STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **RONALD J. DOHERTY, JR.** **d/b/a EERIE PRODUCTIONS** for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2010 through February 28, 2013.	:	DECISION DTA NO. 826909

Petitioner, Ronald J. Doherty, Jr., d/b/a Eerie Productions, filed an exception to the determination of the Administrative Law Judge issued on January 18, 2018. Petitioner appeared by Hodgson Russ, LLP (Andrew W. Wright, Esq., and Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard on November 29, 2018, in Albany, New York, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether petitioner was required to collect and remit sales tax on amounts paid by his patrons to enter his haunted attractions.

II. Whether penalties should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 17, 36, 37 and 42, which have been modified to more accurately reflect the record. The Administrative Law Judge's two findings of fact, both numbered 43, have been renumbered 43 and 44 to correct a typographical error. The Administrative Law Judge's findings of fact 44 and 45, a discussion of proposed findings of fact submitted by petitioner and the Division of Taxation to the Administrative Law Judge, have been omitted. We have also made an additional finding of fact 45. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

1. Petitioner, Ronald J. Doherty, Jr., d/b/a Eerie Productions, operates a haunted attraction called "Frightworld" in Buffalo, New York. Petitioner's business is billed as "America's Screampark," and it is geared toward children as well as adults. Patrons come to Frightworld either for the purpose of being entertained, or to accompany others, such as friends and relatives, who are attending for the purpose of being entertained.

2. Frightworld's season of operation runs from late September until the first week of November each year.

3. Petitioner signs a three-month lease each year for a space, typically an abandoned big-box store, in which to operate Frightworld. The exact location of Frightworld typically changes year to year.

4. A three-month lease allows petitioner enough time to set up Frightworld for the season, operate its facilities and attractions, and take it all down to be stored for the off-season.

5. Frightworld contains a common area, and five separately-themed haunted attractions.[1]

6. The combined size of Frightworld's common area and five attractions generally exceeds 50,000 square feet.

7. Petitioner does not charge his patrons a fee to enter Frightworld.

8. Upon passing through the front doors of Frightworld, patrons enter the common area, which consists of two 20-foot projector screens showing videos, a 20-foot waterfall, live entertainers, a snack counter, a lounge area with benches, occasional live music and light show events, and the facades/entrances to each of the five haunted attractions.

9. The common area contained about 25,000 square feet of space, roughly equal in size to the combined square footage of all five haunted attractions.

10. It is not uncommon that people will enter Frightworld and spend time in the common area without paying to go into the haunted attractions.

11. Petitioner opined that "there's entertainment value in the lobby."

12. Petitioner designed the common area of Frightworld to entertain both the people spending time there who did not enter the attractions (for instance, parents who waited while their children went through the attractions, members of a group who came out with friends for the night but did not want to go through the attractions, etc.) and patrons waiting in line to enter the attractions.

13. Though patrons entered Frightworld's common area free of charge, they were required to pay a fee to enter the five haunted attractions for the purpose of being startled or amused.

14. During the 2010-2012 seasons, patrons paid $23.00 for the ability to access the five

[1] Petitioner also referred to the attractions as "haunted houses."

haunted attractions within Frightworld.

15. Each of the five haunted attractions had the same essential layout: a facade, an entrance, a fixed route along which the patrons traversed on foot, and an exit.

16. Each of the five haunted attractions was constructed in the same way: theatrical flats (walls containing the themed sets of each attraction) were erected off-site in sections called modulars; temporary walls were erected in the interior of the building space to enclose each of the five haunted attractions; the theatrical flats were delivered on semi-trailers, erected, and joined to create the interior walls of each attraction; props were set up; the electric and pneumatic (air-driven) systems that operated the special effects and animation (i.e., anything not moved by a human) within the attractions were installed on top of the sets; and emergency systems were erected and tested.

17. The attractions were free standing. The interior walls of each attraction, which contained the themed sets, were not attached to the floor, ceiling, or four exterior walls of the building. Patrons entered on foot and traversed each attraction on foot.

18. During the 2010 season, Frightworld contained the following five haunted attractions: Raven Hill Asylum, Grind House, Wicked Woods, Return of the Mummy's Curse, and Phobiaz.

19. During the 2011-2012 seasons, Frightworld contained the following five haunted attractions: Raven Hill Asylum, Grind House, Wicked Woods, Death Trap, and Phobiaz.

20. During the 2010-2012 seasons, the New York State Department of Labor's Division of Safety and Labor issued permits to petitioner to operate amusement devices.

21. Petitioner employed two methods to ensure that patrons of Frightworld moved through each of the five haunted attractions: the trained actors and the special effects/animations.

22. The actors used a method called "scaring forward" to prompt patrons through each of the five haunted attractions.

23. Petitioner trained Frightworld's actors to "scare forward" to move patrons through the attractions.

24. The manner in which the actors "scared forward" was dependent upon the theme of the attraction, but could include: jumping out from behind walls, slamming doors, using curtains or other scare spots; using thematically-appropriate props (e.g., a dentist's drill, a chainsaw, an axe, a C02 gun, sparks, or noisemakers); using distractions (e.g., an animation like a mummy or spider distracted a patron while an actor simultaneously scared them forward); or using the element of surprise (e.g., where an actor placed a feather duster through a hole in the wall to hit patrons around the ankle while they waded through an area that looked like a swamp).

25. In addition to the trained actors, patrons were prompted through the haunted attractions by numerous special effects and animations.

26. In the Phobiaz attraction, which operated during each of the 2010-2012 seasons, patrons encountered the following major special effects: animated snakes; a laser hallway designed to look like water with an airbag effect that squeezed around the patrons' legs; an endless floor designed to look like a bottomless pit with a pneumatic wall that pushed patrons toward the pit; and a 32-foot hallway at the exit that contained an airbag that patrons had to push their way through.

27. In the Wicked Woods attraction, which operated during each of the 2010-2012 seasons, patrons encountered the following major special effects: a 12-foot waterfall; a tilted room designed to look like a slanted shack, at the end of which was an actor with a C02 gun who

shot patrons forward; a gravity tilt bridge inside a cave; and a 26-foot downward sloping ramp with an airbag effect designed to look like the patron was wading through water.

28. Among the effects found in the other haunted attractions that operated during the 2010-2012 seasons were vortex tunnels; simulated ceiling drops; three different versions of the airbag effect (a floor-to-ceiling version that fills with air on either side of a hallway, a similar version that only goes about waist high, and a version that attaches to the ceiling and fills with air pushing downward); and suspension bridges.

29. Petitioner specifically designed his attractions so that the actors and special effects combined to ensure that patrons moved forward through the attractions.

30. These methods of moving patrons through the five haunted attractions ensured that patrons were conveyed through the attractions in a timely manner and did not get injured.

31. When patrons failed to move forward through the attractions as prompted by the actors and the special effects, they occasionally were injured.

32. Patrons traversed any of the five haunted attractions in a matter of minutes; patrons were not allowed to loiter within the attractions.

33. Petitioner trained the actors who worked within the haunted attractions in crowd control and scare tactics.

34. If a patron refused to move forward through the attraction or was physically unable to move forward through the attraction, an emergency protocol was initiated whereby the actors inside the attraction alerted management, without breaking character, to have the patron removed.

35. The Division of Taxation (Division) had previously audited petitioner for the period

March 1, 2005 through November 30, 2008 (the prior audit). The prior audit examined petitioner's admission charges and expenses for that period resulting in a notice of determination that asserted sales tax due on petitioner's admission charges to Frightworld's haunted attractions as well as tax due on expense purchases.

36. On November 30, 2012, a stipulation for discontinuance of proceeding (Stipulation) was filed with the Division of Tax Appeals reflecting a settlement in the amount of $8,360.00 plus interest thereon. The settled upon amount equals the amount of tax due on expense purchases assessed as a result of the prior audit.

37. The Stipulation settled the prior audit and was unambiguously limited to the terms expressly set forth in the Stipulation itself. While the Stipulation contained no provision indicating that the Division considered that petitioner's admission charges were not subject to tax, neither did it indicate that petitioner was to collect tax on a prospective basis.

38. During the course of the prior audit, petitioner sought and received an advisory opinion. This advisory opinion, TSB-A-10(11)S, dated March 26, 2010 (first advisory opinion), concluded that based on the facts petitioner presented, the admission charges to the haunted attractions were subject to sales tax.

39. In April 2013, the Division began an audit of petitioner focused on the admission charges collected at Frightworld and petitioner's expense purchases for the period March 1, 2010 through February 28, 2013 (current period).

40. The auditor who conducted the audit of petitioner's admission charges during the current period was not directly involved in the prior audit. She did have some involvement with the prior audit, and did review the prior audit as part of her work on the audit currently at issue.

The same audit supervisor supervised both audits.

41. The auditor did not visit Frightworld or its attractions in her official capacity as an auditor during the course of the audit of petitioner's admission charges for the current period. However, the auditor had visited Frightworld as a patron both prior and subsequent to conducting her audit.

42. On August 8, 2013, during the course of the audit for the current period, petitioner requested another advisory opinion from the Division concerning the taxability of the admission charges. It was petitioner's contention that the facts submitted in the first advisory opinion were inaccurate.[2] Petitioner was advised by his current representatives to continue not collecting sales tax on the admission charges to the haunted attractions. Such advice was given no earlier than November 30, 2012.

43. On August 21, 2014, the Division issued an advisory opinion to petitioner concluding that his admission charges were taxable (TSB-A-14[29]S).

44. On January 27, 2015, the Division issued a notice of determination to petitioner that asserted sales tax due of $88,183.59 plus penalties and interest.[3]

45. The main purpose of the actors in petitioner's haunted attractions is to scare and entertain petitioner's patrons.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that charges for admission to places of

---

[2] During the course of the prior audit, petitioner was first represented by Karen Kellogg, CPA, and Richard Brooks, CPA, followed by David Gross, CPA. Following issuance of the notice of determination resulting from the first audit, petitioner retained his current representatives.

[3] $2,109.41 is the amount of tax asserted due attributable to, and asserted due on, expense purchases. This portion of the notice of determination is not at issue in this proceeding.

amusement are subject to sales tax while charges for the use of amusement devices are not. The Administrative Law Judge then discussed ***Fairland Amusements v State Tax Commn.***, (110 AD2d 952 [3rd Dept 1985] [Mikoll, J., dissenting] ***reversed in accordance with dissenting opinion below*** 66 NY2d 932 [1985]) and ***Bathrick Enters. v Murphy*** (50 Misc 2d 14 [Sup Ct, Albany County 1966], ***revd*** 27 AD2d 215 [3d Dept 1967], ***affd*** 23 NY2d 664 [1968]). In those cases, it was held that rides such as Ferris wheels, merry-go-rounds and coin-operated games such as bowling games, were not places of amusement, but rather amusement devices. The Administrative Law Judge compared those cases to ***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240 (1994), ***cert denied*** 513 US 811 (1994) where the court found that booths allowing patrons to view live female entertainment, even though coins were required to set in motion the apparatus that moved the curtain to allow the patron to view the entertainment, were not amusement devices, but rather places of amusement. The Administrative Law Judge concluded that petitioner's haunted attractions were more like the booths in ***Matter of 1605 Book Ctr.*** than the rides in ***Fairland Amusements*** and the coin-operated games in ***Bathrick Enters.***, as petitioner's haunted attractions were more similar to a structure or place of amusement than to a ride or amusement device.

Finally, the Administrative Law Judge concluded that petitioner had not established reasonable cause for waiver of penalties in that petitioner obtained an advisory opinion stating that the admission charges to the attractions were subject to tax. The Administrative Law Judge found petitioner's argument, that the facts provided to the Division in his request for the advisory opinion were incorrect, unavailing and held that it would have been the prudent course for petitioner to begin collecting tax once the advisory opinion was issued.

ARGUMENTS ON EXCEPTION

Petitioner initially requests amendments to various findings of fact on the basis that such findings do not constitute an accurate reflection of the record in this matter.

Petitioner then asserts that the statutory scheme imposing sales tax on admission charges to or for the use of places of amusement is ambiguous and must therefore be construed in favor of taxpayers. Petitioner argues that the Administrative Law Judge's failure to utilize this statutory construction analysis, indeed the failure to even mention the word ambiguous in the determination, provides a basis to reverse the determination.

Petitioner argues that he does not charge his patrons to enter Frightworld, a place of amusement, charges that would be subject to tax; but rather charges patrons to use the haunted attractions or facilities within Frightworld, amusement devices that are not subject to tax. Petitioner asserts that a place of amusement is comprised of only the physical space within which an amusement is provided and does not include the amusement facilities contained within that physical space. In support of his position, petitioner points to the facts that: 1) the haunted attractions are temporary facilities; 2) not everyone who enters Frightworld enters the haunted attractions; 3) the actors in the attractions are there to ensure that the patrons move through the attractions quickly; and 4) each of the haunted attractions has effects just like other rides in amusement parks. Petitioner concedes that an argument can be made that because the haunted attractions are structures, albeit temporary, and the actors in the haunted attractions serve various purposes, the haunted attractions could be considered places of amusement. However, petitioner argues that because there is an ambiguity as to whether the haunted attractions are amusement facilities or devices, as opposed to places of amusement, that ambiguity must be decided in

petitioner's favor. Petitioner also points to the fact that the Division has previously considered carnival funhouses to be amusement devices and not places of amusement. Petitioner points to the fact that his Department of Labor permits indicate that the haunted attractions are amusement devices as further support for his position.

Finally, petitioner argues that penalties are inappropriate because of the ambiguities in the statutory scheme and because the Division settled a previous assessment issued against petitioner with no amount being paid for the same charges at issue in the present matter.

The Division argues that the term "place of amusement" has been interpreted by the courts as being broadly defined and plain from the face of the statute, thus not requiring resort to rules of construction to divine the meaning of the term.

Furthermore, the Division argues that the haunted attractions are unlike portable Ferris wheels and merry-go-rounds that travel across the state from event to event and are considered amusement devices and not places of amusement; nor are the haunted attractions similar to coin-operated bowling games and the like, which are clearly amusement devices and not places of amusement. The Division points out that petitioner's haunted attractions are substantial in construction and space and patrons do not ride through the haunted attractions but are required to walk through on their own while facing various obstacles. Furthermore, the Division points out that the haunted attractions are not amusement devices because patrons are paying for entry into the haunted attractions to see a show, not to utilize an amusement device. The Division discounts petitioner's reliance on the fact that the haunted attractions are listed as amusement devices on petitioner's Department of Labor permits as being irrelevant for taxation purposes and because petitioner did not provide any evidence that the Labor Law requirements for the permits

were met.

Finally, the Division argues that penalty abatement is not appropriate in this matter because the Division has consistently informed petitioner that the transactions at issue were subject to tax. The Division also argues that the fact that petitioner's submission for the initial advisory opinion did not contain an accurate factual description of petitioner's operations is not grounds for abatement of penalty, as it was a situation brought about by petitioner.

OPINION

Revisions and additions to findings of fact

We begin with a discussion of petitioner's requested revisions to the Administrative Law Judge's findings of fact and the Division's objections to those revisions. Petitioner requests that finding of fact 1 be revised to delete any reference to patrons coming to Frightworld to be entertained, as petitioner asserts that the record reflects that patrons come to Frightworld for a variety of reasons. The Division counters that there is no evidence in the record to support petitioner's contention that patrons come to Frightworld for any purpose other than to be entertained and that petitioner has not made any specific reference to the record in support of his assertion. We find that, other than persons who come to Frightworld to accompany patrons such as friends and relatives, the record supports a finding that patrons come to Frightworld to be entertained.

Petitioner requests that finding of fact 13 be revised to delete any reference to patrons paying to enter the haunted attractions of Frightworld "for the purpose of being startled or amused" as being overly broad because the record shows that petitioner specifically designed the haunted attractions to move patrons through the attraction in a matter of minutes. The Division

counters that there is no evidence in the record to support petitioner's assertions. We find petitioner's assertion that patrons pay to enter the haunted attractions for the purpose of being moved through the attractions to be nonsensical and, accordingly, have not revised finding of fact 13.

Petitioner requests that finding of fact 17 be revised to delete the statement that "[N]o mechanical devices conveyed patrons through the attractions" as inaccurate and inconsistent with other findings of the Administrative Law Judge. Petitioner asserts that the record shows that various mechanical devices and actors assisted in conveying patrons through the haunted attractions. The Division counters that petitioner's assertions have no basis in the record and that the record shows that many of the devices that petitioner claims assist in conveying patrons actually inhibit the movement of patrons, such as air bags that restrict patrons' forward motion so that patrons have to fight through them. We interpret the Administrative Law Judge's language to mean that patrons were not carried through the haunted attractions using any type of conveyor belt or car-type vehicle. Our interpretation makes finding of fact 17 consistent with the statement in finding of fact 25 that "patrons were prompted through the haunted attractions by numerous special effects and animations." However, the statement in finding of fact 17 that "[P]atrons entered on foot and traversed each attraction on foot" achieves the same result on its own. Accordingly, we find that the statement that "[N]o mechanical devices conveyed patrons through the attractions" is confusing and redundant and have deleted it from finding of fact 17.

Petitioner requests that findings of fact 36 and 37 with regard to settlement of the prior audit as reflected in the Stipulation be modified to state that: 1) none of the agreed upon amount of tax to be paid in settlement of the prior audit reflected tax due on admission charges; and

2) the Stipulation contained the entire agreement of the parties. Petitioner argues that these modifications would more completely reflect the record, which petitioner asserts supports a finding that the prior audit was settled on the basis that the Division agreed to drop the tax due on admission charges and petitioner agreed to pay the tax due on expense purchases. The Division counters that petitioner's requested findings are not supported by the record, and furthermore, that petitioner's requested finding that none of the agreed upon amount of tax to be paid reflected tax due on admission charges contradicts petitioner's requested finding that the Stipulation contained the entire agreement of the parties. We find that the amount of tax that petitioner agreed to pay pursuant to the Stipulation did indeed equal the amount of tax due on expense purchases assessed as a result of the prior audit. However, because the Stipulation contained the entire agreement of the parties, there can be no finding that the agreed upon amount reflects either the tax due on expense purchases, or conversely, the amount of tax not due on admission charges.

Petitioner requests that finding of fact 42 be revised to delete the statement that he "was advised by his current representatives to continue not collecting sales tax on the admission charges to the haunted attractions." Petitioner asserts that this statement is not supported by the record, and that, even if the record could be read to support this statement, it is not relevant because the advice was given after the close of the current audit period and therefore is not relevant. The Division asserts that the statement is supported by the record and that it is relevant because it was petitioner's current representatives, retained shortly after March 26, 2010, who advised him to continue not collecting sales tax on the admission charges to the haunted attractions and the current audit period encompasses the time period March 1, 2010 through

February 28, 2013. We find that the record does support the statement that petitioner "was advised by his current representatives to continue not collecting sales tax on the admission charges to the haunted attractions." However, we have revised the finding of fact to reflect that such advice was given no earlier than November 30, 2012. As November 30, 2012 is within the current audit period, petitioner's relevancy objection is rejected.

Finding of fact 45 was added to clarify that while the actors hired by petitioner to appear in the haunted attractions may assist in moving people through the attractions, their primary purpose was to scare and entertain the patrons (***see*** exhibit 9, Frightworld's 2010, 2011 and 2012 employee handbooks). For example, the 2010 employee handbook states that patrons "want to see real live vampires and graveyard ghouls. [T]hey want to come face to face with the living dead, be startled by killer clowns or even freaked out by a chainsaw killer. [O]ur goal is to provide that entertainment!!!" It also states, that "Frightworld is a tightly choreographed show with each actor/actress doing their part," and that patrons "want and deserve a great show!! [T]hat's what they're there for and why they are paying their money." Furthermore, the actors are required to always stay in character, even when on their way to a break. Thus, while petitioner provided testimony regarding the function of the actors to move patrons through the haunted attractions, the primary purpose of the actors is to entertain the patrons. As noted above, the patrons do not pay for admission to the haunted attractions just to be moved through them by the actors. Patrons pay to be scared and entertained.

Taxability of admissions to haunted attractions

The fact that Frightworld in its entirety is a place of amusement under Tax Law § 1101 (d) (10) is clear and not at issue. However, petitioner does not charge patrons to enter Frightworld.

Instead, petitioner charges a single fee of $23.00 to enter the five haunted attractions. The issue in this matter is whether those charges are subject to sales tax.

Tax Law § 1105 (f) (1) provides, in pertinent part, that sales tax should apply to "[a]ny admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state." The term "place of amusement" is defined by Tax Law § 1101 (d) (10) as "[a]ny place where any facilities for entertainment, amusement, or sports are provided," and the term "admission charge" is defined by Tax Law § 1101 (d) (2) as "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor."

Petitioner argues that this statutory scheme imposing sales tax on admission charges to or for the use of places of amusement is ambiguous and therefore must be construed in his favor. Indeed, petitioner points to ***Fairland Amusements*** as a case where this particular statutory scheme was previously found ambiguous by the courts. In ***Fairland Amusements,*** the issue before the Appellate Division, Third Department was whether the sales tax imposed by Tax Law § 1105 (f) (1) applies to amusement ride tickets for individual carnival rides. Affirming the determination of the State Tax Commission, the court held that the sales tax applied, since the charge was "for entertainment or amusement or for the use of facilities therefor" (Tax Law § 1101 [d] [2]). The Court of Appeals reversed, adopting the logic of the dissenting opinion below (***Fairland Amusements***, 66 NY2d at 935-36). Thus, the Court found that there is an ambiguity in the taxing statute. When the provision imposing the tax is read in conjunction with the applicable definitions, "place of amusement" may be interpreted as meaning the amusement device or ride itself, or the physical space within which entertainment or amusement devices or rides are provided. Citing the general principle that any ambiguity in the statutory scheme must

be construed most strongly in favor of the taxpayer, the court found that the sales tax does not apply to charges for the use of amusement devices or rides, but only to "an admission charge to enter the location where amusement facilities are found" (***Fairland Amusements***, 110 AD2d at 954).

Thus, the question before us then distills to whether a charge to enter the haunted attractions constitutes "an admission charge to enter the location where amusement facilities are found" (***id.***) or a charge to use an amusement device. We disagree with petitioner that the analysis of this particular question involves the interpretation of an ambiguous statute requiring that the statute be construed in favor of the taxpayer. Rather, we find that ***Fairland Amusements*** resolved the ambiguity in the statute and what remains for this Tribunal is a weighing of the facts to determine whether a charge to enter the haunted attractions constitutes "an admission charge to enter the location where amusement facilities are found" (***id.***) or a charge to use an amusement device (***see 1605 Book Ctr.***, 83 NY2d at 246 ["***Fairland*** . . . does not erect a general threshold ambiguity around the phrase 'place of amusement.'"]).

In any event, while we see no ambiguity, the issue here involves the imposition of a tax upon the charges for entry into the haunted attractions, and we construe statutes imposing tax most strongly against the government and in favor of the taxpayer (***Matter of Building Contrs. Assn. v Tully***, 87 AD2d 909, 910 [3d Dept 1982]), always bearing in mind that pursuant to Tax Law § 1132 (c) (1), it is petitioner's burden to prove by clear and convincing evidence that the tax assessed was erroneous.

The Division's position is that the haunted attractions constitute places of amusement in that they are more similar to the coin-operated private peep show booths at issue in ***1605 Book Ctr.*** than the merry-go-rounds and Ferris wheels at issue in ***Fairland Amusements***. Petitioner

asserts the opposite, that the haunted attractions are the amusement facilities under ***Fairland Amusements***, which considers a place of amusement to be comprised only of the physical space within which an amusement is provided.

In favor of petitioner's position are the facts showing that the haunted attractions are temporary in nature. The haunted attractions were constructed each year by erecting theatrical flats (walls containing the themed sets of each attraction) off-site in sections called modulars. Temporary walls were erected on-site in the interior of the building space to enclose each of the five haunted attractions. Then the theatrical flats were delivered on semi-trailers, erected, and joined to create the interior walls of each attraction. Finally, props were set up, the electric and pneumatic (air-driven) systems that operated the special effects and animation (i.e., anything not moved by a human) within the attractions were installed on top of the sets, and emergency systems were erected and tested. Thus, the attractions were free-standing within the building that contained Frightworld in its totality. The temporary nature of the haunted attractions is an indication that they are more like an amusement device (Ferris wheel) than a place of amusement (coin-operated peep show booths). However, as noted by the Administrative Law Judge, the facts in the record also indicate that the haunted attractions are more substantive and less easy to move than amusement devices. Furthermore, the haunted attractions consist of walls and separate rooms that are more similar to structures, or places of amusement, than an amusement facility or device. We agree with the Administrative Law Judge that the physical structure of the haunted attractions indicates that they are places of amusement.

Petitioner also asserts that the primary job of the actors he hires is to move people through the haunted attractions and not to entertain or put on a show for his patrons, thus the admission charge was not for entry to a place of amusement. We disagree on several grounds. First, the

actors hired by petitioner were instructed by him that they were there to put on a show to scare and entertain the patrons. Clearly, to be entertained was the reason petitioner's patrons paid money to enter the haunted attractions. As previously discussed, it makes no sense to claim that patrons enter an attraction just to be pushed out of it. Second, we find that the use of such actors as entertainers, no matter what their other responsibilities, makes the haunted attractions closer to the coin-operated peep show booths in ***1605 Book Ctr.*** than the rides at issue in ***Fairland Amusements***. We note that unlike ***1605 Book Ctr.***, where the performers were the entire focus of the show, here the show consists of both performers and special effects and animations. However, the essence of the transaction at issue is that the patrons are paying to enter the haunted attractions, a physical location within which to watch a show for amusement (***see 1605 Book Ctr.***, 83 NY2d at 246 ["the nature of the entertainment at issue - privately viewing or speaking with live performers for sexual amusement - is not comparable to the use of mechanical devices, such as amusement rides . . . the entertainment places at issue here involve the viewing and interacting with a live performer, which presents a spontaneous, human feature"]).

Petitioner points to the issuance by the Division of an advisory opinion, TSB-A-07(5)(S) (February 8, 2017), holding carnival funhouses to be amusement devices rather than places of amusement and insists that the haunted attractions are more similar to funhouses than to any of the amusement devices or places of amusement previously dealt with in the cases. To begin with, advisory opinions are by definition advisory and are binding on the Division only in regards to the party requesting the opinion (Tax Law § 171 [Twenty-fourth]). Furthermore, in this particular case, petitioner received not one but two advisory opinions wherein the Division opined that the charges for admission to petitioner's haunted attractions were subject to tax, TSB-A-10(11)S (March 26, 2010) and TSB-A-14(29)S (August 21, 2014). We also find the

analysis in TSB-A-07(5)(S) to be unpersuasive as applied to petitioner's haunted attractions.[4]

Petitioner also points to the fact that the Department of Labor issued him permits to operate amusement devices that covered the haunted attractions. Petitioner has not attempted to explain why the requirements for the issuance of such permits are relevant to a determination of whether the admission charges to petitioner's haunted attractions are subject to tax. Accordingly, we do not find that the issuance of these permits is of any assistance to petitioner.

In conclusion, keeping in mind that where there is an exclusion under the Tax Law, the statute must be construed strongly in favor of the taxpayer, that the statute must be interpreted as an ordinary person would read it (***Fairland Amusements***, 110 AD2d at 954), and that the burden of proving the assessment erroneous remains with petitioner, we find that the haunted attractions are "places of amusement" as that term is used in the Tax Law and subject to tax pursuant to Tax Law § 1105 (f) (1).

Penalties

Penalties were imposed against petitioner pursuant to Tax Law § 1145 (a) (1) (i) and (vi). Both such penalties must be sustained unless the failure was due to reasonable cause and not willful neglect (***see*** Tax Law § 1145 [a] [1] [iii]).

The determination of the Administrative Law Judge sustaining the penalties dealt fully and correctly with this issue and we affirm for the reasons stated therein.

---

[4] We offer no opinion as to whether funhouses are or are not subject to tax as places of amusement under any particular set of circumstances (***but see Outdoor Amusement Bus. Assn. v State Tax Commn.*** [84 AD2d 950, ***revd on dissenting mem. below*** 57 NY2d 790 [1982] [wherein the dissenting opinion opined that admission charges to carnival sideshows would be subject to tax as opposed to fees to participate in carnival games such as throwing a football through a hole in a board]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald J. Doherty, Jr., d/b/a Eerie Productions is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Ronald J. Doherty, Jr., d/b/a Eerie Productions is denied; and

4. The notice of determination, dated January 27, 2015, is sustained.

DATED: Albany, New York
May 29, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner