STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE EXECUTIVE CLUB LLC	:	DECISION DTA NO. 825850
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, 2007 through May 31, 2010.	: :	

Petitioner, The Executive Club LLC, filed an exception to the determination of the Administrative Law Judge issued on January 28, 2016. Petitioner appeared by Mayer Brown LLP (Alvan L. Bobrow, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument, at petitioner's request, was heard on October 20, 2016 in New York, New York, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

*ISSUE*S

I. Whether the Division of Taxation was barred from issuing the notices of determination based upon the applicable statute of limitations.

II. Whether the Division of Taxation correctly determined that the receipts from the sale of scrip at petitioner's adult entertainment business were subject to sales and use taxes as admission charges.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 4, 9 and 17, which have been modified to more accurately and fully reflect the record. Findings of fact 23, and 27 through 29 have been omitted, as such findings dealt with the parties' positions on the issues before the Administrative Law Judge and findings of fact 24 through 26 have been renumbered 23 through 25 accordingly. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner, The Executive Club LLC, operates an adult entertainment business called the Penthouse Executive Club (the Club). The Club is located at 603 West 45th Street, New York, New York. It generated revenues from admissions, bar sales, food sales and performances of the entertainers.

2. Entertainers are licensees of the Club who are required to pay a house fee to receive a license to perform services on the Club's premises. The license permits the entertainers to use the Club's facilities to earn income. The house fee varies during the week, with busier nights being more expensive.

3. Depending upon the day, the Club's customers pay an admission charge of $20.00 to $30.00 to enter the Club. The admission charge may be paid with a credit card or cash. It may not be paid with scrip (***see*** finding of fact 5). Upon remittance of the admission charge, guests may go anywhere within the Club except for the private rooms. The Club collects and remits sales tax on the admission charge.

4. Entertainers earn income by performing dances for and spending time with the Club's guests. The transactions are between the entertainers and the guests and are not recorded on petitioner's records. However, the Club establishes minimum fees based upon industry custom for personal dances. The Club's customers pay the entertainers by cash or scrip (***see*** finding of fact 5).

5. The Club encourages guests to purchase scrip called executive dollars to pay entertainers. The benefit of executive dollars arises from the fact that there is a surcharge, which produces income for the Club. It also gives the entertainers the ability to make much more money than if the customers came in with only cash. When customers have the ability to purchase executive dollars with a credit card, they have the opportunity to spend more money on the entertainers and at the Club.

6. In appearance, executive dollars are similar to play money insofar as they are printed in color with a picture of an entertainer on the front. The executive dollars state, among other things, "THIS NOTE IS LEGAL TENDER FOR TABLE DANCES AND TIPPING ONLY." They have an expiration date and may not be redeemed or used once the expiration date has passed.

7. The executive dollars list items that are offered by the Club such as private dining rooms private theme rooms, executive penthouse suites, champagne lounges, table dancing and cocktails. It is not a list of what the executive dollars may be used for.

8. A customer may purchase executive dollars at a booth in the Club. In some cases, a host or manager may obtain executive dollars for the customer.[1] The Club adds a 20 percent

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[1] The host worked for both Rooms With a View (RWV) and petitioner. RWV was a separate corporation that maintained its own books. It was the subject of a separate sales tax audit. The business conducted by RWV pertained to admission to the private rooms and administration of the rooms. The charges for gaining admission to a private room were reported on the separate sales tax returns of RWV. RWV was a tenant of the Club and paid for utilities and maintenance services.

surcharge when the executive dollars are purchased. As a result, it costs $1,200.00 to purchase $1,000.00 of executive dollars. For verification, a driver's license must ordinarily be presented along with a credit card to purchase executive dollars.

9. Executive dollars may only be used to pay entertainers or for tipping hosts. For example, they could be used to pay for a dance or spending time with an entertainer anywhere in the Club. A guest may choose to spend all of the executive dollars on one entertainer or may choose to spend the executive dollars on dances with a number of different entertainers. Executive dollars may not be used to purchase food or beverage at the Club and are not redeemable at outside retailers.

10. Guests are not required to purchase executive dollars in order to enter the Club. For example, a guest, without purchasing executive dollars, is permitted to pay the admission charge, enter the Club and purchase food and a beverage. Guests may also purchase a dance for cash.

11. After paying the house fee pursuant to the license agreement, entertainers redeem executive dollars that they receive from guests. The Club charges a 13% fee for redeeming executive dollars. Accordingly, entertainers receive $87.00 from the Club for every $100.00 of executive dollars redeemed. Entertainers are permitted to redeem the executive dollars at the Club's office or at night with an individual known as the night auditor. An entertainer may also use the executive dollars to pay the house fee, pay the hair or makeup person or tip the DJ. At the end of the year, the Club gives entertainers a form 1099 for the amounts received.

12. Petitioner does not report the revenue received from executive dollars on its income tax return because it does not consider these funds to be income. Rather, petitioner regards it as money earned by the entertainers.

13. Private rooms at the club could be rented for brief periods of time from Rooms With a View, LLC.

14. An individual, known as a room administrator, advised interested guests which rooms were available and what the charge was for the different rooms. Guests wishing to occupy a particular room would pay for the room by offering the room administrator cash or a credit card. The room administrator would not accept executive dollars to pay for the occupancy of a room.

15. Receipts for the rooms were reflected on the books and records of the Club and on the records of Rooms With a View.

16. On August 23, 2010, the Division mailed a letter to petitioner scheduling a field audit for the period December 1, 2007 through May 31, 2010. The letter advised petitioner that it must be prepared to "show **all** of your sales and use tax books and records to the auditor." A schedule of books and records to be produced was attached to the letter. There was no response to this letter. On September 7, 2010, the Division mailed a second letter to petitioner, which scheduled the audit at petitioner's place of business on September 29, 2010. The parties met as scheduled and the Division explained the nature of the audit and what records were needed. Petitioner did not produce any records on this date. Since no records were made available, the Division asked petitioner's representative to sign a waiver and he agreed.

17. On October 13, 2010, the Division received a consent extending period of limitations for assessment of sales and use taxes under articles 28 and 29 of the Tax Law until on or before March 20, 2012. This consent was executed on October 12, 2010 by Robert Gans, as managing member of petitioner and on October 14, 2010 by Roy Watson, Tax Auditor II, on behalf of the Division. On December 2, 2011, the Division received a consent extending period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law extending the

period for the assessment of sales and use taxes to any time on or before March 20, 2013. This consent was executed on December 2, 2011 by Howard Rosenbluth as Chief Financial Officer of petitioner and Mr. Watson on behalf of the Division (collectively, the consents). All three people executing the consents had authority to do so. By signing the consents on behalf of the Division, Mr. Watson intended to extend the statute of limitations for the assessment of sales and use taxes in this matter. By signing the consents on behalf of petitioner, both Mr. Gans and Mr. Rosenbluth intended to extend the statute of limitations for the assessment of sales and use taxes in this matter. Neither consent contains the Division's raised seal in the place allocated for the seal or anywhere else on the face of the form.

18. Field audit appointments were held on November 23, 2010 and February 17, 2011. Different portions of petitioner's books and records were made available on each occasion. A test period audit method election form was executed for the audit of sales and recurring expense purchases. Following the audit, the Division concluded that the correct amount of sales tax was paid on the sales of food, beverage and coat check services. Additionally, the Division determined that sales tax was collected and remitted on admission charges that customers paid to enter the Club. However, utilizing the test period audit method, the Division also determined that sales tax was due on drinks that were given away for free (commonly known as complementary liquor). This portion of the audit resulted in assessing additional taxable sales of $311,468.00. The Division also conducted a detailed review of the sale of executive dollars and determined that these sales were taxable as admission charges to a place of amusement. This conclusion resulted in finding additional taxable sales of $28,425,440.00.[2] Lastly, the Division

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[2] The amount of tax due was determined by adding up the total amount of executive dollars listed on a spreadsheet for the entire audit period and imposing sales tax on that amount.

examined expense purchases and found that there were additional taxable expense purchases of $89,785.43.

19. At the hearing, petitioner chose not to challenge those portions of the audit that concerned complementary liquor or expenses.

20. On the basis of the foregoing audit, the Division issued a statement of proposed audit change for sales and use tax stating that tax was due in the amount of $33,604.98 plus interest for a balance due of $41,837.40. The Division also issued a statement of proposed audit change for sales and use tax stating that tax was due in the amount of $2,425,261.57 plus interest for a balance due of $3,046,324.32.

21. On July 6, 2012, the Division issued notices of determination that assessed sales and use taxes for the period December 1, 2007 through May 31, 2010 as follows:

Assessment Number	Period Ending	Tax	Interest	Balance
L-038251889-7	May 31, 2010	$33,604.98	$9,215.12	$42,820.10
L-038264666-8	May 31, 2010	$2,425,261.57	$692,616.02	$3,117,877.59

22. In accordance with State Administrative Procedure Act § 307 (1), petitioner's proposed findings of fact have been generally accepted and substantially incorporated herein. However, a portion of proposed finding of fact 1 is not supported by the record, portions of proposed findings 4, 5 and 13 were omitted because they lacked a reference to the transcript or an exhibit and the last sentence of proposed finding of fact 8 was omitted because it was duplicative of another finding of fact.

23. The testimony offered by the parties reflects a conflicting version of the facts. A resolution of this conflict requires a review of the testimony. At the hearing, auditor Larry Mungal testified that the Division determined that the sale of executive dollars was subject to tax

because they were used as an admission charge to a place of amusement. The auditor's supervisor, Roy Watson, participated in the audit and similarly concluded that the executive dollars were taxable as an admission charge. When he was advised of Mr. Watson's conclusion, petitioner's representative replied that approximately one-third of the sales of executive dollars would not be subject to tax because such executive dollars were used for nontaxable purposes. Lastly, the Division offered the testimony of Alicia Carpio, an auditor who conducted the audit of the closely related corporation RWV. On the basis of her conversations with the individual who functioned as petitioner's chief financial officer, Ms. Carpio was under the impression that executive dollars could be used for any purpose inside the Club. Ms. Carpio was at the Club only in the morning, when it was not open to the public.

24. Petitioner presented the testimony of Mr. Howard Rosenbluth. Mr. Rosenbluth provided accounting services as an independent contractor for petitioner and functioned as the chief financial officer. He also provided accounting services for RWV. According to Mr. Rosenbluth, executive dollars could only be used for tipping and paying an entertainer. In particular he stressed that they could not be used for admission to a room or to purchase food or drink.

25. Petitioner also presented the testimony of Mark Yakow, who served as the chief operating officer of the Club. He explained that the function of the scrip was for customers to use for spending time with the entertainers. He further explained that a customer could only use the scrip to sit with an entertainer at dinner, purchase a dance or for tipping.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first addressed the controverted factual question of whether executive dollars could be used to purchase admission to the private rooms. The Administrative

Law Judge discussed and compared the testimony of the various witnesses that testified regarding this issue and found that executive dollars could be used for entertainers, either for the performance of dances or spending time with them, or for tips for entertainers or hosts. The Administrative Law Judge found that the executive dollars could not be used for admission to private rooms.[3]

The Administrative Law Judge next concluded ***Matter of Marchello*** (Tax Appeals Tribunal, April 14, 2011) controlled in the present case. In ***Matter of Marchello***, this Tribunal held that receipts from the sale of scrip used to purchase dances or tip entertainers and wait staff were taxable as amusement charges. The Administrative Law Judge, while acknowledging that in the present case executive dollars could not be used for admission to private rooms, whereas in ***Matter of Marchello*** the scrip could be used for admission to private rooms, found that this distinction was of no consequence.

The Administrative Law Judge also discounted petitioner's argument that the imposition of tax on the receipts from the sale of scrip constituted double taxation as the evidence showed that the receipts for admission to the room and receipts for an exotic dance were separately accounted for.

Finally, the Administrative Law Judge rendered the additional arguments moot and chose not to address same.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues that its receipts from the sale of executive dollars are not subject to sales tax as an admission charge because the executive dollars do not grant admission to anything.

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[3] In reaching a conclusion on this factual issue, the Administrative Law Judge appears to be utilizing the common understanding of the word "admission" as opposed to the statutory term "admission charges" set forth in Tax Law § 1101 (d) (2), which is inclusive of charges for "entertainment or amusement."

Furthermore, petitioner argues, for the first time on exception, that personal dances are not entertainment or amusement, but rather constitute an intimate personal service.

Petitioner also asserts that the Administrative Law Judge failed to address its principal argument that executive dollars are intangible property, and thus not subject to sales tax. In this regard, petitioner asserts that executive dollars have no value except to be exchanged at a later time for a dance provided by an independent third party, the entertainer. Thus, petitioner argues that executive dollars are the same as gift cards and similarly not subject to tax at the time purchased.

Petitioner alleges that the Administrative Law Judge also failed to address a jurisdictional issue that petitioner had raised during the hearing, which was whether the consent to extend the statute of limitations was valid where the Division failed to affix the seal of the Commissioner of Taxation and Finance as required by Tax Law § 175. Petitioner continues to assert that the consents were invalid and therefore the Division had no authority to issue the notices of determination. Petitioner argues that the failure of the affixation of the seal by the Division is not a technicality similar to the misspelling of a name on the document, but affects the validity of the document itself, for example, if someone from the Division without authority executed a document.

Finally, petitioner argues that receipts from the sale of executive dollars do not constitute cover charges under Tax Law § 1105 (d) or charges of a roof garden, cabaret or similar place of entertainment under Tax Law § 1105 (f) (3).

The Division argues that this Tribunal's decision in ***Matter of HDV Manhattan, LLC*** (Tax Appeals Tribunal, February 12, 2016) controls and compels a conclusion that petitioner's receipts from the sale of executive dollars are subject to sales tax as an amusement charge.

Furthermore, the Division asserts that petitioner has failed to distinguish the facts in the present case from those in ***Matter of HDV Manhattan, LLC*** in any meaningful manner.

In response to petitioner's arguments that: (1) personal dances purchased with executive dollars do not constitute entertainment, but rather a personal service, akin to a therapeutic massage conducted in a sensual manner; and (2) it provides the scrip as an accommodation to its entertainers who function like concessionaires at a flea market, the Division notes that the record is bereft of any facts that would support petitioner's arguments.

In response to petitioner's argument that there was no valid extension of the statute of limitations in this matter, the Division argues that Tax Law § 1147 (c) requires only that the taxpayer consent to an extension of the statutorily imposed time limit allowed to the Division to determine additional tax due. Therefore, no affixation of the Division's seal is required. Additionally, the Division asserts that the purpose of affixing an official seal to a document is to establish the authenticity of a document. Thus, where, as here, the parties intended to extend the statute of limitations, the failure to affix the seal does not change the parties' agreement to do so.

The Division did not address petitioner's arguments that receipts from the sale of executive dollars do not constitute cover charges under Tax Law § 1105 (d) or charges of a roof garden, cabaret or similar place of entertainment under Tax Law § 1105 (f) (3).

OPINION

We turn first to the issue of whether the consents executed by the parties served as valid consents to extend the statute of limitations for assessment, in that neither consent was affixed with a seal by the Division.[4] Petitioner argues that the failure to affix the official seal makes the

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[4] The Administrative Law Judge provided no explanation as to why a conclusion in favor of the Division on a substantive issue would render the statute of limitations issue moot, nor are we able to envision any such explanation.

consents invalid and requires a finding that the notices of determination were issued beyond the applicable statute of limitations.

As asserted by petitioner, Tax Law § 175 does require that where a statute authorizes the Division to execute "an instrument," the seal of the "commissioner shall be affixed or shall appear" on such a document. The statute governing the extension of time within which the Division may assess additional tax for sales and use taxes provides that where, prior to the expiration of the relevant statute of limitations, "***a taxpayer has consented in writing*** that such period be extended" additional tax "may be determined at any time within such extended period" (Tax Law § 1147 [c], emphasis added). Thus, Tax Law § 1147 (c) requires only the consent of the taxpayer to extend an applicable statute of limitations and requires no action on the part of the Division to validate such consent. While we commend and do not wish to discourage the Division's best practice of signing such documents, nor what has been the Division's practice of affixing the seal to such documents to indicate the importance and solemnity of the act of extending a period of limitations, neither is required for a valid extension of the statute of limitations in regard to sales and use taxes (***cf.*** Tax Law § 683 [c] [2] [the Division and the taxpayer must agree and "consent in writing" in order to extend the statutory limitation on the time allowed for the Division to assess additional income tax]).

In any event, we concur with the Division's assertion that the failure of the Division to affix the Commissioner's seal to a document purporting to extend the statute of limitations in a given matter does not invalidate the document. Tax Law § 172, providing for the official seal of the Commissioner of Taxation and Finance and its use, indicates that the purpose of the seal is to authenticate documents by providing that a document containing the appropriate signature and affixed with the seal "shall be received in evidence in the same manner and with like effect as

deeds regularly acknowledged or proven" (***see also*** Tax Law § 175 [once signed and sealed "[n]o acknowledgment of the execution of any such instrument shall be necessary for the purpose of the recordation thereof or for any other purpose]"). Thus, contrary to petitioner's assertion that the consents should be held to be invalid, the statutory framework actually indicates only an intent to provide for the authenticity of the documents, which is not in question in the present matter (***see*** finding of fact 17).

We turn next to the issue of whether petitioner's receipts from the sale of the executive dollars are subject to sales and use taxes as receipts from admission charges. Pursuant to Tax Law § 1132 (c) (1), petitioner bore the burden of proving by clear and convincing evidence that the tax assessed was erroneous (***Matter of Mobley v Tax Appeals Trib. of State of N.Y.***, 177 AD2d 797, 799 [1991], ***appeal dismissed*** 79 NY2d 978 [1992]). Furthermore, a presumption of correctness attaches to a notice issued by the Division, and the taxpayer must overcome this presumption (***see e.g. Matter of HDV Manhattan, LLC***).

The Division's notices of determination in the present case are based upon Tax Law § 1105 (f), which imposes sales tax on receipts from certain admission charges to or for the use of a place of amusement. For purposes of the tax, admission charge means "[t]he 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] [2]).

Initially, we note that following the issuance of the determination in the present matter, this Tribunal issued its decision in ***Matter of HDV Manhattan, LLC***, wherein the issue was whether sales tax was due on the receipts from sale of scrip at a club conducting an adult entertainment business. Based upon the similarities of the facts presented in each case, we find that the holding in ***Matter of HDV Manhattan, LLC*** controls the outcome of the present case, in that petitioner

failed in its burden to prove any distinction between the two cases that would overcome the presumption that the Division's notices were correct.

The relevant facts regarding the operation of the respective clubs, are as follows:

- Both clubs operated adult entertainment businesses;
- Customers of both clubs paid an admission or cover charge to enter the clubs and sales tax was collected and paid by the respective taxpayers on these charges;
- Both clubs had a public area where personal dances could be purchased and private rooms where personal dances could be purchased;
- Scrip was available for purchase in both clubs, and in both, customers paid a 20% surcharge on the purchase of scrip (i.e., $120.00 was required to purchase $100.00 in scrip);
- In both cases, scrip could only be used to pay for personal dances, either in the public or private areas of the clubs, or to tip entertainers and other club employees, with the exception that in the present case, scrip could also be used to pay for spending time with the entertainers anywhere in the club;
- The entertainers at both clubs were considered independent contractors who received their income directly from the customers in cash or scrip and paid fees to utilize the facilities of the respective clubs;
- Both clubs controlled at least the minimum price to be charged for a personal dance; and
- In both clubs, entertainers and other employees would redeem the scrip with the clubs, for which the clubs would charge a redemption fee of varying percentages of the face amount of the scrip; and the entertainers paid the clubs a fee to perform at the clubs (***see*** findings of fact 1 through 4, 8 through 9, 11; ***Matter of HDV Manhattan, LLC***).

Petitioner argues that despite these similarities, the facts of this case require a conclusion that the sales of the executive dollars are not subject to sales tax.

At the outset, petitioner asserts that receipts from the sale of the executive dollars are not subject to sales tax as an admission charge because executive dollars do not grant a customer admittance to anything. Petitioner points to the specific findings of the Administrative Law

Judge that the executive dollars could not be used for admission to the club or for admission to the private rooms but could only be utilized for personal dances or spending time with the entertainers, or for tips for the entertainers or hosts.

This argument was specifically addressed in ***Matter of HDV Manhattan, LLC***. In that case, after explaining that charges for personal dances in private rooms had previously been determined to be subject to tax as admission charges (***see Matter of 677 New Loudon Corp. d/b/a Nite Moves***, Tax Appeals Tribunal, April 14, 2010, ***confirmed sub nom Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341 [2011], ***lv granted*** 17 NY3d 714 [2011], ***affd*** 19 NY3d 1058 [2012], ***reargument denied*** 20 NY3d 1024 [2013], ***cert denied*** 134 S Ct 422 [2013]; ***Matter of Greystoke Indus. LLC d/b/a Paradise Found***, Tax Appeals Tribunal, May 19, 2011), this Tribunal concluded that the fact that a customer incurred separate charges for the use of the private room and for the personal dance in the private room made no difference to the taxability of such charges. Admission charges for purposes of sales tax are statutorily defined in Tax Law § 1101 (d) (2) as including not only "the amount paid for admission," but also "any charge for entertainment or amusement" (***see also Matter of HDV Manhattan, LLC***). As personal dances constitute entertainment, the receipts from sales of the executive dollars are taxable to the extent that such dollars were used for personal dances.[5]

Petitioner attempts to distinguish the present circumstances from those presented in ***Matter of HDV Manhattan, LLC*** based upon the specific finding of the Administrative Law Judge that the executive dollars could not be used for admission to the private rooms. However, as noted in footnote 3 herein, the Administrative Law Judge was referring to admission to the

[5] To the extent that the executive dollars were used to pay tips to the entertainers and other employees of petitioner, such receipts may not be subject to tax, but such amounts are not at issue here in that petitioner neither raised or presented evidence on the issue.

rooms in the common understanding of that word, as opposed to the statutory definition of admission charges, which includes not only physical access to the room itself, but also the "entertainment or amusement" provided therein (Tax Law § 1101 [d] [2]). Furthermore, the facts in ***Matter of HDV Manhattan, LLC*** are not distinguishable because in that case it was specifically found that customers were also required to pay two separate charges, a room charge to the club and a charge for the dance. The only difference in the facts is that, in the present case, the two separate charges are collected by two separate corporations. Petitioner has not explained how this distinction makes a difference in the taxability of the charges, nor do we see any difference.

Additionally, petitioner argues that the sale of executive dollars is not a taxable event, in the same manner that the sale of a gift card is not a taxable event, because both are the sale of intangible personal property. In other words, petitioner asserts that the transaction that is taxable is the redeeming of the executive dollars with the Club's entertainers for dances and tips and with the Club's other employees for tips. A similar argument was also espoused and rejected in ***Matter of HDV Manhattan, LLC*** where it was explained that:

> "Implicit in this assertion is that the Club was not required to collect sales tax on the private dance charges. As relevant here, '[p]ersons required to collect [sales] tax' include 'every recipient of amusement charges' (Tax Law § 1131 [1]). Such a recipient 'collects or receives or is under a duty to collect an amusement charge' (Tax Law § 1101 [d] [11]). For purposes of the tax imposed under Tax Law § 1105 (f) (1), the term 'amusement charge,' as used in Tax Law §§ 1101 (d) (11) and 1131 (1) means admission charge as defined in Tax Law § 1101 (d) (2)."

It was concluded in ***Matter of HDV Manhattan, LLC*** that because of both the club's control over the transactions at issue and financial interest in those transactions, it was the club, and not the entertainers, that was responsible to collect the sales tax. As pertains to this argument, there do exist some relevant factors that differ between the present case and ***Matter of HDV***

Manhattan, LLC. For example, the Club in the present case does not receive the receipts from the charges for the use of the private rooms as the club in ***Matter of HDV Manhattan, LLC*** did; a separate corporation receives those receipts. However, there are more than enough similarities to find that the Club is indeed responsible for the collection of the sales taxes on the receipts from the admission charges for the personal dances. Specifically, the Club provided initial access to the public rooms (from which the private rooms could be accessed) and scrip for purchase that could be used to purchase the personal dances, and controlled the minimum prices that could be charged for the personal dances. Furthermore, the Club derived revenue from the scrip sold through both the surcharge it charged its customers and the redemption fees it charged the entertainers.

Alternatively, petitioner argues that what is provided in its club is not entertainment, but rather a nontaxable service similar to a therapeutic massage conducted in a sensual manner or personal services provided by a sex therapist. Petitioner first offered this argument on exception. As asserted by the Division, a party may not generally raise a fact-dependent argument for the first time on exception, as it is unfair to the party who had the burden of proof in establishing the facts that form the foundation of the legal argument (***Matter of Consolidated Edison Co. of New York***, Tax Appeals Tribunal, May 28, 1992; ***Matter of Sandrich, Inc.***, Tax Appeals Tribunal, April 15, 1993). Although petitioner is the party with the burden of proof on this issue, we must still look to the circumstances of the individual case in order to decide if it is unfair, in any event, to allow this argument on exception. The record in this matter is devoid of testimony, or any other evidence, as to the conduct of the performances at the Club. Also, there is no evidence regarding the conduct of therapeutic messages or sex therapy. Thus, petitioner has failed to meet its burden of proof with regard to its argument that the personal dances are a nontaxable service

and the Division has suffered no prejudice as a result of our consideration of this argument. This same reasoning applies to petitioner's argument, also raised for the first time on exception, that the Club's operations are similar to that of a flea market that issues scrip for the convenience of its independent concessionaires. The Division has suffered no prejudice as a result of our consideration of this argument, in that petitioner has provided no evidence in support of the argument and thus failed in its burden of proof.

Finally, we turn to the Division's arguments made before the Administrative Law Judge that receipts from the sale of executive dollars do not constitute cover charges under Tax Law § 1105 (d) or charges of a roof garden, cabaret or similar place of entertainment under Tax Law § 1105 (f) (3). The Administrative Law Judge declined to address these issues as moot, petitioner briefly addressed the arguments in its brief in support of its exception, and the Division did not address these arguments at all during the proceedings before this Tribunal. While we would have preferred that the Administrative Law Judge addressed these arguments, as the Division has not addressed them on exception, we will consider the arguments waived by the Division and accordingly also decline to address such arguments in this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the The Executive Club LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of the The Executive Club LLC is denied; and
4. The notices of determination issued on July 6, 2012 are sustained.

DATED: Albany, New York
April 19, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner