STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
677 NEW LOUDON CORPORATION D/B/A NITE MOVES	:	DETERMINATION
	:	DTA NO. 821458
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2002 through August 31, 2005.	:	
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Petitioner, 677 New Loudon Corporation d/b/a Nite Moves, 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 December 1, 2002 through August 31, 2005.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 5, 2008 at 9:30 A.M. Petitioner appeared by Andrew McCullough, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne Jack, Esq., of counsel). All briefs were to be submitted by September 15, 2008, which date began the six-month period for the issuance of this determination.

ISSUES

I. Whether the Division of Taxation has established that the door admissions collected by petitioner from its patrons is subject to sales tax pursuant to Tax Law § 1105(f)(1) as an admission charge to a place of amusement, or whether petitioner has established entitlement to the exemption under the same section as an admission to a dramatic or musical arts performance.

II. Whether the Division of Taxation has established that the door admissions collected by petitioner from its patrons is subject to sales tax pursuant to Tax Law § 1105(f)(3), as amounts paid as charges of a roof garden, cabaret or other similar place.

III. Whether the Division of Taxation has established that the door admissions collected by petitioner from its patrons is subject to sales tax pursuant to Tax Law § 1105(d), as a cover, minimum, entertainment or other charge made to patrons in an establishment which provides taxable food or beverages.

FINDINGS OF FACT

1. 677 New Loudon Corporation, doing business as Nite Moves (petitioner), operated an adult entertainment establishment, referred to as an adult juice club, located in Latham, New York, offering exotic dancing by females during the audit period at issue, December 1, 2002 through August 31, 2005. Petitioner served only nonalcoholic beverages, including bottled water, soda and juice. At the very beginning of the audit period petitioner sold light lunch items, but this was discontinued due to low demand.

2. After a request for books and records, the Division of Taxation (Division) determined that petitioner's books and records were adequate for the performance of a detailed audit. The Division audited petitioner's fixed asset purchases and recurring expense purchases in detail and determined there was additional tax due of $4,038.67 on additional expense purchases of $50,483.00 for the period in issue. Petitioner does not dispute this amount.

3. Pursuant to an executed test period audit method election agreement entered into by the parties, the Division performed a test of petitioner's sales for the quarter ending August 31, 2005. Petitioner's sales were comprised of four categories: 1) door admission fees, for general admission charges; 2) "couch sales" for the service of private dances performed for customers;

3) register sales for nonalcoholic beverages sold; and 4) house fees, for the fees paid by the dancers to the club. The Division determined that petitioner had not paid tax on its door admissions ($64,612.00 for the test period) or its fee for private dances ($321,535.00 for the test period), and the Division maintains that these items are subject to sales tax. Petitioner had collected tax on its register sales of beverages ($68,937.00 for the test period) and was given credit for taxes paid. The Division determined that the house fees ($18,650.00 for the test period) were not subject to tax.

According the to the Division, petitioner should have paid tax on test period items totaling $281,665.00[1] at a tax rate of 8% for additional tax for the test period of $22,533.20. Giving the taxpayer credit for taxes paid in accordance with its filed sales tax returns for the same period of $5,077.71, the additional tax due was $17,455.49. The Division divided the additional tax due for the test period by the total gross sales reported by petitioner on its sales tax returns for that quarter, $455,165.00, to determine an error rate of 3.8350%. The Division next multiplied the error rate by the total gross sales reported on petitioner's sales tax returns for the audit period ($3,257,417.00) to determine $124,921.94 in additional tax due on sales for the entire period in issue. Then the Division added the additional tax due on expenses purchases of $4,038.67 to this amount to arrive at total additional tax due $128,960.61.

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[1] The Division appears to have omitted August taxable sales in this calculation, wherein the end result would have been $455,084.00 for the test period total, and significantly higher tax for the audit period. There was no explanation provided for this discrepancy. Article 28 makes no provision for the assertion of a greater deficiency based upon mathematical errors in audit calculations, unlike the remedy provided in income tax under Tax Law § 689(e)(3). While there is no apparent bar to the Division's issuance of more than one notice of determination assessing tax for a particular period (***see Matter of Adirondack Steel Casting Co. v. New York State Tax Commn, 121 AD2d 834, 504 NYS2d 265; [1986]; Matter of Turner Construction Company v. New York State Tax Commn, 57 AD2d 201, 394 NYS2d 78 [1977]***), there is no evidence or claim that the Division ever attempted to do so within the statute of limitations. Accordingly, the discrepancies which appear to be mathematical errors will have no effect on the notice of determination as issued.

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

5. The Division's auditor had a preconceived opinion that the admissions for the door and the private couch dances were taxable, along with the beverages sold. The auditor spoke briefly with petitioner's management and observed only the layout of the business prior to its opening. No observation was made of either the stage dances or the private couch dances as part of the audit. The auditor did not discuss with petitioner any possible exemptions from sales tax, nor the percentage of beverage sales as it related to total income from the club's operations.

6. The auditor observed that the club had a sign posted at the entrance that stated there was a $5.00 door fee, and that patrons were required to buy a minimum of two nonalcoholic beverages, paid also at the time of admission. In 2004, when the business was remodeled, the sign regarding the two-drink minimum was removed. The bartenders still ask all customers if they would like a beverage, but do not require the purchase of one or more to remain in the club. The cost of beverages was estimated at $3.00 to $5.00 each. The sales of beverages consisted of approximately 15% of petitioner's total sales income during the audit period.

The admission charge at the door was $5.00 at the beginning of the audit period, and raised to $8.00 in 2003, and later to the current admission fee of $10 ($3.00 before 5:00 P.M.). The admission fee is a general admission to the club to watch the performances on the main stage.

7. Petitioner provides entertainment consisting of exotic dancers performing routines in costume for a portion of the time, and in the nude the balance of the time they are on stage. The main stage where the performances take place is 12 feet by 10 feet, with a brass pole from floor

to ceiling and a brass rail around the edge of the stage. Petitioner has standards it sets for the costumes worn by the dancers and the dancers generally have several theme costumes to accompany their routines. Dancers choose their own music and are encouraged to enhance the entertainment value by pairing the dance music with the theme chosen.

8. Petitioner introduced into evidence several DVDs illustrating various dance techniques. The first was a DVD of dance clips depicting routines that some of petitioner's dancers used for training or to adapt new techniques into their choreography, taken from YouTube. It was comprised of three pole dance routines, two of which were material from PoleJunkies.com, a Canadian internet site established to teach pole dancing for fitness, one video of some pole dance clips, and the last of a stage performance that began as a ballet performance and then incorporated more active use of pole techniques in a manner which was acrobatic in nature. Petitioner's dancers often used sources such as these to choreograph new routines and learn new techniques, particularly with pole routines.

The second DVD was of actual stage performances at petitioner's place of business. It was approximately 20 minutes in length and showed several performances by two or three dancers. Each were using pole techniques and dance steps to music.

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

9. The dancers are hired with a variety of backgrounds, training and levels of dance experience. Some have training in gymnastics, ballet, jazz, or exotic dance and refine their routines given the parameters set forth by the club, advancing their own ability and creativity

over time. New steps and routines are often learned from videos and other dancers in the industry.

10. The patron is able to select a particular dancer to perform at table side or to perform a private couch dance, while others are dancing on the stage. Patrons had the option of requesting a table dance on the open floor area off the stage, in close proximity to a particular customer at their table, for which there was no set fee, but customarily would result in tips to the dancer, which were not shared with the club. For an additional charge, patrons could request a private dance in a small private room with the same or another dancer. The private dances were performed in the nude, unlike the table dances, in the intimate setting of a small private room with a chair or couch. There were six small private rooms each with a curtain that allowed for the private room to be monitored. They did not have the same dance poles as the stage; however, the dance routines were very similar to those performed on stage, with the dancer's focus being on the particular patron. During the beginning of the audit period, private dances were $20.00 for a three-minute private dance, which petitioner and the dancer shared equally. The latter part of the audit period, the cost of private dances was raised to $25.00; petitioner received $15.00 and the dancer received $10.00.

11. House fees, another income category in petitioner's business, represent a fee paid by the dancers as independent contractors to petitioner. It is a space rental agreement for the rental of the facility in which to perform. The dancers are afforded the use of the stage, equipment and the dressing area for $25 per day, or $30 per evening. The Division did not include the house fees in taxable sales.

12. Stephen Dick, the CFO and general manager of petitioner, provided many of the details of petitioner's business at the hearing. He is responsible for the day to-day business

management and handles the bookkeeping for petitioner. He also acts as a DJ one afternoon a week.

13. Dr. Judith Lynne Hanna, a cultural anthropologist, was retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance critic. Dr. Hanna earned a master's degree in anthropology from Columbia University in 1975 and a doctoral degree in anthropology from Columbia University in 1976, specializing in nonverbal communication and the arts and society. Her doctoral dissertation was on a group's choreography and its meaning and style. She is a senior research scholar in the Department of Dance and an affiliate in the Department of Anthropology at the University of Maryland, College Park, Maryland. Dr. Hanna has training in a multitude of dance genres, has taught dance as well as courses on dance theory at the college level, and has continually conducted teacher and youth dance workshops. She has served as a dance consultant and critic, and has written 6 books on dance, published more than 150 articles in dance periodicals, and done many reviews and commentaries on dance. Since 1995, Dr. Hanna has been conducting on-site research on exotic dance and adult entertainment. Along with the research approach she has taken with other forms of dance, she has examined the characteristics and choreography of exotic dance. Dr. Hanna has been retained on 43 occasions as an expert in court matters relating specifically to exotic dance and was accepted as an expert in this field for this matter.

14. Dr. Hanna reviewed and analyzed the dancer videos entered into evidence particularly the one which contained two dancers performing at petitioner's place of business for about 22 minutes of dancing. She described this as a choreography, or arrangement, of about 61 different moves with theme and variation patterns with repetition. She identified the use of locomotion, gesture, pole, mirror and floor work at variable levels in response to music.

Dr. Hanna reviewed other videos that some of the dancers have used in developing new routines, and she spent two hours at the club observing six dancers and speaking with some of them. One of the dancers she observed did not perform pole work, but instead used a country dance routine, complete with costumes and her own artistic interpretation and choreography.

15. Dr. Hanna's report discussed dance in general, and exotic dance in great detail. Her report focused on the sequential parts of the performance, the messages of the performer, the skill it takes to perform dance routines, and the psychology of dance and its effect on the viewers. She set forth a description in detail of the choreographed sequence for each dancer in the videos submitted into evidence and discussed the various characteristics of the dancers' choreography. Dr. Hanna concluded that the presentations at petitioner's business are live dramatic choreographic performances in a theater which has shows that consist entirely of dance routines.

SUMMARY OF THE PARTIES' POSITIONS

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

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

CONCLUSIONS OF LAW

A. Pertinent to this matter, Tax Law § 1105 imposes sales tax upon the following:

> (d)(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)* (emphasis supplied):
>
> (1) in all instances where the sale is for consumption on the premises where sold . . . .
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> * * *
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> (f)(1) 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 (emphasis supplied).
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> * * *
>
> (3) The amount paid as charges of a roof garden, cabaret or other similar place in the state.

B. The primary focus of this matter is whether the admission fees collected at the door and the "couch" fees collected for the private dances are subject to sales tax. The Division asserts taxation under three different provisions of Tax Law § 1105. Although there is no constitutional prohibition against double taxation, which more often occurs when different articles of the Tax Law apply to a given transaction, it would seem unusual for each of these three subsections of Tax Law § 1105 to act as the provision intended to capture as taxable the door admission charges and the private dance charges. In fact, a more plausible explanation is that one must look to the primary focus of each of the Tax Law sections, and then determine

whether the primary focus of petitioners' transactions, occurring in the context of this business venue, results in a taxable event.

Petitioner charged a general admission at the door of its premises as an entrance fee, which permitted a patron to view all of the stage dances, and any table dance performed for that patron or another on the open floor. Further, petitioner charged a separate fee for the private couch dances. Since the private dance charge would qualify as a charge for additional entertainment, it would also be considered an admission charge under the Tax Law (20 NYCRR 527.10[b][1]).

In ***Matter of 1605 Book Center v. Tax Appeals Tribunal*** (83 NY2d 240, 609 NYS2d 144 [1994], ***cert denied*** 513 US 811, 130 L Ed 2d 19 [1994]) the Court of Appeals upheld imposition of sales tax on receipts from peep show booths pursuant to Tax Law §1105(f)(1) as places of amusement. The peep show booth consisted of separate booths surrounding a stage from which patrons were able to view nude or partially nude females performing. Patrons would enter the booths and deposit coins in a slot, which resulted in a curtain or screen raising to enable the patron to 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. (***Matter of 1605 Book Center v. Tax Appeals Tribunal***, 83 NY2d at 245, 609 NYS2d at 147.)

Clearly petitioner's place of business is a place of amusement under the statute, and this is not in dispute. Accordingly, petitioner's admission fee and private dance charge would be subject to sales tax under Tax Law § 1105(f)(1), unless it qualified for the exemption as a dramatic or

musical arts performance. Petitioner asserts that it meets the enumerated exception contained within the taxing 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 ***Matter of 1605 Book Center***.

The tax regulations further explain Tax Law § 1105(f)(1) at 20 NYCRR 527.10(d)(2), Example 4:

> A theater 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.

Thus, the question must focus on whether the dance performances at petitioner's club qualify as a musical arts performance.

C. What distinguishes this case is that petitioner explicitly seeks the exemption and introduced both evidence of the dance routines and the testimony of an expert in dance, along with her report, in support of its position. At the hearing, petitioner introduced dance videos as evidence of the routines of its dancers to illustrate that the routines were choreographed dance routines. The videos depicted dance routines that incorporated acrobatic pole maneuvers, splits, and other patterned repetitions. The pole maneuvers in particular are no small feat to accomplish, and attempting such a performance without the skill and a planned routine of steps could prove dangerous. Petitioner's expert described the symbolism, fantasy experience and other characteristics of exotic dance as entertainment in a manner that highlighted the artistic expression and the skill and training involved from an academic perspective. She describes the exotic dance routines as follows:

> somewhat 'risque' or 'naughty' adult play, a fanciful teasing that transgresses social decorum and dress codes in an ambiance ranging from sedate to carnival-like. Exotic dance is erotic fantasy and communication with a display

> of nudity, disclosure of more skin and different movements than are seen in public, the use of high heels. . . and incorporation of jazz-like, improvisatory movements in routines.

The fact that a community may opt not to have a juice bar or a billboard advertising its existence in its neighborhood is not a factor in the determination of whether petitioner's entertainment charges are subject to these sales tax provisions. The fact someone may believe that this entertainment is not appropriate for any audience is not the issue. The fact that the dancers remove all or part of their costume during the performances, that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of Tax Law § 1105(f)(1). Accordingly, petitioner has met its burden of proof pursuant to Tax Law § 1132 on this issue and the admission charges it collects from its patrons at the door and for the private dances meet the exception to taxation under Tax Law § 1105(f)(1), and are therefore not taxable under this section.

D. The Division maintains that petitioner's admission charges are also taxable pursuant to Tax Law § 1105(f)(3) which provides that a sales tax shall be imposed on "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state." Tax Law § 1101(d)(12) defines roof garden, cabaret or similar place as:

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

Other than the existence of the public performance for profit, there are two tests that must be met for petitioner's admission charges to be taxed under this section: its business must be a roof garden, cabaret or similar place, and its beverages must be more than incidental to the

performances. The term "cabaret" is defined as "a restaurant serving liquor and providing entertainment (as by singers and dancers); a nightclub" (Merriam-Webster Online Dictionary. 2009, available at http://www.merriam-webster.com/dictionary/cabaret>). A "roof garden" is a restaurant or nightclub at the top of a building often in connection with or decorated to suggest an outdoor garden (Merriam-Webster Online Dictionary, 2009, available at http://www.merriam-webster.com/dictionary/roof garden>). What a cabaret and roof garden appear to have in common is that they are both restaurants that also have entertainment. Petitioner does not serve either alcohol or food (with the exception of briefly serving lunch) and does not appear to meet the definition of either, but for the entertainment that is provided. If one could argue that petitioner's place of business constitutes a "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 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 of refreshments to gross sales (***see Roberto v. United States***, 357 F Supp 862 [1973], ***affd*** 518 F2d 1109 [1975]; ***Dance Town U.S.A. v. United States***, 319 F Supp 634 [1970]). In ***Stevens v. United States*** (302 F2d 158 [5th Cir 1962]) the court encouraged an analysis that took into account the relative percentages of gross receipts as the most important single index, along with other factors. In ***Ross v. Hayes*** (337 F2d 690 [5th Cir 1964]), the court found that the cabaret tax was not applicable because the taxpayer's establishment was a dance hall and the sale of food and drink was merely incidental, even at 44% of the gross income. The

focus was that of the taxpayer's overall operation, as should be applied here. In the present case petitioner's refreshment sales constitute 14.2% of its total sales. This percentage is a strong indicator that the selling of refreshments was merely incidental to petitioner's business, and not an integral part of that business. The testimony provided by Mr. Dick clearly indicated that the primary reason people visit the petitioner business is for the entertainment provided, not the beverages. Furthermore, the fact that petitioner discontinued usage of a sign stating a policy of a two-drink minimum, payable upon entrance is also evidence that it did not require its patrons to make such purchases and the selling of refreshments was incidental to petitioner's business. Petitioner has met its burden of proof that its admission charges were not 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)(i), set forth in detail in Conclusion A. For two reasons this section is misapplied to the taxation of the admission charges herein (taxation of the beverages is not disputed). First, the focus of Tax Law § 1105(d)(i)(1) is to tax food and beverages. The receipts from a cover or other entertainment charge is included as a secondary or tangential focus of the subject of that tax section. In other words, if patrons visited petitioner's business because the juice beverages were extraordinary, and happened to experience entertainment while there, this section would surely apply. Clearly it is not the case that people are drawn to petitioner's business for the juice drinks. The patrons are there to see beautiful, scantily clad performers dancing on stage. Thus, the taxation of the admission charges is not provided for here, but rather under section 1105(f)(1).

Secondly, the proper interpretation of the parenthetical "(except those receipts taxed pursuant to subdivision [f] of this section)" is that since it has been determined that the admission

charges collected by petitioner from its patrons were subject to tax pursuant to Tax Law § 1105(f)(1), (but met the exception contained therein), they cannot be held taxable under Tax Law § 1105(d). Accordingly, the Division erred in taxing the admission charges in this matter under Tax Law § 1105(d)(i).

F. Petitioner's constitutional protection arguments are not addressed herein, as the admission charges have been determined to be not taxable.

G. The petition of 677 New Loudon Corporation d/b/a Nite Moves is granted to the extent indicated in Conclusions of Law C, D, and E and the Notice of Determination dated February 13, 2006 is hereby modified accordingly; except as so modified, the Notice of Determination is in all other respects sustained.

DATED: Troy, New York
March 12, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE