This consent is machine stamped as validated by the Division on October 12, 2004.

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

SUMMARY OF THE PARTIES' POSITIONS

13. There is no dispute between the parties that some of the component parts of petitioner's party packages, such as food and beverage items, shoe rentals and the like are subject to sales tax while other component parts, such as bowling, ice skating, rock climbing and the like, when sold separately, are not subject to sales tax. Petitioner asserts that its customers are aware that there is a sales tax amount in the price paid, based on the statement to that effect in the party package

brochure, and also claims that its patrons are orally advised of the fact that sales tax is being charged on the taxable components of the party package at the time a party is booked.

14. Petitioner asserts that its bookkeeping system is detailed and includes excellent internal controls, and thus petitioner should be entitled to utilize its internal allocations of the total receipts from party package sales and group party sales into the various "cost centers" as a means of segregating and paying sales tax on only the taxable components of the combined charge paid by its customers. Finally, petitioner maintains that neither of the consent documents allowing for an extension of the period of limitations on assessment are valid. In this regard, petitioner asserts that Deborah E. Boehler, who signed the earlier consent, was not a person authorized to bind petitioner, and that the subsequent consent, signed by petitioner's chief financial officer, is vitiated by the date set forth on the face thereof. Consequently, petitioner maintains that the portion of the assessment pertaining to the earliest of the three quarterly periods in issue must be cancelled in any event.[2]

15. The Division argues, in contrast, that petitioner's party package sales and group party sales are not rendered in separate transactions consisting of taxable and nontaxable parts, each of which were separately identified on the invoices provided to the purchasers, but rather that the entire price charged, as bundled and presented, constituted an integrated sale the entire amount of which was properly subject to sales tax. The Division also asserts that the consent signed by Deborah E. Boehler constituted a valid extension of the period of limitations on assessment since it was executed by the person with whom the Division's auditor was directly engaged on the

[2] More specifically, in light of the date of issuance of the Notice of Determination, if the consent document is found to be invalid the Division admits that the tax assessed for the first two quarterly periods (9/1/01 through 2/28/02) and for a portion of the third quarterly period (the month of March 2002) would be cancelled as not timely assessed.

audit and who possessed apparent authority to act on petitioner's behalf. The Division further maintains that the consent executed by Richard Dannenbaum, a person who admittedly held the authority to act on petitioner's behalf, was executed on a date falling prior to the expiration of the period of limitations and thus constituted a valid waiver with regard to the periods in question.

CONCLUSIONS OF LAW

A. As an initial matter, petitioner has argued that the portion of the assessment covering the first three quarterly periods in question must be cancelled because the same was not issued in a timely manner. Most specifically, petitioner argues that consent documents obtained by the Division which purportedly extended the period of limitation on assessment with regard to such quarterly periods are invalid because (1) one of such consent forms was signed by an authorized person but reflected a date of execution falling some three years after the act of signing and, (2) the other consent form was signed by a person without proper authority to bind petitioner.

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

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

C. In this case, each of the consent documents includes the name of the taxpayer (i.e., petitioner), the signature of a person holding themselves out as authorized to sign on petitioner's behalf, the taxable periods to which the extension of the period of limitations applies, and the extended date by which an assessment for such taxable periods may be issued. The first consent

form, signed by Deborah E. Boehler, was dated September 13, 2004, and was returned to and signed and dated as accepted on behalf of the Division by J. Sullivan on September 28, 2004. The second consent form, signed by Richard Dannenbaum bears, as noted, a date which is ambiguous and could reasonably be read as October 7 of 2001 or 2004 or 2007. This consent was returned to and signed and dated as accepted on behalf of the Division by J. Sullivan on October 12, 2004. Both of these consent forms were, thereafter, machine stamped as validated by the Division on October 12, 2004. Each of the dates listed above, save for the ambiguous date on the second consent, falls prior to the expiration of the period of limitations on assessment for the three earliest quarterly periods in question.

D. In light of the foregoing, it is abundantly clear that both of the consent documents were in fact executed (i.e., signed) on a date prior to the expiration of the period of limitations on assessment. This conclusion is clearly evidenced by the dates on which the consent forms were accepted back from petitioner by the Division and thereafter were machine stamped as validated by the Division. Mr. Dannenbaum does not deny signing the consent form on which his name appears and returning the same to the Division. However, the affidavit by Mr. Dannenbaum, to the extent entitled to any weight or consideration herein, avoids stating the date on which he actually executed the consent in favor of very carefully setting forth the date he inserted, allegedly October 7, 2007, on the date line of the consent form (***see*** Finding of Fact 12). Petitioner's initial brief incorrectly states that Mr. Dannenbaum's affidavit "was introduced to support his signature *and the date of his signature.*" (Emphasis added.) As discussed below, the October 7, 2007 date sought by petitioner could not have been "the date of his signature" and hence the date of execution of the consent document. Such October 7, 2007 date, in fact, fell

after the June 21, 2007 date of the subject hearing held in this matter at which point the consent, already signed, was offered in evidence.

E. Apparently, based on the method of Mr. Dannenbaum's execution of the consent document, petitioner espouses the argument that its consent, though executed, would not become effective until the future date written thereon. Petitioner's argument in this vein is rejected. First, there is no provision for the execution of a "springing" consent which is to become effective at some point in the future. In fact, the Tax Law and regulations set forth no requirement that the consent document be dated, but rather only require that the consent be in writing and be executed prior to the expiration of the period of limitations on assessment (Tax Law §1147[c]). It is true that the consent document carries a date line on its face. However, the particular date of execution of a consent document only becomes relevant when an issue arises as to whether the written consent was in fact executed, i.e., signed, by the party being held thereto on a date falling prior to the expiration of the period of limitation on assessment. Here, the evidence bears out that the consent form executed by Mr. Dannenbaum, a person whose authority to bind petitioner thereon is not contested, was signed by him on a date falling prior to the expiration of the period of limitation on assessment, and the simple manipulative expedient of inserting a date falling far in the future, without more, does not overcome the fact of execution of the consent prior to expiration of the period of limitation on assessment. In sum, the evidence bears out that the second consent was executed by a person with authority to bind petitioner, was executed prior to the expiration of the period of limitation on assessment, and was in turn accepted and validated by the Division, thus resulting in a valid extension of the period of limitations.

F. Petitioner's argument would fail even if the simple insertion of a future date, without more, could be read as delaying the point in time at which a consent to extent the period of limitations on assessment would become effective. In this regard, petitioner is seeking the benefit of a statute of limitations defense. In order to prevail on such a defense, petitioner was required to show the beginning date and ending date of the statutory limitation period, and to establish that the consent to extend was not executed prior to the ending date of the prescribed period (***Matter of The Tides Inn***, Tax Appeals Tribunal, April 2, 1992). Petitioner has not established this latter fact. As noted, the manner in which the year portion of the date is written on the consent document is unclear and ambiguous, and could be read as either October 7, 2001, October 7, 2004, or October 7, 2007. The earliest of these three possible dates, October 7, 2001, predates both the issuance of the Division's appointment letter advising petitioner that it would be subject to an audit, and the date on which the auditor prepared and delivered the consent document to petitioner, by nearly three years (***see*** Findings of Fact 5, 11 and 12), and thus simply cannot be the date on which the consent document was executed. Furthermore, the latest of the three possible dates, October 7, 2007, not only falls after the audit was completed and the resulting Notice of Determination was issued, but indeed falls after all of the proceedings held in this matter, including the subject hearing. Clearly this could not have been the date on which the consent document was executed (***see*** Conclusion of Law D). Each of the foregoing dates leads to a nonsensical result and points either (at best) to a true ambiguity in the writing causing confusion and leading to the inescapable conclusion (contrary to Mr. Dannenbaum's affidavit) that the date of execution of the consent was in fact October 7, 2004, or (at worst) to a contrived effort to circumvent the tax examination and assessment process. To some degree, and again to

the extent worthy of any weight, the Dannenbaum affidavit by its very careful wording, points toward the latter.

G. Ultimately, petitioner's method of executing the consent created the ambiguity in this matter, and petitioner may not as a result benefit therefrom. Rather, it was incumbent upon petitioner to resolve the ambiguity it created, and petitioner has failed to do so. Mr. Dannenbaum did not appear at the hearing and testify as to the date on the consent or his intent with respect thereto, his affidavit does not set forth or explain what his intent was in signing a consent but inserting a date far in the future, and the consent document on its face does not explicitly or otherwise express any intent to forestall the effectiveness of the consent document. Accordingly, the Notice of Determination was issued within the period of limitations on assessment, as validly extended, and petitioner's request that the earliest three quarterly periods be cancelled as not assessed in a timely manner is rejected.[3]

H. Treated next is the substantive issue of whether the Division properly assessed sales tax on the full amount of petitioner's party package sales and upon the tax deemed included (i.e., the "tax on tax") portion of petitioner's group party sales. With regard to this issue, Tax Law § 1105(d)(i) imposes sales tax on:

> The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section) . . . .

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

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[3] Having determined that the consent executed by Mr. Dannenbaum was in fact valid and provided for extension of the period of limitations, it is unnecessary to address whether the consent executed by Deborah E. Boehler was or was not valid.

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

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

I. Petitioner's argument is that since some of the items included in what comprises a party package would not, if sold separately, be subject to sales tax, petitioner may segregate such items out (i.e., differentiate the taxable and nontaxable component items of its party packages) and remit tax only on the amounts charged for the taxable items included in the party packages rather than on the entire sales receipt for the party package. Petitioner, in other words, seeks to utilize the "unit price method" with respect to its sales receipts for "bundled" party packages, but thereafter would internally "unbundle" such receipts into the respective taxable and nontaxable individual component parts of such packages for purposes of computing and remitting sales tax. Petitioner's argument is rejected. While it is undisputed that, viewed in isolation, some of the component items included in a party package are taxable (e.g., food, beverages, shoe rentals, and the like) while other component items (e.g., participatory sports such as bowling, ice skating, and the like) are not (***see*** Tax Law § 1105[f][1]; 20 NYCRR 527.10[d][4][example 6]), it remains that petitioner sells party packages consisting of a mixture or variety of such items as opposed to making individual sales of bowling or skating admissions to its party package customers. Petitioner is not involved in distinct nontaxable transactions with respect to its party package

customers, but rather offers a single transaction, a party package, consisting of a number of integral component parts. Petitioner charges its customers a lump sum price per person for the given package, and provides its customers with an invoice setting forth a single charge which does not separately state the amount of tax charged or otherwise distinguish or segregate the taxable and nontaxable components of the overall charge. Similarly, petitioner's advertising flyers for such party packages do not identify which of the items included therein are, and are not, taxable. Unlike ***Matter of Bernstein-on-Esssex St., Inc.*** (Tax Appeals Tribunal, December 3, 1992), as cited by petitioner, the Division did not fail to recognize or allow for the existence of any discrete nontaxable sales (e.g., individual sales of bowling, ice skating, etc.), or impose tax on such sales. Rather, the Division found that petitioner's party packages provide for food, beverages, access to places of amusement and access to facilities for participatory sports, but found no separately stated charge for the use of facilities for such participatory sports. Petitioner did not break down its party packages into the taxable and nontaxable component parts thereof. Petitioner is selling to its customers a party "package," and petitioner's advertisements and invoices as rendered to its customers provide no support for the method and result sought by petitioner.

J. Contrary to petitioner's assertion, by brief, the evidence is not sufficient to conclude that petitioner orally communicated to its customers, at the time of booking a party, that petitioner was selling and the customer was purchasing "an unbundled transaction consisting of two different components that are not integral to each other." Rather, petitioner's customers were purchasing a party package providing a number of different items for a single price per customer. It is well settled that if a single invoice charge includes taxable and nontaxable components, the entire charge is subject to tax (***Matter of LaCascade v State Tax Commn.***, 91 AD2d 784, 458

NYS2d 80 [1982]; ***Matter of Artex Systems, Inc., v. Urbach***, 252 AD2d 750 [1988]; Tax Law § 1132[c]; 20 NYCRR 527.1[b]). In this case, the amount of sales tax charged was not "stated, charged and shown separately" on petitioner's customers' invoices. Signs advising that all applicable taxes are included, or bearing like language, are not sufficient to constitute the separate statement of tax on a receipt as is required (***see*** Tax Law § 1132[a][1]; 20 NYCRR 532.1[b][1], [3]), or to establish, as in the case of the group party sales, that the undifferentiated amount shown on the invoices was not the sales receipt amount subject to tax but rather was the sales receipt amount including therein the sales tax charged to the customer. Accordingly, the Division's assessment of tax on the full amount of petitioner's receipts from party package sales, and on the "tax on tax" portion of the group party sales receipts, is sustained. Finally, petitioner refers to the "unit price method," a policy applicable as a means of accounting for sales where a vendor has collected tax on a sale but where no written receipt is given to a customer. Under this method, the "unit price" is the price, including sales tax, at which the sale is recorded, and the seller is required to make the customer aware of inclusion of sales tax in the price by visibly posting a placard stating that the prices of all taxable items include sales tax (***see*** 20 NYCRR 532.1[b][4]). While petitioner apparently utilizes the unit price method for individual sales at its food concessions, the unit price method has no applicability with regard to petitioner's party package or group party sales. That is, the unit price method is specifically inapplicable where, as here, a taxpayer provides its customers with a written receipt or invoice (***Matter of LaCascade v. State Tax Commn, supra***; 20 NYCRR 532.1[b][4]).

K. The petition of Lake Grove Entertainment, LLC is hereby denied and the Notice of Determination dated May 9, 2005 is sustained.

DATED: Troy, New York
March 27, 2008

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE