STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
THE EXECUTIVE CLUB LLC	:	DECISION DTA NOS. 827313,
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2010 through May 31, 2013.	:	827315, 827317
In the Matter of the Petitions	:	
of	:	
ROBERT GANS	:	DTA NOS. 827314, 827316, 827318
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2010 through May 31, 2013.	:	

Petitioners, The Executive Club LLC and Robert Gans, filed an exception to the determination of the Administrative Law Judge issued on May 24, 2018. Petitioners appeared by Akerman, LLP (Alvan L. Bobrow, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. No reply brief was filed. Oral argument was heard on January 24, 2019, in New York, 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 the Division of Taxation correctly determined that the receipts from the sale of executive dollars, a kind of scrip utilized by petitioners in their business, were subject to sales and use tax.

II. If so, whether this matter should be remanded to determine the correct amount of tips paid with executive dollars.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. However, we have not restated the Administrative Law Judge's finding of fact 49, which discusses the treatment of petitioners' proposed findings of fact as submitted below. We have also made additional findings of fact, numbered 49 and 50. As so modified, the Administrative Law Judge's findings of fact appear below.

1. Petitioner, The Executive Club LLC (Executive Club), operated an adult entertainment club known as the Penthouse Executive Club, in New York, New York (the Club), during the period June 1, 2010 through May 31, 2013 (the period at issue). It generated revenues from admissions, bar sales, food sales, surcharges, and performances of the entertainers.

2. Petitioner, Robert Gans, was the managing member of Executive Club during the period at issue. Petitioners[1] do not dispute that Mr. Gans was a person responsible for the collection and remittance of sales and use tax due on behalf of Executive Club.

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[1] Petitioners will refer to Executive Club and Robert Gans, collectively, unless an individual petitioner is specified.

3. To allow entry to the Club, petitioners collected an admission charge of $20.00 to $30.00, depending on the day of the week. The admission charge could be paid with a credit card or cash. Upon remittance of the admission charge, guests could view live performances on stage in the main area of the Club and go anywhere within the Club except for private rooms. Petitioners collected and remitted sales tax on these charges and do not dispute that such charges are subject to tax.

4. In addition to entertainment in the main area of the Club, petitioners offered entertainment in various private rooms throughout the Club. To gain access to the private rooms, petitioners charged customers a separate admission charge. The charge varied depending on the type of room and length of time the room was used. The room fee could be paid by cash, credit card, or check. Payment for a private room was charged as a separate transaction.

5. Prior to December 1, 2011, the revenue from the private room charges was reported by another entity, Rooms With a View, LLC. Beginning December 1, 2011, petitioner Executive Club started reporting the receipts from the private room charges. Starting in March 2012 and going forward, petitioner Executive Club reported the private room charges as subject to sales tax and collected sales tax on those charges. For the period December 1, 2011 through February 28, 2012, petitioner Executive Club did not report and remit sales tax for the private room charges. During the audit in this matter, the Division of Taxation (Division) determined sales tax due for the private room charges in the amount of $67,686.94. In their reply brief to the Administrative Law Judge, petitioners conceded the amount of sales tax determined due on the private room charges, and such amount is not at issue.

6. To perform at the Club, the Club's entertainers pay a house fee to petitioner Executive Club.

7. Customers can pay the Club's entertainers for personal dances or to spend time with them, either in the main area of the Club or in a private room. Payment for these interactions between the customer and the entertainer can be made in cash or scrip, also known as "executive dollars," "executive currency," or "Roberts currency."

8. The entertainer's fee is generally $300.00 for a half hour and $600.00 for an hour. According to Mark Yackow, the Club's chief operating officer, the Club allows the entertainers to negotiate the fee, "but over the fourteen years we've been here, it's stated that . . . It's accepted that the entertainer would get $600.00 for the hour, and $300.00 for the half hour." The customer may also pay the entertainer a tip in addition to the required fee. Tips paid by customers at the Club are voluntary.

9. The Club encourages guests to purchase executive dollars to pay the entertainers. It is the Club's experience that customers tend to spend more money on entertainers when customers purchase scrip than when they pay with cash, because they can use their credit cards to purchase the scrip.

10. The Club charges a 20% surcharge on every sale of executive dollars (i.e., a customer is charged $120.00 in order to receive $100.00 of executive dollars). The Club also charges a 13% redemption fee when the entertainers redeem the executive dollars for cash.

11. Petitioner Executive Club treats the 20% surcharge on its sale of executive dollars as income, and treats the executive dollars sold as a liability on its books until they are redeemed.

12. Petitioner Executive Club records the 13% redemption fee charged on the redemption of executive dollars as income on its books. Beyond the 13% redemption fee, petitioner Executive Club does not report the revenue received from executive dollars as income on its

books. According to Howard Rosenbluth, Executive Club's chief financial officer, the remainder of the revenue received is reported by the entertainers or whoever received the executive dollars.

13. Executive dollars are similar in appearance to play money, insofar as they are printed in color with a picture of an entertainer on the front. The executive dollars have an expiration date and may not be redeemed or used once the expiration date has passed. Executive dollars from different time periods were presented into the record, each containing different printed statements. For example, a sample of executive dollars with an expiration date of June 30, 2011 states, "Valid for performance fees only. Fees for personal performances are mandatory service charges and not tips or gratuities to the entertainer." A different copy of executive dollars with the same expiration date of June 30, 2011 states on its face, "Valid for performance fees only. Not valid for gratuities." Other sample copies of executive dollars with expiration dates of June 30, 2013 and December 31, 2012 do not contain any language regarding their use.

14. Mr. Rosenbluth testified that regardless of the language printed on the executive currency, it has been used the same way from the date the Club opened in 2003 to present. According to Mr. Rosenbluth and Mr. Yackow, despite the limiting language printed on some of the executive dollars, they could be used for dances, for time spent in a room with an entertainer, having dinner with an entertainer, paying an entertainer for her time, and for tips and gratuities.

15. Customers are not required to purchase executive dollars but can do so if they choose.

16. A customer may purchase executive dollars at an executive currency booth, or may have a floor host obtain the executive dollars for him. When the customer, or host on the customer's behalf, purchases the executive dollars, the Club adds the 20% surcharge.

17. During the audit period, executive dollars could be used to pay the entertainer fee and to tip bartenders, cocktail waitresses, security people and hosts. The entertainers can use the executive dollars to pay the house fee (***see*** finding of fact 6), buy a meal, and tip the bartender and other Club employees. Mr. Rosenbluth and Mr. Yackow testified that executive dollars could not be used to pay for a private room, but could be used to pay the entertainer for private time in a room.[2]

18. Executive dollars do not have to be used when purchased, but can be used during future visits to the Club, so long as the expiration date has not passed. Executive dollars may not be redeemed after the printed expiration date. As explained by Mr. Yackow, "if we're lucky, [the customer] doesn't come - - he loses it. He loses it" because the executive dollars expire. Customers cannot redeem executive dollars for cash.

19. When entertainers redeem executive dollars with the Club, they are charged a 13% redemption fee. The Club then pays the entertainers the balance by check or direct deposit. At the end of the year, the Club issues a form 1099 to the entertainers for 87% of the face value of executive dollars redeemed.

20. Petitioner Executive Club did not collect sales tax on the sale of executive dollars during the audit period because petitioners did not think the sale was taxable.

21. Petitioners maintained monthly records of sales of executive dollars and amount of surcharges charged on the executive dollar sales during the audit period in its System Financial Report. The System Financial Report shows monthly revenue from food, beverage, executive dollars, surcharge on executive dollars, room fee and tips payable, in addition to other items.

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[2] Petitioners' reply brief to the Administrative Law Judge contradicted the testimony of Mr. Rosenbluth and Mr. Yackow, in that it stated, "the guest purchased a large amount of Executive Currency, and then used it in a small part to pay for the private room . . . ." No explanation was provided for the discrepancy.

22. Petitioners introduced a sample of the Club's financial records, including a System Financial Report for the period January 1, 2013 through July 1, 2013; schedules of private room fees and sale of executive currency control sheets dated January 4, 2013, February 26, 2013, April 17, 2013 and May 1, 2013; ten credit card receipts, seven with the heading "Roberts Currency," two of which were dated February 27, 2013 and five of which were dated April 18, 2013, and three with the heading "Roberts Private," dated April 18, 2013. The credit card receipts titled "Roberts Currency" indicate various charges for "Food/Bev" together with a 20% surcharge and a "charge tip."[3] The credit card receipts titled "Roberts Private" indicate charges for "1 silver 1 hr" plus tax. Petitioners also introduced an "Analysis of Entertainer Tips" for the period January 2013 through May 2013 purporting to show a summary of tips paid in the Club's various private rooms. No source documentation was provided for the purported private room tips other than hand-written, mostly illegible notes on some of the schedules of private room fees and sale of executive currency control sheets dated January 4, 2013, February 26, 2013, April 17, 2013 and May 1, 2013, that purport to show tips for entertainers in some of the private rooms.[4] The System Financial Reports petitioners introduced for January 1, 2013 through July 1, 2013 indicate "0.00" on the lines for "tips paid" and "EC Tips Pd."

The sale of executive currency control sheets show the name of the customer, credit card information, the amount of the executive currency purchased, the surcharge amount, and "charge tips." The control sheets do not indicate what the executive currency is being purchased for (i.e., it does not differentiate between entertainer fees or tips).

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[3] One of the seven "Roberts Currency" receipts does not show a "charge tip."

[4] While the Analysis of Entertainer Tips lists eight categories of rooms, the schedule of private room fees lists only two rooms for January 4, 2013, five rooms for February 26, 2013, two rooms for April 17, 2013 and two rooms for May 1, 2013.

23. Mr. Yackow explained that the schedule of private room fees is completed daily by the Club's room administrator when customers and entertainers use the private rooms. The schedule of private room fees shows the room name, the customer name, the floor host's initials, the entertainer's name, the method of payment (cash or credit card), the time in and out of the room, the room fee, charge tips, and entertainer room fee.

24. Mr. Yackow testified that purchases of executive currency to be used for private dances and tips may be recorded as one transaction or as two separate transactions.

25. Mr. Yackow described the seven credit card receipts with the heading "Roberts Currency" (***see*** finding of fact 22) as "close receipts" or "close-out" receipts that the Club keeps. According to Mr. Yackow, when a customer purchases executive currency through the Club's host, the host goes to the executive currency booth to purchase the amount requested by the customer. The executive currency booth attendant runs the credit card transaction, charging the customer for the amount of executive currency requested plus a 20% surcharge. The host then brings a receipt, similar to the "close-out" receipt presented in evidence, to the customer, which the customer signs. The customer may also leave a tip for the host. The Club's manager reviews the transactions daily with the host who was responsible for the charges.

When describing the receipt dated February 27, 2013, with a time-stamp of 1:40 a.m., Mr. Yackow stated that the charge was for $1,000.00 of executive currency, plus a 20% surcharge, and that the customer added a $200.00 tip for the host. However, a review of the receipt indicates a "charge tip" of $400.00 rather than a $200.00 tip for the host as claimed by Mr. Yackow, and indicates a food or beverage purchase rather than executive currency. Specifically, the receipt shows the following charges:

"1 1000$ Food/Bev	1000.00
20.00% surcharge	200.00
Subtotal	1000.00
Service	600.00
Payment	1600.00
Charge Tip	400.00
Visa	1600.00"

There was no explanation for the discrepancy, no testimony regarding the "service" charge of $600.00, and no explanation of why the itemized charges do not equal the total amount charged.

26. On November 15, 2012, the Division initiated an audit of petitioner Executive Club's sales and use tax records for the period June 1, 2010 through August 31, 2012. This was a follow-up to an audit of Executive Club that the Division had previously conducted for the period December 1, 2007 through May 31, 2010.

27. The Division mailed a letter, dated November 15, 2012, to petitioner Executive Club scheduling a field audit for the period June 1, 2010 through August 31, 2012. The letter advised petitioner that it must provide "any and all documentation in auditable form and electronic form (if available) which supports the sales and use tax returns as filed." An information document request (IDR), describing the books and records to be produced, was attached to the letter.

28. On November 27, 2012, petitioners' attorney, Alvan Bobrow, contacted the Division's auditor and informed her that he was petitioners' representative for the audit and would provide a power of attorney form. On multiple dates from November 30, 2012 through January 29, 2013, the auditor attempted to contact Mr. Bobrow to follow-up on the November 27 conversation and left messages requesting that he submit the power of attorney form. On February 6, 2013, Mr. Bobrow sent the auditor an incomplete power of attorney form. The

auditor again left messages for Mr. Bobrow on multiple dates from February 6, 2013 through August 21, 2013, requesting that he provide a completed power of attorney form.

29. On April 1 and 23, 2013, the auditor sent consents to extend the statute of limitations to assess tax to petitioner Executive Club because petitioners had not provided a completed power of attorney form.

30. On May 20, 2013, petitioner Executive Club's Chief Financial Officer, Howard Rosenbluth, executed a consent to extend the statute of limitations on behalf of Executive Club (consent), allowing the Division until June 20, 2014 to assess any taxes determined due for the period June 1, 2010 through May 31, 2011. On May 29, 2013, the auditor's supervisor, Roy Watson, signed the consent. The consent in the record does not have the Division's raised seal.

31. On August 12, 2013, the auditor sent to petitioner Executive Club a second letter attempting to schedule a field audit and again requesting Executive Club's books and records for the audit period.

32. On August 27, 2013, the Division received a completed power of attorney form authorizing Mr. Bobrow and Jeffrey S. Reed, Esq., to act as petitioner Executive Club's representatives.

33. By letter dated October 10, 2013, the Division informed petitioner Executive Club that the audit period had been expanded to cover June 1, 2010 through May 31, 2013, and requested Executive Club's books and records for the expanded audit period.

34. On February 27, 2014, petitioner Executive Club, by its attorney, Mr. Reed, executed another consent to extend the statute of limitations allowing the Division until December 20, 2014 to assess any taxes found due for the period June 1, 2010 through November 30, 2011

(second consent). The second consent was signed by Mr. Watson on behalf of the Division on February 27, 2014. The second consent in the record does not have the Division's raised seal.

35. On August 22, 2014, petitioner Executive Club executed a test period audit method election, agreeing to a test period audit method for recurring expense purchases.

36. On October 14, 2014, petitioner Executive Club, by its attorney, Mr. Reed, executed a third consent to extend the statute of limitations allowing the Division until March 20, 2015 to assess any taxes found due for the period June 1, 2010 through February 28, 2012 (third consent). The third consent was signed by Mr. Watson on behalf of the Division on October 14, 2014. The third consent in the record does not have the Division's raised seal.

37. Petitioners provided the Division's auditor with Executive Club's daily system financial reports (Reports) for the audit period. The auditor performed a detailed audit of Executive Club's sales records. Based on a review of the sales records, the auditor determined that gross sales per petitioners' records were not in agreement with reported gross sales. Based on her review of petitioners' sales records, the auditor determined additional tax due for the following items: sales of executive dollars; surcharges on executive dollars; and private room revenue. The auditor also determined additional tax due for expense purchases and complimentary beverages.

38. For the sales of executive dollars, the auditor conducted a detailed audit of petitioners' records. To determine receipts from sales of executive dollars, the auditor used the amounts shown on Executive Club's Reports, which shows monthly revenue from food, beverage, executive currency, executive currency surcharge, room fee and tips payable, among other items. The auditor added the amount of executive currency sales indicated in the Reports for each month, to arrive at a total of gross and taxable sales of $29,186,060.00 for the audit

period. The auditor calculated sales tax due on these sales in the amount of $2,590,262.85. When calculating the amount of executive dollar sales, the auditor did not include any amount listed as "tips paid" from the Reports.

39. For the surcharge on the sales of executive dollars, the auditor again used information contained in the Reports. The auditor added the surcharge amount indicated in the Reports for each month, to arrive at total surcharges of $5,664,772.00 for the audit period, and determined tax due of $502,748.51.

40. Regarding revenue earned from charges for the use of private rooms at the Club, based on review of petitioners' records, the auditor determined that petitioners had not remitted tax due on such charges for the quarter ending February 29, 2012. To compute the tax due for this area, the auditor added the room fees for December 2011, January 2012 and February 2012, as indicated in petitioners' records, to determine total room fee for that period of $762,669.77, and determined additional tax due of $67,686.94. Petitioners concede the amount of sales tax determined due on the private room charges (***see*** finding of fact 5).

41. For the auditor's review of expense purchases, petitioners agreed to project the results of the previous audit for this area to determine the tax due from expenses and complimentary beverages for the period in issue, and executed a test period audit method election (***see*** finding of fact 35). To compute the tax due for the audit period, the auditor divided the total tax due from expenses and complimentary beverages from the prior audit period ($33,604.98) by the number of quarters in the prior audit period (10) to determine quarterly tax due of $3,360.50. The auditor then multiplied quarterly tax due ($3,360.50) by the number of quarters in the current audit period (12) to determine additional tax due of $40,326.00 from expenses and complimentary beverages for the period in issue. Petitioners concede to this amount of tax.

42. The Division issued a notice of determination, number L-042229682, dated November 25, 2014, to petitioner Executive Club asserting tax due of $3,093,011.36, plus interest. This notice assessed tax due on executive dollar sales and surcharges for the period at issue.

43. The Division issued a notice of determination, number L-042229689, dated November 25, 2014, to petitioner Executive Club asserting tax of $67,686.94, plus interest, determined due on revenue from the private room charges. This notice is no longer at issue and petitioners concede this amount (***see*** findings of fact 5 and 40).

44. The Division issued a notice of determination, number L-043416775, dated December 26, 2014, to petitioner Executive Club asserting tax of $40,326.00, plus interest, due on expenses and complimentary beverages. This notice is no longer at issue and petitioners concede this amount (***see*** finding of fact 41).

45. The Division issued three separate notices of determination to petitioner Robert Gans as a responsible person for taxes due of the Executive Club. Notice of determination, number L-042235703, dated November 26, 2014, asserted additional tax of $1,694,477.32, plus interest, for the taxes due on executive dollar sales and surcharges for the period September 1, 2011 through May 31, 2013.[5] Notice of determination, number L-042235704, dated November 26, 2014, asserted $67,686.94 in tax, plus interest for the amount determined due on room charges for the sales tax quarter ending February 29, 2012. Notice of determination, number L-042320551, dated December 29, 2014, asserted $20,163.00 in tax, plus interest for the amount determined due for expenses and complimentary beverages for the period September 1, 2011

[5] The amounts determined due from petitioner Robert Gans for executive dollar sales and surcharges, and expenses and complimentary beverages, were less than the amounts due from Executive Club for the same areas because the statute of limitations for certain sales tax quarters had expired before the assessments were issued to him and consents had not been obtained from him to extend the time period for assessments.

through May 31, 2013.[6] Petitioners do not dispute that Mr. Gans is a person responsible for Executive Club's sales tax obligations, and do not dispute the amount determined due for tax on room sales, expenses and complimentary beverages.

46. Petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. By conciliation orders dated August 6, 2015, BCMS sustained the notices.

47. On November 5, 2015, petitioners filed timely petitions with the Division of Tax Appeals. The Division filed timely answers in response to the petitions.

48. Upon cross-examination during the hearing, the auditor testified that she was unaware if executive currency could be used to gain entrance to the Club or a private room during the audit period, and that she did not know whether customers could pay cash for private dances at the Club. She testified that she believed such purchases would be taxable.

49. The Division objected during the hearing to petitioners' requests to adjourn the hearing for purposes of settlement discussions on the issue of the nontaxable tips and the Division's representative expressed throughout the hearing that the Division did not find petitioners' proof on the issue persuasive (e.g., hearing tr, pp 17-19, 27, 261)

50. At the conclusion of the hearing, petitioners requested that the record remain open for submission of additional documents offered for the purpose of showing the amount of the receipts from the sale of executive dollars that were used for tips. The Division objected to this request on several grounds including that the documents, without testimony explaining them, would not be useful. The Administrative Law Judge agreed and inquired of petitioners as to why the documents were not available at the hearing. In response, petitioners stated that in lieu of

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[6] See footnote 5.

submitting the documents to the Administrative Law Judge to include them in the record, they would provide the documents to the Division in an effort to attain a settlement prior to briefs having to be filed or a determination having to be issued. The Administrative Law Judge expressed concern that if there was no settlement, the documents would not be in the record and she would have no substantiation for the amount of the tips. Petitioners acknowledged that they understood this and withdrew their request to submit additional documents to the Administrative Law Judge. At that point, the Administrative Law Judge closed "the record for any additional documents or testimony" (hearing tr, pp 247-59).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that: (1) collateral estoppel was not applicable; (2) the consents to extend the statute of limitations in this matter were valid; (3) petitioners did not prevail on the argument that the sale of executive dollars was not an admission charge because executive dollars did not provide admission to anything, because, among other reasons, petitioners were unable to distinguish controlling precedent; (4) the surcharge paid by customers to purchase executive dollars is taxable as a service charge included in the price paid for admission; (5) the sale of executive dollars is alternatively taxable as charges of a roof garden or cabaret; and (6) petitioners did not prove that receipts entered in evidence from the sale of executive dollars indicating they were for "Food/Bev," were not taxable as "any cover, minimum, entertainment or other charges." Neither party filed an exception to any of these conclusions of the Administrative Law Judge with this Tribunal and thus, such issues are not currently before us.

With regard to the first issue currently before us, the Administrative Law Judge held that the sale of executive dollars was not the same as a nontaxable sale of intangible property such as

a gift card. The Administrative Law Judge explained, based on controlling precedent, that while the taxable transaction when using gift cards is the redemption of the gift card for taxable items, the taxable transaction in this case, because of the Club's control over the transactions at issue and financial interest in those transactions, is the sale of executive dollars by the Club to its customers.

With regard to the second issue currently before us, the Administrative Law Judge held that to the extent receipts from executive dollars used to pay tips are not subject to tax, petitioners failed in their burden to prove the amount of those receipts. The Administrative Law Judge explained that the records submitted into evidence on this issue were unconvincing and, at times, contradictory.

ARGUMENTS ON EXCEPTION

Petitioners argue that executive dollars are essentially the equivalent of gift cards and thus, the taxation of the receipts from the sales of executive dollars are not taxable when sold, but upon the redemption of the executive dollars for taxable items. In support of their argument, petitioners note that just like gift cards, executive dollars are redeemable at any time after purchase through the expiration date. Petitioners assert that receipts from the sale of executive dollars do not involve sales of tangible personal property or taxable services, but rather the sale of intangible property, similar to a gift card.

Petitioners also allege that the Administrative Law Judge determination, and the precedent relied upon by the Administrative Law Judge, do not address the issue of whether receipts from the sale of executive dollars are taxable when sold or redeemed. Petitioners contend that such cases only address the issue of whether it is the Club or the entertainer that is responsible for the payment of the sales tax due, an issue petitioners assert is irrelevant to an

analysis of whether receipts from executive dollars should be taxable when they are purchased or when they are redeemed.

Petitioners argue that even if it is determined that the taxation of the receipts from the sales of executive dollars are taxable at the time of the sale, receipts from executive dollars used to tip entertainers and others at the Club are not subject to sales tax. Petitioners assert that they are entitled to a remand of this matter in order to determine the correct amount of those tips, as evidence on this issue was provided to the Division after the hearing, but is not in the record in this matter. Petitioners note that a remand would provide the parties with more time to resolve this issue through an agreement.

The Division argues that the Tribunal previously rejected the argument being made by petitioners that receipts from the sale of executive dollars are taxable at the time of redemption rather than at the time of purchase. The Division asserts that the Administrative Law Judge correctly followed Tribunal precedent and held that it was the Club, and not the entertainers, that were responsible for collecting sales taxes on these transactions because of the Club's operational control over, and financial interest in, the transactions. Thus, the Division argues that it was petitioners' burden to distinguish the present matter from the previous Tribunal decisions and petitioners failed in that burden.

With regard to the issue of whether petitioners should be allowed some adjustment for any receipts from executive dollars redeemed for tips, the Division asserts that the Administrative Law Judge was correct to conclude, based upon scarce and disparate evidence, and the failure to address the discrepancies in such evidence, that petitioners had failed to prove what portion, if any, of those receipts were actually used for tips. Furthermore, the Division opposes any remand to provide petitioners with the opportunity to submit additional evidence.

The Division argues that petitioners' basis for requesting a remand, that they thought the Division was amenable to settlement and thus submitted additional information only to the Division and not to the Administrative Law Judge, is not supported by the record. Specifically, the Division points to its objections to petitioners' requests for adjournments for purposes of settlement negotiations, and its position that petitioners' evidence was insufficient, as indicative of the lack of reasonableness of petitioners' belief that the Division was amenable to reaching an agreement in this matter.

OPINION

As previously noted, the parties did not file exceptions in response to the conclusions of the Administrative Law Judge that: (1) collateral estoppel was not applicable; (2) the consents to extend the statute of limitations in this matter were valid; (3) petitioners did not prevail on the argument that the sale of executive dollars was not an admission charge because executive dollars did not provide admission to anything, because, among other reasons, petitioners were unable to distinguish controlling precedent; (4) the surcharge paid by customers to purchase executive dollars is taxable as a service charge included in the price paid for admission; (5) the sale of executive dollars is alternatively taxable as charges of a roof garden or cabaret; and (6) petitioners did not prove that receipts entered in evidence from the sale of executive dollars indicating they were for "Food/Bev," were not taxable as "any cover, minimum, entertainment or other charges." As these issues are not before us on exception, we merely state that we believe that the Administrative Law Judge completely and correctly addressed such issues and we affirm the determination of the Administrative Law Judge based upon the reasoning contained therein.

We now turn to petitioners' arguments on exception.

Initially, we note that as the receipts at issue are for entrance to, or for use of, a place of amusement, all such receipts are presumptively subject to sales tax until the contrary is established, and the burden to prove that any receipts are nontaxable is on petitioners (Tax Law §§ 1105 [f], 1101 [d] [2], 1132 [c] [1]; ***see also Matter of Rizzo v Tax Appeals Trib. of State of N.Y.***, 210 AD2d 748 [1994]; ***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 (***Matter of HDV Manhattan, LLC v Tax Appeals Trib. of the State of N.Y.***, 156 AD3d 963, 966 [3d Dept 2017]).

Mindful of these precepts, we first address the issue of whether the receipts from petitioners' sale of executive dollars are subject to tax at the time of purchase by the customer, or at the time of redemption. We acknowledge that petitioners are correct that neither this Tribunal, in ***Matter of The Executive Club LLC*** (Tax Appeals Tribunal, April 19, 2017) (***Executive Club I***), nor the Administrative Law Judge in the determination, directly addressed petitioners' argument that executive dollars are the functional equivalent of gift cards and receipts from the sale of each should be treated the same for sales and use tax purposes. Rather, in both cases, it was indirectly addressed in the holding that it was petitioners, and not the entertainers, that were responsible for the collection of the tax based upon petitioners' control over various transactions at the Club.

In direct response to petitioners' argument, we hold that executive dollars are not intangible property similar to gift cards. It is true, as petitioners contend, that executive dollars are neither tangible property nor taxable services. However, that does not mean that executive dollars are intangible property. Rather, "the Club's receipts from the sale of scrip are taxable as

admission charges to a place of amusement" and such admission charges include charges for the private dances (***Matter of HDV Manhattan, LLC v Tax Appeals Trib. of the State of N.Y.***, 156 AD3d 963, 965 [3d Dept 2017]).

Petitioners also argue that the receipts from the sale of the executive dollars must be subject to tax at the time the executive dollars are redeemed, because it is impossible to determine what portion of the executive dollars will be used for taxable admission charges as opposed to nontaxable tips until that time. On the other hand, petitioners assert that they know as soon as executive dollars are purchased how much the customer intends to use for entertainment and how much for tips because the customer tells the host and the host writes it down at the time of purchase (oral argument tr, pp 9-11). Petitioners admit that as they have this information at the time of purchase, they could collect the tax at that time. However, petitioners then somehow conclude that whether or not they know at the time of sale the amount of executive dollars to be used for entertainment and the amount for tips, they still see little difference between executive dollars and a gift card (oral argument tr, p 14). Petitioners' arguments are confusing and inconsistent. In any event, as discussed below, petitioners have not proven the amount of executive dollars used for tips. Accordingly, petitioners have not overcome the presumption of correctness that attached to the Division's notice regarding this issue (***Matter of HDV Manhattan, LLC v Tax Appeals Trib. of the State of N.Y.***, 156 AD3d at 966). The receipts from the sale of the executive dollars are not taxable as intangible personal property, but as admission charges to a place of amusement and sales tax is collectable at the time the customer purchases the executive dollars.

Having concluded that the receipts from the sale of executive dollars are taxable at the time of purchase, we must address the issue of whether this matter should be remanded to

determine the correct amount of tips paid with executive dollars. The Administrative Law Judge concluded that petitioners failed to meet their burden of proving the amount of the tips based upon the scarcity of the records petitioners submitted into evidence, the unconvincing nature of such records, and in certain instances, the contradictory nature of the evidence (***see*** finding of fact 22). We believe that the Administrative Law Judge completely and correctly addressed this issue and we affirm for the reasons stated in the determination.

However, petitioners' argument on exception is not that they submitted sufficient evidence to the Administrative Law Judge to prove the amount of the tips, but rather that they are entitled to a remand of this matter to submit additional evidence. Petitioners assert that they had additional records but provided them to the Division after the hearing in hopes of resolving this matter rather than, or in addition to, providing them to the Administrative Law Judge.

This Tribunal has the authority to remand matters to an Administrative Law Judge for additional proceedings (Tax Law § 2006 [7]; 20 NYCRR 3000.17 [e] [2]). However, with regard to further fact finding, which is what petitioners are requesting, this Tribunal has established that remanding a case to an Administrative Law Judge is only appropriate in "special circumstances" (***Matter of Great Eastern Printing Co.***, Tax Appeals Tribunal, February 20, 1992, citing ***Matter of Capital District Better TV***, Tax Appeals Tribunal, September 5, 1991 [matter remanded out of concern that certain statements of the Administrative Law Judge off the record may have dissuaded petitioners from introducing specific evidence]; ***Matter of Jencon, Inc., Tax Appeals Tribunal***, December 20, 1990 [matter remanded because the petitioner was not given an opportunity below to present evidence on either the jurisdictional issue or the merits of the case]; ***Matter of Platias***, Tax Appeals Tribunal, December 6, 1990 [matter remanded in order to determine if the Division's policy of accepting certain mailing evidence as proof of timely filing

was applied to the petitioners prior to hearing]; ***Matter of Karolight, Ltd.***, Tax Appeals Tribunal, February 8, 1990 [matter remanded to obtain evidence necessary to establish the Tribunal's jurisdiction over the case]).

Petitioners appear to be arguing that their "special circumstances" are that they did not submit records for the entire audit period at the hearing because they thought the issue could be resolved with the Division. Petitioners propose that should this matter be remanded, the parties could continue to review documentation and possibly resolve this issue. The Division opposes any remand of this case, as it asserts that the record is clear that the Division objected to any adjournment of the hearing for the purposes of settlement and made clear throughout the hearing that the Division did not find petitioners' evidence persuasive and therefore did not see any need to further adjourn the hearing (***see*** finding of fact of 49). Thus, the Division argues that it makes no sense to further elongate these proceedings under the guise of settlement negotiations.

We agree with the Division and find that this case does not present the "special circumstances" required in order to remand a case for additional fact finding. First, in response to inquiries from the Administrative Law Judge as to why the records were not available at the hearing, petitioners decided to withdraw their request to submit additional documentation after the date of the hearing. Second, the Administrative Law Judge made clear that there would be no "additional documents or testimony" allowed into the record (***see*** finding of fact 50). Having had every opportunity, petitioners failed to submit the documents to the Administrative Law Judge that they now seek the opportunity to submit to the Administrative Law Judge on remand. These circumstances are the exact opposite of the special circumstances that are required for this Tribunal to remand a matter for additional fact finding (***see Matter of Great Eastern Printing Co.***; ***Matter of Feldman***, Tax Appeals Tribunal, May 23, 2002). Finally, remanding and

reopening the record in this case would undermine the sound principle enunciated in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991)

that:

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing."

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Executive Club, LLC and Robert Gans is denied;

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

3. The petitions of The Executive Club, LLC and Robert Gans are denied; and

4. The notices of determination dated November 25, 2014, November 26, 2014, December 26, 2014 and December 29, 2014 are sustained.

DATED: Albany, New York
July 24, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner