L 9 (3-68)

Sales Tax Determinations 1968 A-Z

BUREAU OF LAW

MEMORANDUM Club Escapade, Inc.

TO: State Tax Commission

FROM: Alfred Rubinstein, Hearing Officer

SUBJECT: Application of Club Escapade, Inc. for Review of a Determination Assessing or Denying a Refund or Credit of Sales and/or Use Taxes under Article 28 and/or 29 of the Tax Law for the Period August 1, 1965 through August 31, 1967

A hearing on the above-entitled application was held before me on January 23, 1968 at 1500 Genesee Street, Utica, New York. The appearances and the exhibits were as noted on the transcript.

The issue involved whether a charge for admission to a tavern for the privilege of witnessing a "topless" dancer constituted a dramatic or musical arts admission charge, exempt from sales tax.

The taxpayer filed sales tax returns for the periods August 1, 1965 through August 31, 1967, reporting as non-taxable receipts of $19,763.00, in the aggregate. On audit, these receipts were determined to be subject to the sales tax. By Notice No. 90,753,572, dated November 22, 1967, additional taxes at the combined state and local rate of 4% were imposed, in the sum of $790.52 together with interest of $22.37, a total of $812.89.

The taxpayer owns premises in Great Bend, New York. Food and alcoholic beverages are dispensed on the premises, and patrons engage in social dancing. Recorded music is provided. The premises are licensed for on-premises sale of alcoholic beverages under a tavern license. Aside from the corporate officers who perform all executive and administrative functions, employees include bartenders, waiters, a cook and a cleaner. The premises are open for business from March until November, and the patronage is made up, to some extent, of the personnel stationed at Camp Drum, which is nearby.

Normally, the premises are open to all persons who wish to enter without fee. However, when "topless" dance exhibitions are provided for the patrons, an admission charge is levied. The charge of $1.00 is imposed only on unescorted male patrons. Female patrons, or males escorting females are not charged an admission fee. The taxpayer contends that the performer is a practitioner of an "art", characterized by the taxpayer as "choreographic" dancing and otherwise known as "topless" dancing, in which a pulchritudinous young lady engages in "interpretive" dancing. Apparently, an integral and important element of the performance is a display of the dancer's breasts and attire is neither added nor subtracted during the performance.

The taxpayer contends (1) that the admission charge is a fee for admission to a place of assembly for a live choreographic performance, (2) that the relative state of undress of the performer is not a factor to be considered, (3) that the performance represents a new art form, and (4) that the performance is choreographic art solely with respect to unescorted males, who are charged an admission fee (but not to females or their male escorts neither of whom are required to pay an admission fee).

The determination imposing the tax on the admission charges levied by the taxpayer was imposed pursuant to section 1105 of the Tax Law. Subdivision (d)(1) imposes the tax on receipts from sales in or by "restaurants" or "taverns" where alcoholic beverages are sold including any charge made to patrons or customers for "cover", "minimum", "entertainment" or "other charge" except receipts taxed pursuant to subdivision (f). Subdivision (f)(1) of section 1105 imposes the tax on admission charges in excess of 10¢ for any place of amusement (subject to certain exceptions) and subdivision (f)(3) imposes the tax on

> "The amount paid as charges of a roof garden, cabaret or other similar place in the state."

Taxpayer's contention is that the determination is in error on the ground that its activities are within the exception contained in subdivision (f)(1) as "dramatic or musical art performances".

The phrase "Dramatic or musical admission charge" is defined in section 1101 of the Tax Law, at subdivision (d)(5) as

> "Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

and the charge of a roof garden, cabaret or similar place is defined at subdivision (d)(4) of the same section as

> "Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place."

In addition, subdivision (d) of section 1101 defines other terms used in subdivision (f) of section 1105 as follows: "Admission charge" at paragraph (2), "Amusement charge" at paragraph (3), "Patron" at paragraph (9), "Place of amusement" at paragraph (10), and "Roof garden, cabaret or other similar place" at paragraph (12).

As taxpayer does not allege that the place where the performances are given is a theatre, opera house or concert hall, nor that the performances in question are live dramatic or live musical ones, the claim for exemption is based, solely, on such performances as live choreographic ones in a place of assembly, within the meaning of the statute.

Tax statutes should be interpreted as the ordinary person reading them would so interpret them, and strict construction may not be used to defeat their clear and unmistakable meaning and intent, Steinbeck v. Gerosa, 4 N Y 2d 302; Business Statistics Organization v. Joseph, 299 N.Y. 443; Wien v. Murphy, 25 A D 2d 222.

The use of the phrase "place of assembly" in conjunction with "theatre", "opera house" and "concert hall" clearly indicates that the statute intended to exempt from the tax admission charges to exhibitions of the performing arts, the primary and predominant functions of such places. That some theatres, opera houses and concert halls may serve food or beverages does not change their essential character. They do so under special licenses, and not as cabarets, restaurants, or taverns. It was not intended to exempt an establishment such as the Club Escapade, self-described on its tax returns as a "restaurant" and which is licensed by the State Liquor Authority as a "tavern", whose primary and predominant business activity consists of the sale of food and beverages for on-premises consumption, as all receipts of such purveyors of food and beverages are specifically subject to the sales tax under section 1105 of the Tax Law. Clearly then, the taxpayer's premises are not a "place of assembly" within the definition contained in subdivision (d)(5) of section 1101.

I am of the opinion that the Club Escapade is a roof garden, cabaret, or other similar place as that term is defined in common usage. The present Tax Law, at subdivision (d)(12) of section 1101, merely defines the term as, 'Any roof garden, cabaret or other similar place which furnishes a public performance for profit' and resort may be had to the definition contained in section 1(d) of Chapter 278 of the Laws of 1947 and carried over unchanged in Chapter 742 of the Laws of 1952, the former enabling acts permitting counties and cities to levy certain local special taxes, and which were repealed by Chapter 93 of the Laws of 1965 when the present sales tax law was enacted, and which reads:

> "The term 'roof garden, cabaret or other similar place' shall include any room in any hotel, restaurant, hall or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are

> afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

or a cabaret as defined by the Administrative Code of the City of New York, at section B32-296.0(3), of Article 38, the licensing law, as

> "Any room, place or space in the city in which any musical entertainment, singing, dancing or similar amusement is permitted in connection with the restaurant business or the business of directly or indirectly selling to the public food or drink."

(See People v. Rickoff, 31 Misc 2d 549; People v. Greenberg, 12 Misc 2d 396 and People v. Liquorman, 171 Misc. 535 for judicial interpretations of this definition in connection with prosecution for violation of regulatory statutes where strict interpretation is required.)

No competent evidence was adduced as to the educational, cultural or edifying nature of the performances sufficient to allow a finding that they constituted choreography, the receipts of which are exempt from the sales tax on admission charges to places of amusement. The witness, Paul N. Rood, testified that in his opinion the dances were choreography and an art form. His judgment was based on, "what I see in mass media today". Prior to assuming the presidency of the taxpayer, Mr. Rood's experience included engagement as a home builder, real estate salesman, wholesale plywood and lumber sales and as a Marine Corps pilot. He is a graduate of Syracuse University College of Forestry, and has never done any interpretive dancing.

Accordingly, and based on the evidence, it is my opinion that the Club Escapade is not a place of assembly for a live dramatic, choreographic or musical performance within the meaning of subdivision (d)(5) of section 1101 of the Tax Law; that the receipts of Club Escapade from admission charges for the privilege of viewing "topless" dancers are not admission charges for dramatic or musical arts performances within the meaning of subdivision (f)(1) of section 1105 of the Tax Law; that such admission charges are subject to the sales tax imposed by section 1105 of the Tax Law under subdivisions (d)(1)(1), (f)(1) and (f)(3), and that the determination assessing additional sales taxes against the taxpayer should be sustained.

The determination of the Tax Commission should be substantially in the form submitted herewith.

/s/ ALFRED RUBINSTEIN
Hearing Officer

AR:ac
Enc.

April 25, 1968
11-14-68

STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION :

OF :

CLUB ESCAPADE, INC. :

FOR A HEARING TO REVIEW A DETERMINATION ASSESSING OR DENYING A REFUND OR CREDIT OF SALES AND/OR USE TAXES UNDER ARTICLE 28 AND/OR 29 OF THE TAX LAW FOR THE PERIOD AUGUST 1, 1965 THROUGH AUGUST 31, 1967 :

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Club Escapade, Inc. having filed an application for a hearing to review a determination assessing or denying a refund or credit of sales and/or use taxes under Article 28 and/or 29 of the Tax Law for the period August 1, 1965 through August 31, 1967, and a hearing having been held before Alfred Rubinstein, Hearing Officer of the Department of Taxation and Finance, at 1500 Genesee Street, Utica, New York, on January 23, 1968, at which hearing the taxpayer appeared by its president, Paul N. Rood and its representative, Ronald G. King, CPA, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That for the period August 1, 1965 through August 31, 1967 the taxpayer filed sales tax returns, reporting non-taxable receipts of $19,763.00 in the aggregate; that based on an audit completed October 17, 1967, the Sales Tax Bureau issued Notice of Determination No. 90,753,572 dated November 22, 1967, assessing the taxpayer additional tax and interest of $812.89, on a finding that the receipts of $19,763.00 reported

as non-taxable were subject to the state and local sales taxes; that on November 30, 1967 the taxpayer filed a protest and application for a hearing for review of the determination assessing additional sales taxes; that the sum of $19,763.00 was the total of taxpayer's receipts from admission charges to its premises for the period August 1, 1965 through August 31, 1967.

(2) That the taxpayer operates a restaurant and tavern in Great Bend, Jefferson County, New York; that on its premises the taxpayer serves food and alcoholic beverages; that the taxpayer's premises are licensed by the State Liquor Authority under a tavern license; that the taxpayer furnishes to its patrons and customers recorded music for entertainment and social dancing; that the taxpayer, at certain times, provides exhibitions of "topless" dancing for the entertainment of its patrons and customers, on which occasions it charges an admission charge solely on unescorted male patrons; that the performance of the dancer consists of body and leg movements accompanied by recorded music, during which time the upper portion of the anatomy is exposed; that at times when no dancing exhibitions are furnished the premises are open to all members of the public without any admission charge; that for the purpose of furnishing food and beverages to its patrons and customers the taxpayer employs bartenders, waiters, a cook and a cleaner.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

DETERMINES:

(A) That the taxpayer's premises constitute a place of amusement within the meaning of subdivision (d)(10) of section 1101 of the Tax Law; that the same constitute a roof garden, cabaret or other similar place within the meaning of subdivision (d)(12) of section 1101 of the Tax Law; that the same constitute a restaurant or tavern within the meaning of subdivision (d)(1) of section 1105 of the Tax Law; that the taxpayer's premises do not constitute a theatre, opera house, concert hall or other hall or place of assembly for live dramatic, choreographic or musical performances within the meaning of subdivision (d)(5) of section 1101 of the Tax Law.

(B) That taxpayer's receipts, during the period August 1, 1965 through August 31, 1967, in the amount of $19,763.00 from charges for admission to its premises were amounts paid for entertainment or amusement within the meaning of subdivision (d)(2) of section 1101 of the Tax Law; that the same were amusement charges within the meaning of subdivision (d)(3) of section 1101 of the Tax Law; that the same were charges of a roof garden, cabaret or other similar place within the meaning of subdivision (d)(4) of section 1101 of the Tax Law; that such receipts did not constitute dramatic or musical arts admission charges within the meaning of subdivision (d)(5) of section 1101 of the Tax Law.

(C) That taxpayer's receipts during the period August 1, 1965 through August 31, 1967 in the amount of $19,763.00 from charges for admission to its premises were charges for cover, minimum or entertainment of patrons or customers within the meaning of subdivision (d)(1)(1) of

section 1105 of the Tax Law; that the same were admission charges to a place of amusement within the meaning of subdivision (f)(1) of section 1105 of the Tax Law; that the same were amounts paid as charges of a roof garden, cabaret or other similar place within the meaning of subdivision (f)(3) of section 1105 of the Tax Law.

(D) That accordingly, the determination assessing additional sales taxes in the sum of $812.69 against the taxpayer for the period August 1, 1965 through August 31, 1967 is correct; that the amount set forth therein is due and owing together with additional interest, if any, and other statutory charges; that said assessment does not include any tax or other charge which could not have been lawfully demanded, and that taxpayer's application for review or refund or credit with respect thereto be and the same is hereby denied.

Dated: Albany, New York this 22nd day of November, 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
President

/s/ A. BRUCE MANLEY
Commissioner

Commissioner