STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ANTHONY CAPECI	:	DECISION DTA NOS. 828636,
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, 2008 through February 28, 2014.	:	828637 AND 828638

Petitioner, Anthony Capeci, filed an exception to the determination of the Administrative Law Judge issued on December 23, 2021. Petitioner subsequently filed a motion to remand this matter to the Administrative Law Judge based on new evidence. Petitioner appeared by Jennifer M. Kinsley, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. The Division of Taxation filed a response to petitioner's motion. Oral argument was heard in Albany, New York, on August 25, 2022, 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.

ISSUES

I. Whether the Division of Taxation correctly determined that sales of scrip at petitioner's clubs were subject to tax.

II. Whether petitioner is entitled to estoppel against the Division of Taxation.

III. Whether petitioner was a responsible person for Metro Enterprises Corp. within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the collection and payment of sales tax for the period March 1, 2008 through February 28, 2014.

IV. Whether petitioner has shown that the notices of determination violate the federal and New York State constitutions.

V. Whether the Division of Taxation's objection to certain testimony was properly sustained during the hearing.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have modified findings of fact 14, 56, 61, 64, 72 and 95 to reflect the record more accurately. We have also added an additional finding of fact numbered 99. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact appear below.

1. Petitioner, Anthony Capeci, commenced this proceeding by filing petitions with the Division of Tax Appeals on March 26, 2018 in protest of the following notices of determination, dated December 1, 2016 (notices):

Notice No.	Period	Tax	Interest	Penalty
L-045796580	03/01/08 - 02/28/14	$3,863,002.13	$4,909,599.02	$1,545,198.94
L-045794592	03/01/10 - 02/28/14	$1,798,108.53	$1,757,904.95	$719,241.65
L-045794593	03/01/10 - 05/31/12	$0.00	$0.00	$86,000.00
L-045794594	03/01/10 - 02/28/14	$501,699.02	$481,054.84	$200,678.12

L-045794595	03/01/10 - 02/28/14	$0.00	$0.00	$156,000.00

Notice L-045796580 was issued to Mr. Capeci as an officer/responsible person of Metro Enterprises Corp. (Metro). Notices L-045794592 and L-045794593 were issued to Mr. Capeci as an officer/responsible person of MLB Enterprises Corp. (MLB). Notices L-045794594 and L-045794595 were issued to Mr. Capeci as an officer/responsible person of 44th Enterprises Corp. (44th).

2. During the period March 1, 2008 through February 28, 2014 (the period at issue) petitioner was the sole shareholder and president of 44th and MLB. Petitioner concedes that he is a responsible person for 44th and MLB for the purposes of the collection and payment of sales tax.

3. 44th and MLB operated adult entertainment clubs (collectively referred to as the Clubs) in New York, New York, during the period at issue. MLB's club, doing business as Lace Gentlemen's Club, was located on 7th Avenue, and 44th's club, doing business as Lace II Gentlemen's Club and subsequently Diamond Club Gentlemen's Cabaret, was located on 8th Avenue. The Clubs are no longer operational.

4. Mario Barnes was a manager of MLB's club, and an individual named Don[1] was a manager of 44th's club.

5. The Clubs were run in the same manner. The Clubs offered live exotic dance performances to patrons and collected general admission charges, coat check charges, charges for sales of alcoholic and non-alcoholic drinks, admission charges for the use of private rooms

[1] The individual's last name is not contained in the record.

and private dance fees from customers, and performance fees and charges from the Clubs' dancers.[2]

6. Petitioner's Clubs engaged individuals to perform adult entertainment/exotic dancing services for the patrons of the Clubs.[3] A contract between the dancers and the Clubs, entitled Non-Exclusive Lease of Entertainment Facilities (contract) entered into the record provides that the dancers were required to pay MLB $150.00 per performance date, $150.00 per 30 minutes for use of the "champagne room," and $500.00 per hour for the use of the "viper room." The contract also provides that all scheduling of dancers' performances shall be arranged through Metro. However, affidavits of Anthony Capeci and John Scarfi state that the agreements between the dancers and the Clubs specify that the dancers' scheduling will be negotiated between the dancers and the Clubs.[4] Similarly, during the hearing in the matter of 44th and

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[2] Mr. Capeci and 44th admitted in their response to plaintiff's first request for admissions in ***Dennis v 44th Enterprises Corp. and Capeci***, (Sup Ct, NY County, Freed, J, Index No. 153420/2016), dated July 1, 2019, that they charged the dancers various fees, including house fees and late fines. Official notice of the record of the proceedings in ***Dennis v 44th Enterprises Corp. and Capeci***, (Sup Ct, NY County, Freed, J, Index No. 153420/2016) is taken pursuant to State Administrative Procedure Act (SAPA) § 306 (4). Pursuant to SAPA § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. The Division of Tax Appeals may take official notice of official court records and filings from other state and federal actions and proceedings (***see e.g. RGH Liquidating Trust v Deloitte & Touche LLP***, 71 AD3d 198, 207-208 [1st Dept 2009] ***revd on other grnds*** 17 NY3d 397 [2011]). Although petitioner cites to certain documents from the ***Dennis*** proceedings in his brief, he did not enter the filings and documents from the ***Dennis*** matter into this record. As such, official notice of the full record of proceedings, including affidavits submitted therein, and 44th's and Capeci's answer and admissions (herein referred to as the ***Dennis*** matter answer and the ***Dennis*** matter admissions), is taken.

[3] The individuals are referred to herein as dancers, entertainers, or performers.

[4] Prior to the hearing in this matter, petitioner filed a motion for summary determination, dated November 13, 2019. As exhibits in support of the motion, petitioner submitted affidavits of Anthony Capeci, dated January 29, 2018, and John Scarfi, dated January 30, 2018, from ***Metro Enterprises Corp. & Scarfi v New York State Dept. of Taxation and Finance*** (Sup Ct, Albany County, Index No. 901347-17). Petitioner's motion was denied by order dated January 9, 2020 (***Matter of Anthony Capeci, 44th Enterprises Corporation and MLB Enterprises Corporation***, Division of Tax Appeals, January 9, 2020). Official notice of the motion and affidavits submitted in support is taken pursuant to SAPA § 306 (4) by which official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (***Matter of Ordway***, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (***see Bracken v Axelrod***, 93 AD2d 913 [3d Dept 1983]).

MLB, Mr. Capeci testified that his Clubs controlled the dancers' work hours and shifts.[5] Petitioners provided no explanation for the discrepancy between the contract entered into the record and the affidavits and testimony.

7. The contract also provides that the "Club agrees that Entertainer is entitled to keep all dance fees paid to her and all 'tip' (gratuities) given to her by patrons during her performance date, during any period during which she is considered a 'tenant' and not an 'employee'" and further provides:

> "No Employment Relationship
>
> The parties agree that Entertainer is not an 'employee' of the Club. Entertainer agrees Club will not pay her wages, overtime, expenses, benefits, or any other employee-related benefits, in exchange for permitting her to retain all dance fees paid to her by customers while on Club's premises.
>
> Entertainer further understands that she is entitled to retain all dance fee and gratuities paid to her by patrons on Club's premises only during such periods as she is considered a non-employee."

8. Each of the Clubs had a main room where dancers performed on stage, around which there were tables, chairs and couches for customer use. To gain entry to the Clubs, patrons paid an admission fee, depending on the time of day, which allowed them to view live exotic performances on stage in the main area of the Clubs. In addition to the main area of the Clubs, the Clubs had various private rooms where customers could have private entertainment for an additional charge. Each Club also had a second floor that could be used for private parties.

9. To gain access to the private rooms, the Clubs charged customers a separate admission

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[5] Petitioner introduced the transcripts from the hearings in the ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.*** (***Matter of 44th and MLB***) (DTA Nos. 828639 and 8284609, held on January 29, 2020) and the ***Matter of Scarfi and Metro Enterprises Corp.*** (***Matter of Scarfi and Metro***) (DTA Nos. 828745 and 828746, held on July 15, 2019) into the record for this matter. Petitioner did not testify during the hearing for this matter.

charge. The Clubs set the price for private room rentals, which varied depending on the size of the room, amount of time in the room, and how many customers and dancers were in the room. The Clubs' managers informed the auditors that if a customer wanted a dance in a private room, they were charged separately on two credit card receipts – one for the room charge and one for the dance fee. Customers could pay for private rooms by cash, credit card or scrip.

10. Scrip (also known as vouchers, funny money or Lace dollars) is a fictitious currency patrons could purchase at the Clubs with a credit card. Scrip could be used at the Clubs to purchase dances, tip dancers and waitresses,[6] and pay for entertainment in private rooms. During the audit of MLB, the club's manager informed the auditors that scrip could also be used to purchase drinks. Customers were not required to use scrip for purchases and could use cash instead.

11. Customers purchased scrip through the Clubs' employees, who would run the charge through a credit card terminal maintained by Metro at the Clubs. MLB and 44th's credit card terminals were also used to process scrip transactions on occasion. The Clubs' patrons paid a 20% surcharge on every purchase of scrip (e.g., a customer is charged $120.00 to receive $100.00 of scrip).

12. The dancers paid a 10% redemption fee when they exchanged the scrip received from a customer into cash. To redeem the scrip for cash, the dancers would go to the Clubs' managers at the end of the night, and the managers would exchange the scrip for cash, less the redemption fee. Other fees, such as rent charged by the Clubs, were also sometimes deducted

[6] Although petitioner contends that scrip could only be used to tip dancers, Mr. Scarfi presented contradictory testimony during the hearing for 44th and MLB (***see*** footnote 6), stating first that a customer could not use scrip for anything other than tipping dancers, but later testifying that scrip could also be used to tip the Clubs' waitresses. In Mr. Scarfi's affidavit, dated January 30, 2018, he affirms that "[p]atrons often used scrip for 'tips' *in addition to 'dancer fees'*" (emphasis added) (***see*** footnote 5).

from the scrip amounts upon redemption.

13. According to Mr. Capeci and Mr. Scarfi, the cash used to redeem the scrip came from Metro's bank accounts and was kept in safes located in the Clubs. Cash from Metro's bank was brought to the Clubs by both petitioner's and Metro's employees. The managers who sold the scrip to the patrons and exchanged the scrip into cash for the dancers were employees of the Clubs.

14. During the hearing in the ***Matter of 44th and MLB***, John Scarfi, Metro's president and sole shareholder, testified that scrip transactions were run on the Clubs' credit card terminals a couple of times a week when there was a problem with Metro's terminal. Mr. Scarfi further testified during the hearing in that matter that such transactions were reconciled on ledgers and reflected on Metro's form 1120 tax returns. In the ***Matter of Scarfi and Metro***, Mr. Scarfi testified that when the Clubs used Metro's credit card terminals or vice versa, Metro reported it on a form 1099-K filed with the Internal Revenue Service (IRS). In contrast, Mr. Capeci testified during the hearing in the ***Matter of 44th and MLB*** that the Clubs and Metro did not use any tax form or other forms to reconcile or explain Metro's use of the Clubs' credit card terminals. There was no explanation for the discrepancy in testimony.

15. Petitioner's Clubs employed waitresses, bartenders, bar backs, managers and disc jockeys to work in the Clubs. Petitioner's Clubs also engaged dancers to perform at the Clubs. Although Mr. Capeci testified during the hearing in ***Matter of 44th and MLB*** that the dancers were employees of the Clubs, during the audits of 44th and MLB, he stated that the dancers were "tenants" of the Clubs and that they were neither employees nor independent contractors. Neither petitioner nor the Clubs withheld any employment taxes or paid workers' compensation for the dancers. In the ***Dennis*** matter answer, 44th and Mr. Capeci affirmatively stated that the

dancers were independent contractors, not employees. In the ***Dennis*** matter admissions, 44th and Mr. Capeci admitted that they categorized the dancers as independent contractors and that they should have categorized them as employees (***see*** footnote 3). 44th and Mr. Capeci further admitted in the ***Dennis*** matter admissions that the dancers did not receive compensation (i.e., hourly, salaried, or otherwise) from them (***id.***).

16. According to Mr. Capeci, his Clubs set rules for how the dancers performed their work in the Clubs, including setting the work hours and shifts, and controlling the music that the dancers used (***see*** finding of fact 6). Petitioner considered the dancers to be an integral part of the Clubs' business.

17. The Clubs had a minimum fee of $20.00 for dances. During the hearing in the ***Matter of Scarfi and Metro***, Mr. Capeci testified that the dancers could negotiate a higher or lower price for a personal dance with the customer.[7]

18. During an investigation of MLB's club conducted by the Division's investigators, the Club's manager stated that a lap dance in the main room was $20.00 per song and lap dances in private rooms ranged from $160.00 to $900.00. During an investigation of 44th's club by the Division's investigators, the Club's manager stated that lap dances on the main floor were $20.00 and charges for private rooms ranged from $300.00 to $1,100.00 per hour, depending on the number of customers and how many entertainers are in the room at once.

19. Mr. Capeci further testified during the hearing in the ***Matter of 44th and MLB*** that any payment received by a dancer directly from a customer was "deemed to be a tip." However,

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[7] It is noted that in the ***Dennis*** matter, plaintiff Louisa Dennis's affidavit states "I did not set the price for dances – Lace II did" (***see*** footnote 3). Ms. Dennis was a dancer at 44th's Club.

his testimony is contradicted by the ***Dennis*** matter answer, in which 44th and Mr. Capeci denied plaintiff Dennis's allegation that the club's customers reasonably believed that 100% of the tips would be given to employees and affirmatively stated that "some or all of the payments received by Plaintiff for performances were administrative charges, which a reasonable customer should understand were not gratuities . . . ." (***see*** footnote 3).

20. Mr. Capeci testified at the hearing in ***Matter of 44th and MLB*** that the Clubs did not keep track of scrip paid to dancers. This testimony is contradicted by the testimony of Mr. Scarfi, who testified at the hearing in ***Matter of 44th and MLB*** that ledger books showing scrip payments to dancers were prepared by the Clubs' managers.

21. During the hearing in this matter, petitioner offered the testimony of Joseph Endres, an attorney whose firm represented Metro in sales tax audits. During Mr. Endres's testimony, petitioner introduced into the record a 26-page document that the witness described as a journal Metro maintained that tracked voucher transactions and "the amount of cash paid to entertainers at the club" (exhibit 3). Mr. Endres did not identify which club he was referring to or whether the journal pertained to transactions at MLB's club, 44th's club, or another club that Metro conducted business with. Mr. Endres testified that exhibit 3 was not one complete continuous journal but instead was a sampling of several different journals.

Exhibit 3 contains credit card settlement reports showing a summary of charges for Visa, Mastercard and American Express, and handwritten ledger pages dated March 13, 2010, March 23, 2010, April 5, 2010, April 23, 2010, April 29, 2010, May 5, 2010, May 25, 2010, June 2, 2012, June 14, 2012, July 10, 2012, July 23, 2012, August 2, 2012, and August 23, 2012. The credit card settlement reports do not contain a tip line showing amounts paid for tips, and do not identify individual transactions. The amounts shown on the ledger pages are inconsistent with

the amounts on the settlement reports.

When questioned about who prepared the ledgers, Mr. Endres testified that it was his understanding that they were "created by the entertainers and, you know, in part, Keith [Warnick] working on them to maintain the books."[8] Mr. Endres later testified that the "journals were created by Metro, in part by Keith, in part by the entertainers, as part of the transactions that occurred on a daily basis."

22. In contrast to Mr. Endres' testimony, during the hearing in the ***Matter of 44th and MLB***, Mr. Scarfi testified that the Clubs' managers prepared the ledger books for the scrip transactions and payments to dancers, including the "batch report" (credit card settlement reports) that show the daily total scrip charges and the amounts of scrip that were redeemed by the dancers.

23. During the hearing in the ***Matter of Scarfi and Metro***, Mr. Scarfi offered contradictory testimony as to whether Metro maintained records of scrip transactions. He initially testified that Metro kept books and records of money paid to dancers from the redemption of scrip and payments the customers made with scrip. However, he later testified that the money from the credit card transactions for scrip purchases were not recorded in Metro's books and records. When questioned whether he had any documents that would show a receipt for tips, Mr. Scarfi testified that he did not.

Audits of MLB and 44th

24. The Division performed sales tax audits of MLB and 44th for the period March 1, 2010 through February 28, 2014.

[8] According to Mr. Scarfi, Mr. Warnick was Metro's only employee.

25. By separate audit appointment letters and information documents requests (IDRs) to MLB and 44th, dated January 8, 2013, the Division's auditor, Jennifer Genovese, commenced audits, initially for the period of March 1, 2010 through November 30, 2012.[9] The letters scheduled field audit appointments on January 29, 2013, and advised 44th and MLB that they must provide "any and all documentation in auditable form and electronic form (if available) which supports the sales and use tax returns as filed." The attached IDRs described the books and records required to be produced.

26. On January 22, 2013, Mr. Capeci contacted Ms. Genovese on behalf of 44th and MLB and requested that the Division reschedule the audit appointments to allow him time to gather the requested records. On March 4, 2013, the Division received a letter from Mr. Capeci requesting that the audits of 44th and MLB be delayed until after the tax season. The audit appointments were rescheduled to June 3, 2013.

27. On June 3, 2013, Ms. Genovese and her supervisor, Christine Scala, conducted a field appointment for the audits of 44th and MLB, and met with Mr. Capeci at his office. Mr. Capeci explained the operations of the Clubs to the Division's auditors. He informed the auditors that the Clubs operated from 12:00 p.m. to 4:00 a.m. daily, that there is no entrance admission charge from 12:00 p.m. to 8:00 p.m., and a $20.00 admission charge from 8:00 p.m. to 4:00 a.m. Mr. Capeci explained that patrons paid $20.00 for dances performed on the Clubs' main floors, and that customers can pay for the dances by cash or "funny money" (scrip), which is processed by a third party. Mr. Capeci further explained that both Clubs have three registers,

[9] By letters to MLB and 44th dated December 16, 2015, the Division informed them that the audit period had been expanded to cover March 1, 2010 through February 28, 2014, and requested their books and records for the expanded audit period.

one at the front for admission and coat check, one for the bar, and one for private rooms. Private and semi-private rooms are available to patrons for an additional charge. The customer incurs two separate charges when utilizing a private room: a charge for the room and the dancer's fee. Mr. Capeci did not inform the auditors of the rates for private rooms at the Clubs. According to Mr. Capeci, the Clubs' taxable sales consisted of the admission charges, private room charges, drinks, and coat check charges. Mr. Capeci explained that he used the Clubs' bank deposits to prepare the Clubs' sales tax returns. He provided some sales tax backup records for the audit period, but bank statements and general ledgers were not made available to the auditors during the initial audit appointment. Mr. Capeci told the auditor that the ledger needed to be "cleaned up."

28. The Division sent second IDRs, dated June 10, 2013, to 44th and MLB requesting the following: bank statements; general ledgers; federal returns; depreciation schedules; dancers' contracts; point of sale (POS) reports; register tapes; Z outs; batch summaries; prices lists for room rentals, services and dances; food and drink menus; promotional admission coupons and/or passes; purchase invoices for food and liquor; copy of a letter referenced during the initial appointment; payroll records to back up tips paid out; explanation and back up regarding the dancers' rental fees; explanation of where the private room rental fees charged to the dancers are deposited and how they are accounted for; information on the business that processes credit card sales, including name of business, business ID#; POS sales reports, invoices, receipts, and guest checks. For MLB, the second IDR also requested substantiation for chargebacks for the quarters ending May 31, 2012 and November 30, 2012.

29. On July 11, 2013, another field audit appointment was conducted for the audit of both Clubs. During this appointment, Mr. Capeci provided incomplete bank statements,

incomplete purchase invoices for 2011, copies of promotional coupons, information regarding the company that processes the credit card transactions (Metro), and copies of a transaction for a private room rental and a "funny money" purchase. Mr. Capeci had in his possession records of these transactions for October through December 2012, including Metro's receipts for each transaction. Additionally, the following records were at Mr. Capeci's office for review, but he would not allow the auditors to take the records from his office to review register z-out tapes for the quarter ending May 31, 2012, rental contracts signed by dancers, and credit card transactions for room rentals and scrip sales from October through December, 2012.

30. By letter from Ms. Genovese to Mr. Capeci, dated July 24, 2013, the Division requested that 44th and MLB provide numerous books and records that were still outstanding.

The letter further stated, in part:

> "At our appointment on July 11, 2013, you had some z-out tapes available, dancer's contracts, and c/c transactions for 'funny money' and room charges all of which you requested be transcribed at your office. Since you will not allow these documents to be copied or removed from your office, please provide accommodations on August 15, 2013 for approximately 2-3 auditors for a full day."

31. Mr. Capeci subsequently canceled the appointment for August 15, 2013. By letter dated August 15, 2013, the Division sent Mr. Capeci a third IDR requesting the Clubs' outstanding books and records and stating again that:

> "At our appointment on July 11, 2013, you had some z-out tapes available, dancer's contracts, and c/c transactions for 'funny money' and room charges, all of which you requested be transcribed at your office. Since you will not allow these documents to be copied or removed from your office, please provide accommodations on September 19, 2013 for approximately 2-3 auditors for a full day."

Another field audit was conducted on September 19, 2013, and the Division's auditors transcribed the summary detail for front door, bar and room charges for the quarter ending May

31, 2012.

32. On August 15, 2013, Division's investigators conducted investigations of the Clubs. The investigators entered MLB's club at approximately 5:15 p.m., were charged a $5.00 admission fee per person and told there was a one drink minimum each. The investigators spoke with the Club's manager, Mario Barnes. The investigators inquired about a private party and asked if the party could pay the dancers directly. Mr. Barnes replied that, "No you don't have to pay them, we pay them." Mr. Barnes further informed the investigators that Lace dollars can be purchased at the front register if customers do not have cash, and that the Lace Dollars can be used to purchase drinks, lap dances, and be given as tips. The investigators were informed that there is free admission before 5:00 p.m., from 5:00 p.m. to 8:00 p.m. admission is $5.00, and after 8:00 p.m. admission is $20.00. The investigators were also informed that a lap dance in the main room is $20.00 per song, and a lap dance in a private room ranges from $160.00 to $900.00.

Other Division investigators entered 44th's club at approximately 5:15 p.m. on August 15, 2013. The doorman stated that admission was free with a one drink minimum per person. In the main room, the investigators observed dancers removing money that had been placed in their costumes and give it to a man who placed it in an envelope and left the room. The investigators were informed that lap dances were $20.00. The investigators spoke with the club's manager, Don, who informed them that small private rooms "go for anywhere between $300 and $1,100 per hour, it depends on amount of customers and how many girls are in the room at once."

33. On November 14, 2013, Ms. Scala and Ms. Genovese toured the Clubs with Mr. Capeci. The auditors noted that the Clubs had multiple private rooms in which the dancers perform for patrons. During the tour, Mr. Capeci explained that Lace dollars can be purchased to

pay for lap dances, the dancer's fee to go in a private room and to tip employees.

34. On June 4, 2014, Mr. Capeci informed Ms. Genovese that he wanted to discuss the audits with her supervisors before they progressed any further, contending that the scrip sales were not subject to tax. In a letter from Mr. Capeci to Mario Scarpace, of the Division's Field Audit Management, dated July 24, 2014, Mr. Capeci stated, in part, that: "The underlying reason for operating the club in this fashion was to avoid lawsuits and employment tax issues in the future."[10] A telephone call was subsequently conducted between Mr. Scarpace and Mr. Capeci, wherein Mr. Scarpace informed Mr. Capeci that the Clubs' receipts from the sales of private dances were subject to sales tax and that the Division was proceeding with the audits. In response, Mr. Capeci stated that on a previous audit he was not informed by the Division that the Clubs' business model was subject to tax, and that he would send a letter to the Division's Executive Deputy Commissioner, Nonie Manion, requesting a meeting.

35. By letter dated December 12, 2014, Mr. Capeci requested a meeting with Joe Carzo, Director of Audits. In response, a conference call was held between Joseph Vanderlinden of the Division's Field Audit Management, several other Division supervisors and employees, and Mr. Capeci. Mr. Vanderlinden explained that Mr. Carzo did not believe a meeting was necessary and that the Division was proceeding with the audits.

36. On September 17, 2015, Mr. Carzo, several employees from Field Audit Management, Ms. Genovese, Ms. Scala, and their supervisors participated in a conference call with Mr. Capeci. During the call, the Division discussed the status of the audit, potential issues,

[10] Similar to Mr. Capeci's explanation of the purpose behind the Clubs' business model, in Mr. Scarfi's affidavit in the ***Dennis*** matter, he described the "primary purpose" of Metro's business model as the scrip provider to the Clubs as being to "eliminate any implication that the scrip provider is . . . an 'employer' liable for compliance with the Fair Standards Act and New York Labor Law" (***see*** footnote 3).

the test of register tapes, private dances, customers' methods of payments, credit card processing and funny money. The call was concluded by agreeing that the audit team would resume audit activities and complete the review of available books and records. Mr. Capeci agreed to sign waivers extending the statute of limitations for expiring periods (waivers), and the Division agreed to have another discussion with Mr. Capeci before issuing assessments.

37. The Division subsequently sent the waivers to Mr. Capeci. Mr. Capeci signed the waivers and returned them with a letter dated September 25, 2015, in which he claimed that the Division's acceptance of the waivers validated his understanding that no further audit of the Clubs' private dances would be performed at the audit level and any further discussion of that matter would be held with the Division's executive personnel. By letter dated October 13, 2015, Mr. Carzo sent copies of the fully executed waivers to Mr. Capeci and responded to Mr. Capeci's correspondence by stating that the Division's endorsement of the waivers did not imply acceptance of his understanding or interpretation of the law or his business model.

38. On November 6, 2015, the Division sent a fourth IDR for the Clubs to Mr. Capeci, requesting outstanding records, as well as explanations and reconciliations for certain bank deposits and transfers shown in the Clubs' bank accounts. For MLB, the Division requested documentation on transfers of $973,748.94, credit card tips paid of $1,190,859.67, dancer fees (rent per the sales tax backup) of $3,968,808.00, and additional deposits of $2,927,114.43. For 44th, the Division requested documentation on transfers of $214,322.96, credit card tips paid out of $328,969.84, dancer fees (rent per the sales tax backup) of $1,389,160.80 and additional deposits of $2,038,093.72.

39. Another field audit appointment was conducted on November 23, 2015. On December 3, 2015, Ms. Genovese sent a letter to Mr. Capeci as a follow-up of the November 23,

2015 appointment, wherein she stated that to date, the Division had not received any of the documents requested in IDR number 4, and requested that he provide the documents by December 21, 2015.

40. On December 16, 2015, the Division sent letters and IDRs number 5 to Mr. Capeci, expanding the audit period for the Clubs to include March 1, 2010 to February 28, 2014 and requesting books and records for the updated audit period. The letters scheduled a field audit appointment for the Clubs on January 28, 2016.

41. During the field audit appointment on January 28, 2016, Mr. Capeci provided some of the missing bank statements that were previously requested. Ms. Genovese noted in her audit log that when she asked Mr. Capeci for the missing bank statements, he responded, "Shhh . . . okay, I will pretend like I care." Mr. Capeci also provided the auditor with some "funny money" books with a log of the dancers who worked at the Clubs. The auditor determined that the logs were not sufficient to substantiate how many dancers worked at the Clubs or how much rent the Clubs received from the dancers. The auditor requested that Mr. Capeci allow her to take three of the funny money books to review and return to him at the end of the audit, but Mr. Capeci denied the request, stating, "No, they stay here." The auditor inquired about the difference between vouchers and "Lace $" as indicated in the books and Mr. Capeci stated there was no difference. When the auditor asked why they were broken out separately in the books, Mr. Capeci stated that she did not need to know. Ms. Genovese noted in her audit log that Mr. Capeci became agitated and began yelling and screaming at her during the appointment.

42. On January 29, 2016, Ms. Genovese discussed the January 28 field audit appointment with her supervisors and Field Audit Management. On February 1, 2016, Mr. Carzo and Mr. Vanderlinden called Mr. Capeci and left a voice message for him to return their

call. On February 10, 2016, Mr. Vanderlinden called Mr. Capeci and stated that the Division was continuing with the audits of the Clubs and referred him to case law regarding the taxability of dance sales. During the call, Mr. Capeci referenced a letter from Executive Deputy Commissioner Manion in which he claimed that the Division agreed his business model was not taxable. Mr. Vanderlinden replied that he would review the mentioned letter.

43. On February 24, 2016, Mr. Carzo and Mr. Vanderlinden called Mr. Capeci and left a detailed message that they had reviewed the correspondence he mentioned during the February 10 call, and that the letter only applied to the matter discussed in that correspondence and was for settlement purposes only. They further reiterated that the Division would be going forward with the audits.

44. On February 25, 2016, Ms. Genovese, together with Section Head Frank Grillo, called Mr. Capeci to discuss the audits and the requested records. Ms. Genovese faxed IDRs 4 and 5 to Mr. Capeci for his review. Mr. Capeci asked what part of the general ledger the Division wished to review and the auditors explained that they were requesting the general ledger for the entire audit period. Mr. Capeci inquired why they wanted the ledger for the entire period and the auditors explained that the Clubs had no internal controls with the records currently provided. Ms. Genovese noted in her audit log that Mr. Capeci then stated that he needed to "clean up the general ledger for 2010 through 2014" because it was full of "mis-postings from the bookkeeper." Mr. Capeci also asked why the auditors wanted to see purchase invoices and why they could not obtain them from third parties or the Division's database. The auditors explained that they needed the Clubs' original source documents. Mr. Capeci suggested that the auditors look at records for 2012 or 2013, and that he preferred 2013.

45. On February 29, 2016, a call was held between Ms. Genovese, Ms. Scala, Mr. Grillo

and Mr. Capeci to discuss Mr. Capeci's request that his response to the records request be postponed until after the tax season. The auditors explained that if they received waivers from him extending the statute of limitations for the audit period of the Clubs, that they would allow additional time for the records to be provided. They also discussed scheduling an extraction of petitioners' electronic point of sales records with the Division's Technology Assist Audit (TAA) unit, and Mr. Capeci agreed.

46. On March 31, 2016, Ms. Genovese, Ms. Scala, and the TAA auditor went to the Clubs to attempt an extraction from the point of sale (POS) records. At MLB, the POS data available only went back to August 2015, which was after the audit period. The Club's manager stated that the system was upgraded and this was a new installation of software, but that he was sure the data was backed up before the new installation. The manager contacted the POS company, who later provided POS records for MLB for the period May 12, 2012 through February 28, 2014.

For 44th, the Division was unable to extract records from the POS system for the audit period, as the data only went back to August 2015. Petitioners and their POS company did not provide any POS records for 44th for the audit period.

47. On June 10, 2016, the Division's auditors again requested that Mr. Capeci provide the sales tax backup for the updated audit period, general ledgers for the entire audit period for both Clubs, and register tapes for the quarter ending November 30, 2013 to reconcile with the POS records for MLB.

48. After reviewing the POS records provided for MLB, the auditors selected the sales tax quarter ending November 30, 2013 as a test period to determine if the club had reported the proper amount of tax. This period was chosen for the test period because the POS records from

earlier periods were incomplete in that the gross sales reported on MLB's tax returns were substantially higher than the gross sales per the POS records provided. The quarter ending November 30, 2013 was the earliest quarter for which sales recorded in the POS were at least equal to the reported sales.

49. By letter dated June 16, 2016, the Division again requested that Mr. Capeci provide the outstanding records for the Clubs, as well as a written inventory of all records maintained and available during the audit period and all daily detailed sales records for the quarter ending November 30, 2013, and original source documents to substantiate certain deposits. The letter stated that the records were to be provided by June 28, 2016.

50. Mr. Capeci again requested an extension of time to provide the Clubs' records, but stated that he would provide the requested inventory by June 30, 2016. By letter dated June 27, 2016, the Division granted Mr. Capeci's request for an extension to July 14, 2016, and noted that as discussed, he would provide the requested inventory by June 30, 2016. Mr. Capeci did not provide the inventory, as stated, by June 30, 2016.

51. Another field appointment was conducted on July 14, 2016. The only records provided were sales invoices for the quarter ending November 30, 2013 for MLB. No records were provided for 44th. Mr. Capeci said that he was still working on the general ledgers and 44th's invoices for the quarter ending November 30, 2013 were not available.

52. By letter dated July 15, 2016, the Division requested that 44th and MLB provide all the requested records that were still outstanding by July 21, 2016 and stated that no further postponements would be granted. The requested records were not provided by the established deadline.

53. On August 10, 2016, the Division sent letters to 44th and MLB stating its intent to

impose penalties on the Clubs for failing to provide books and records for the audit period.

54. The Division determined that MLB's records were not adequate because the summary paper POS, paper register tapes and credit card batch summaries provided were not detailed and not provided or maintained for every shift every day, there were no controls in place to ensure what was received was a recording of every transaction, and the electronic records provided for May 12, 2012 through the end of the audit period were incomplete and did not reconcile to the paper receipts for the same periods nor to the taxpayer's reporting or bank deposits.

55. The Division determined that 44th's records were incomplete because the summary paper POS, paper register tapes and credit card batch summaries provided were not detailed and not provided or maintained for every shift every day, there were no controls in place to ensure what was received was a recording of every transaction, and the POS paper records did not reconcile to the taxpayer's reporting or the bank deposits.

56. To determine whether MLB had paid the proper amount of tax due for the audit period, the Division added the club's receipts from bar sales, door admissions, coat check and room rentals for the quarter ending November 2013 and determined audited gross receipts from those areas of $1,051,743.82 for that quarter. The club did not separately state sales tax on its invoices. Therefore, to determine audited sales, the auditor subtracted tax remitted for that quarter ($59,575.92) from audited gross receipts and determined audited gross sales of $992,167.90 for the quarter. The auditor divided audited gross sales by gross sales reported by MLB for that quarter ($671,278.00) to determine an error rate of 1.478.[11] The auditor then

[11] The determination erroneously states that the error rate was 1.47%. The audit report and the computations therein show the correct error rate.

multiplied gross sales reported in the amount of $8,790,452.00 by the error rate to determine audited gross sales of $12,992,537.09, additional gross sales of $4,202,085.09 and tax due of $372,935.05 for the period at issue from MLB's door admissions, coat check, bar sales and room rentals.

57. The Division also determined that MLB had an additional revenue stream from the sale of scrip and that tax was due from MLB on these sales. As stated in the Division's field audit report:

> "There was an additional revenue stream attributed to MLB Enterprises maintained by a related company Metro Enterprises. Metro Enterprises sells script [sic] to patrons who wish to use their credit card rather than cash when purchasing a lap dance and/or private dance. Metro Enterprises has a dedicated credit card terminal in MLB's club and the receipts are deposited into a dedicated bank account for MLB Enterprises. The credit card terminal is operated by MLB's employees and not reported by MLB Enterprises. The receipts were deemed receipts from the operation of an adult entertainment establishment."

To determine the tax due on scrip sales at MLB, the auditor computed additional taxable sales from scrip sales based on deposits attributed to MLB for the period in issue in the amount of $16,058,292.71 and determined additional tax due from MLB on these sales in the amount of $1,425,173.48.

58. In total, the Division determined that for the period at issue, MLB had additional taxable sales of $20,260,377.79 and owed sales tax in the amount of $1,798,108.53 plus penalties and interest.

59. The Division issued two notices of determination to MLB. Notice of determination L-045789856, dated November 30, 2016, assessed additional tax of $1,798,108.53 plus penalties and interest. Notice of determination L-045790014, dated November 30, 2016, asserted penalties in the amount of $86,000.00 for MLB's failure to produce books and records for the

audit period.[12]

60. On December 1, 2016 the Division issued two notices of determination to Mr. Capeci as an officer/responsible person of MLB. Notice number L-045794592 asserted tax due in the amount of $1,798,108.53 plus interest and penalty. Notice number L-045794593 asserted penalties in the amount of $86,000.00 to Mr. Capeci as a responsible person for MLB's failure to produce books and records for the audit period.

61. To determine whether 44th had paid the proper amount of tax due for the period in issue, the Division added the club's receipts from bar sales, door admissions, coat check and room rentals for the quarter ending November 2013 and determined audited gross receipts from those areas of $662,326.08 for that quarter. To determine audited sales, the auditor subtracted tax remitted for that quarter ($40,622.65) from audited gross receipts and determined audited gross sales of $621,703.43 for that quarter. The auditor divided audited gross sales by gross sales reported by 44th for that quarter ($457,720.00) to determine an error rate of 1.35.[13] The auditor multiplied gross sales reported ($4,698,852.00) by the error rate to determine audited gross sales of $6,382,270.89 and additional gross sales of $1,683,417.89 for the period in issue from door admissions, coat check, bar sales and room rentals. The auditor then multiplied $1,683,417.89 by the tax rate to determine additional tax due from 44th of $149,403.32 from these sales.

62. The Division also determined that 44th had an additional revenue stream from the

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[12] The Tax Appeals Tribunal sustained these notices by decision dated May 26, 2022 (***Matter of 44th and MLB***).

[13] The determination erroneously states that the error rate was 1.35%. The audit report and the computations therein show the correct error rate.

sale of scrip and that tax was due from 44th on these sales. As stated in the Division's field audit report:

> "There was an additional revenue stream attributed to 44th Enterprises maintained by a related company Metro Enterprises. Metro Enterprises sells script [sic] to patrons who wish to use their credit card rather than cash when purchasing a lap dance and/or private dance. Metro Enterprises has a dedicated credit card terminal in 44th's club and the receipts are deposited into a dedicated bank account for 44th Enterprises. The credit card terminal is operated by 44th's employees and not reported by 44th Enterprises. The receipts were deemed receipts from the operation of an adult entertainment establishment."

To determine the tax due on scrip sales at 44th, the auditor computed additional taxable sales from scrip sales based on deposits attributed to 44th for the period in issue in the amount of $3,969,528.78 and determined additional tax due from 44th on these sales in the amount of $352,295.67.

63. In total, the Division determined that for the period at issue, 44th had additional taxable sales of $5,652,946.67 and owed additional tax of $501,699.02, plus penalties and interest.[14]

64. The Division issued two notices of determination to 44th. Notice of determination L-045789743, dated November 30, 2016, assessed additional tax of $501,699.02 plus penalties and interest. Notice of determination L-045789538, dated November 30, 2016, asserted penalties in the amount of $156,000.00 for 44th's failure to produce books and records for the audit period.[15]

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[14] It is noted that the total of tax determined due from door admission, coat check, bar sales and room rentals of $149,403.32 plus tax determined due from scrip sales of $352,295.67 equals $501,698.99 rather than $501,699.02 as stated in the field audit report and notice of determination. There was no explanation for the discrepancy. Such difference, nevertheless, is deemed inconsequential.

[15] The Tax Appeals Tribunal sustained these notices by decision dated May 26, 2022 (***Matter of 44th and MLB***).

65. On December 1, 2016, the Division issued two notices of determination to Mr. Capeci as an officer/responsible person of 44th. Notice number L-045794594 asserted tax due in the amount of $501,699.02 plus interest and penalty. Notice number L-045794595 asserted penalties in the amount of $156,000.00 to Mr. Capeci as a responsible person for 44th's failure to produce books and records for the audit period.

66. Mr. Capeci had check signing authority on MLB's and 44th's bank accounts and exercised that authority during the period at issue.

67. Mr. Scarfi had signatory authority on MLB's bank accounts.

68. Mr. Scarfi wrote checks to employees of MLB and 44th from Metro's bank account.

Audit of Metro

69. By letter dated April 21, 2014, the Division scheduled a field audit with Metro for the period March 1, 2008 through February 28, 2014. The letter advised Metro that during an audit appointment on May 15, 2014, it must provide "any and all documentation in auditable form" and included an IDR describing the books and records to be produced.

70. Metro's audit was commenced as a result of the audits the Division was conducting of 44th and MLB. The audits of Metro, 44th, and MLB were conducted by the Division's auditor, Jennifer Genovese, under the supervision of auditor Christine Scala.

71. The Division also audited Lace Entertainment, Inc. (Lace), and Stiletto Entertainment, LLC (Stiletto) during the same time frame. The Division's auditor, Crystal Ricks, conducted those audits under the supervision of Ms. Scala.

72. Lace and Stiletto also operated adult entertainment clubs in New York, New York,

during the period at issue and transacted with Metro to process scrip sales at the clubs.[16]

73. During the audits, the auditors determined that Metro's role with the MLB, 44th, Lace and Stiletto was integral, and they were structured in a way that one could not exist without the other. The auditors found that transactions were commingled and could not be distinguished.

74. The auditors determined that the same employees were working for and receiving payments from both Metro and the Clubs.

75. The auditors also noted that books and records of Metro and the Clubs were commingled. During the audit of MLB, its owner provided the auditors with envelopes containing a day's receipts for both MLB and Metro stapled together.

76. During the audit of Metro, the auditors were informed that Metro provided the Clubs with dancer referrals and scheduling, and dispensed scrip in the Clubs by providing credit card terminals for the exchange of patrons' credit card payments into scrip.

77. Metro had credit card terminals at MLB's, 44th's, Lace's and Stiletto's clubs for processing customers' credit cards for the purchase of scrip. The credit card terminals were maintained by Metro inside the clubs and were operated by the Clubs' employees. Mr. Scarfi testified during the hearing for the ***Matter of Scarfi and Metro*** that for a period of time either Metro's credit card terminal or the club's credit card terminal went down and they "swapped out terminals." He did not specify which club or what time period.

78. Metro did not report the credit card payments from the sales of scrip as income on its federal income tax return. Mr. Scarfi testified during the hearing for the ***Matter of Scarfi and Metro*** that Metro reported only the 20% surcharge from the scrip sales and 10% redemption fee

[16] In addition to 44th, MLB, Lace and Stiletto, Metro sold scrip at four adult entertainment clubs in New Jersey.

as income on its federal returns.

79. During the audit of Metro, Mr. Scarfi told the auditors that either he, Metro's only employee, Keith Warech, or one of the Clubs' employees would bring cash from Metro's bank to the Clubs to cash out the dancers' scrip.

80. Mr. Scarfi testified during the hearing in the ***Matter of Scarfi and Metro*** that Metro only had one employee and the Clubs' employees processed the credit card transactions for the sale and redemption of scrip. Mr. Scarfi further testified that Metro does not compensate the Clubs' employees for running Metro's scrip transactions and delivering Metro's cash. However, during Metro's audit, the auditors observed that Metro's business records showed repeat payroll expenses from Metro to the Clubs' employees. Metro's bank records also show numerous checks from Metro to employees of the Clubs.

81. Alyshia Holland, an employee of 44th, had signatory authority on Metro's bank account and withdrew money from Metro's account to deliver to the Clubs when needed. Mr. Scarfi testified during the hearing in the ***Matter of Scarfi and Metro*** that he never paid Ms. Holland. However, during Metro's audit, the auditors obtained Metro's bank records showing numerous checks paid from Metro to Ms. Holland (***see Matter of Scarfi and Metro***, Tax Appeals Tribunal, August 5, 2021, finding of fact 20).

82. Metro's bank signature card lists Debra Zarucka as Metro's vice president. Mr. Scarfi stated in his affidavit, dated January 30, 2018, that he was the sole officer of Metro (***see*** footnote 5). There is no explanation in the record for the discrepancy.

83. Mr. Scarfi testified during the hearing in the ***Matter of Scarfi and Metro*** that Metro did not make any payments to the Clubs and the Clubs made no payments to Metro. However, the affidavit of Anthony Capeci, included with petitioner's motion, states that the Clubs paid

registration fees to Metro by cash (***see*** footnote 5).

84. Records obtained by the auditors during Metro's audit show numerous payments from Metro to the Clubs. The Division introduced into the record in this matter the following checks from Metro's bank account showing payments to the Clubs:[17]

Date	**Club**	**Amount**
1/12/09	MLB	$26,775.00
1/4/10	MLB	$22,175.00
1/25/10	MLB	$21,525.00
2/1/10	MLB	$16,050.00
2/13/10	MLB	$21,975.00

85. Metro did not file any sales tax returns or pay any sales tax to New York for the period at issue.

86. During the audit of Metro, the Division requested that Metro provide its books and records for the audit period. The Division also requested the records of MLB, 44th, Lace and Stiletto during the audit of each club.

87. The Division reviewed the books and records provided by Metro and determined that they were incomplete and insufficient to determine the proper amount of sales tax.

88. During the audits of MLB, 44th, Lace and Stiletto, the Division reviewed the books and records provided and determined that they were incomplete and insufficient to determine the proper amount of sales tax.

89. Metro maintained separate bank accounts for the credit card receipts from scrip sales from MLB's, 44th's, Lace's and Stiletto's clubs. The Division issued subpoenas for Metro's

[17] In the ***Matter of Scarfi and Metro***, the Division introduced additional records showing payments from Metro to MLB, 44th, Lace and Stiletto (***see Matter of Scarfi and Metro Enterprises Corp.***, Division of Tax Appeals, August 5, 2021, finding of fact 21).

bank statements. The auditors transcribed the deposits from credit card receipts in Metro's bank accounts for the period at issue to compute its tax liability from scrip receipts.

90. Based on a review of Metro's bank deposits, the Division determined taxable sales from the sale of scrip in the amount of $38,281,746.00.

91. The auditors also determined that Metro was responsible for taxes due on additional audited taxable sales made in MLB's, 44th's, Lace's and Stiletto's clubs. During the audits of each club, the Division determined tax due from the sales of beverages, room rentals, general admission charges and coat check charges.

92. The Division determined that Metro had taxable sales and tax due for the period March 1, 2008 through February 28, 2014 as follows:

Sales of scrip at MLB's club	$23,912,554.61
General admission, bar sales, coat check, room rental at MLB	$4,202,085.08[18]
Sales of scrip at 44th's club	$6,308,899.73
General admission, bar sales, coat check, room rental at 44th	$1,683,417.89[19]
Sales of scrip at Stiletto's club	$1,293,723.33
General admission, bar sales, coat check, room rental at Stiletto	$43,267.34[20]
Sales of scrip at Lace's club	$6,866,568.33
General admission, bar sales, coat check, room rental at Lace	$228,049.74[21]

[18] ***See*** finding of fact 56.

[19] ***See*** finding of fact 61.

[20] To determine taxable sales at Stiletto's club from bar sales, door admissions, coat check and room rentals, the auditor compared the club's point of sale records to its reported sales for the quarters ending November 2013 and February 2014 (no point of sale was in place for the months of September and October 2013, so the auditor determined an average for these months) and determined additional taxable sales of $43,267.34 for the period September 1, 2013 through February 28, 2014.

[21] To determine taxable sales at Lace's club from bar sales, door admissions, coat check and room rentals,

Total Taxable Sales	**$44,438,566.05**
Total Tax Due	**$3,863,002.13**

93. The Division issued notice of determination L-045794061, dated December 1, 2016, to Metro asserting tax due of $3,863,002.13 plus penalties and interest for the period March 1, 2008 through February 28, 2014.[22]

94. On December 1, 2016, the Division issued a notice of determination, number L-045796580, to Mr. Capeci as an officer/responsible person of Metro, asserting tax in the amount of $3,863,002.13, plus penalties and interest.

95. Metro maintained separate bank accounts for each of the Clubs in which it sold scrip. Mr. Capeci had check signing authority on some, but not all, Metro checking accounts associated with MLB and 44th. He exercised that authority by signing checks from such accounts payable to employees of his Clubs. The Division submitted into the record copies of 29 checks signed by Mr. Capeci and dated between August 8, 2008 and August 15, 2008 drawn from a Metro account at JP Morgan Chase Bank associated with MLB.[23] Mr. Capeci did not have check signing authority on Metro checking accounts associated with Stiletto or Lace and he was not involved in the operation of either of those clubs. Metro also sold scrip in four adult entertainment clubs in New Jersey. Mr. Capeci was not involved in the operation of those clubs.

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the auditor compared the club's point of sale records to its reported sales for the quarter ending November 2013 and calculated and error rate of .16. The auditor then multiplied gross sales reported by the error rate to determine audited gross sales of $1,303,460.40 and additional taxable sales of $228,049.74 for the period September 1, 2013 through February 28, 2014.

[22] The Tax Appeals Tribunal sustained this notice of determination in ***Matter of Scarfi and Metro*** issued on the same date as the present decision.

[23] Mr. Scarfi claimed in his affidavit dated January 30, 2018 that Mr. Capeci never exercised his check signing authority for Metro (***see*** footnote 5). There was no explanation for the discrepancy.

The Hearing Record

96. A hearing in this matter was held on December 1, 2020, and continued on January 22, 2021. The Division entered into the record, among other items, the audit file from the Metro audit for the period March 1, 2008 through February 28, 2014, and the audit files from the MLB and 44th audits for the period March 1, 2010 through February 28, 2014, and presented the testimony of Christine Scala, the Division's audit supervisor.

97. Petitioner entered into the record, among other items, the transcript of the hearing in the ***Matter of Scarfi and Metro***, held on July 15, 2019, and the transcript of the hearing in the ***Matter of 44th and MLB***, held on January 29, 2020. Petitioner offered the testimony of Joseph Endres, Esq. (***see*** finding of fact 21) and Professor Minna Kotkin.

98. Professor Kotkin teaches employment law and administrative law at Brooklyn Law School and has 45 years of experience in employment law. In preparation of her testimony, the witness read the transcripts from the prior hearings in ***Matter of 44th and MLB*** and ***Matter of Scarfi and Metro***, but did not have personal first-hand knowledge regarding the factual matters at issue. Petitioner presented Professor Kotkin as an expert witness in employment law. Petitioner's representative's line of questioning sought only legal conclusions from Professor Kotkin on employment and labor law issues. The Division objected to her testifying as an expert in the present sales tax matter and argued that her testimony regarding employment law was irrelevant. The Administrative Law Judge sustained the Division's objection, limited the witness's testimony to areas in which she had knowledge of specific facts, and excluded legal conclusions.

Petitioner's representative was then allowed to proffer what the witness's testimony would have been and stated that she would have testified as to the employment relationship

between the Clubs and the dancers and would have described the legal criteria to determine an employment relationship. After the proffer of testimony, the Administrative Law Judge allowed petitioner's representative to proceed with any factual questions for the witness, other than questions regarding her conclusions on issues of law. Petitioner's representative persisted with questions involving the witness's legal conclusions in the area of employment law, and the Division's objections were sustained. Petitioner's representative requested to again proffer testimony over the objections and was denied and instructed to move on with her next line of questioning.

99. After he filed his exception, petitioner filed a motion with the Tax Appeals Tribunal seeking to remand this matter to the Administrative Law Judge to consider newly discovered evidence consisting of certain documents. The Division opposed the motion.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that sales of scrip for the purchase of exotic dances at adult entertainment clubs are taxable as admission charges to a place of amusement under Tax Law § 1105 (f) (1). The Administrative Law Judge also determined that those transactions remain taxable even if the charges are collected by a separate entity. The Administrative Law Judge also found that the scrip sales were alternately taxable under Tax Law § 1105 (f) (3) as the charges of a roof garden, cabaret or other similar place and under Tax Law § 1105 (d) as entertainment or other charges made to customers.

The Administrative Law Judge rejected petitioner's contention that scrip was used solely for gratuities. According to the Administrative Law Judge, the record shows that scrip was used to purchase dances and does not show the amount of scrip used for tips. The Administrative Law Judge concluded, therefore, that all scrip sales were presumptively taxable.

The Administrative Law Judge rejected petitioner's labor law argument, finding that it rested on the unsupported factual premises that all payments to the dancers were voluntary gratuities and that the full amount of scrip was retained by the dancers. The Administrative Law Judge also found that the dancers' status as employees or independent contractors has no bearing on whether scrip was used to pay mandatory fees or voluntary gratuities.

The Administrative Law Judge determined that the Division's assessment against MLB and 44th for door admissions, bar sales, room charges and coat check fees was reasonable. The Administrative Law Judge noted that petitioner offered no evidence or argument to the contrary.

The Administrative Law Judge rejected petitioner's estoppel argument. She found that the Division did not make any false representations to petitioner, a necessary element of such a claim. Additionally, noting petitioner's reliance on certain prior audits of adult entertainment establishments, the Administrative Law Judge found that the results of a prior audit are not binding on a later audit.

The Administrative Law Judge also rejected petitioner's argument that the Division improperly adopted a policy that scrip is always subject to tax, contrary to SAPA. The Administrative Law Judge found that the record indicated that the Division made determinations as to the taxability of scrip sales on a case-by-case basis.

The Administrative Law Judge found that there was no dispute that petitioner was a responsible person of 44th and MLB during the period at issue and therefore personally liable for the collection and payment of sales tax on behalf of those entities. Having determined that the Division properly assessed tax against 44th and MLB, the Administrative Law Judge sustained the notices at issue asserting such derivative liability.

The Administrative Law Judge also found that petitioner was a responsible person for

Metro. The Administrative Law Judge cited the following facts in the record in support of this conclusion: petitioner had a substantial financial interest in and control over the sales for which Metro was assessed; petitioner had check-signing authority for Metro bank accounts; he exercised that authority, including signing checks payable to his Clubs' employees; petitioner's Clubs received substantial, and unexplained, payments from Metro; petitioner hired and managed his Clubs' employees who performed the day-to-day functions for Metro, such as managing the sale of scrip, processing customer credit cards for scrip purchases, maintaining books for scrip transactions and obtaining cash from Metro's bank accounts to bring to the Clubs to redeem scrip. The Administrative Law Judge thus concluded that petitioner possessed sufficient authority and control over the affairs of Metro to render him a responsible person for sales tax purposes.

The Administrative Law Judge rejected petitioner's constitutional argument that the assessments violated his due process rights based on his asserted inability to simultaneously comply with both the Tax Law and the relevant labor laws. The Administrative Law Judge found that petitioner did not show that the Division applied the Tax Law to him any differently than any other similarly situated taxpayer and rejected his constitutional claim because it was premised on the unfounded factual claim that all scrip payments to dancers were voluntary gratuities.

The Administrative Law Judge also rejected petitioner's claim that the testimony of Professor Kotkin was improperly excluded from the hearing. The Administrative Law Judge determined that such testimony, which related to that witness's opinions and conclusions on employment law matters, was irrelevant. The Administrative Law Judge determined that the testimony was also excludible because it consisted solely of legal conclusions. Additionally, the

Administrative Law Judge found that petitioner's claim that the Administrative Law Judge erred in not allowing a proffer of the Professor Kotkin's testimony was contrary to the record.

Finally, the Administrative Law Judge made an express finding that the testimony of petitioner and Mr. Scarfi, as set forth in the hearing transcripts of ***Matter of 44th and MLB*** and ***Matter of Scarfi and Metro*** and submitted into evidence in the present matter, lacked credibility.

ARGUMENTS ON EXCEPTION

As he did below, petitioner contends that scrip was used exclusively to provide gratuities to employees of the Clubs and, accordingly, scrip sales were not subject to sales tax. Citing ***Metro Enters. Corp. v New York State Dept. of Taxation & Fin.*** (171 AD3d 1377 [3d Dept 2019]), petitioner asserts that whether scrip sales are subject to tax depends on the relationship between Metro, the dancers, and the Clubs. Petitioner contends that the dancers were employees of the Clubs and that the Administrative Law Judge failed to apprehend that fact. Petitioner argues that the dancers, as employees, were entitled to the benefit of certain labor law provisions. Petitioner further argues that the Administrative Law Judge failed to grasp and correctly apply these principles of labor law in her analysis. According to petitioner, these provisions provide that amounts paid to dancers as gratuities belong to them and petitioner, as their employer, is not entitled to any part of such gratuities. Petitioner notes, too, that the Division agrees that voluntary gratuities are not subject to sales tax.

According to petitioner, the record shows that scrip could be used only to tip dancers and that only dancers could redeem scrip. Petitioner further contends that customer scrip payments were voluntary and at the customer's discretion. Petitioner thus asserts that the evidence establishes that scrip was used exclusively for tipping dancers. Petitioner asserts that the Clubs' limited involvement in scrip transactions does not change their character as gratuities. Petitioner

also argues that, under federal labor law, if service fees are not included in employers' gross receipts, they must be presumed to be gratuities and here, petitioner notes, the scrip was not included in the Clubs' gross receipts.

Petitioner also argues that scrip sales may be subject to tax when such sales are made by a club that offers dancing for profit or where scrip is used to pay for a private dance. Here, according to petitioner, the Clubs did not sell dances for profit and scrip could not be used to purchase dances.

Petitioner also seeks to distinguish prior case law. According to petitioner, those cases hold that purchases of dances or rental of rooms using scrip are taxable. In the present case, petitioner asserts, scrip was not used to purchase anything; it was used for tips only.

Petitioner contends that the Division should be estopped from proceeding with the assessments at issue. Petitioner asserts that he relied to his detriment on the Division's previous audits of another, similarly operated adult entertainment club and scrip provider, which operated in a manner similar to Metro and the Clubs. Petitioner notes that the Division cancelled a proposed sales tax assessment on scrip transactions during these prior audits (***see Matter of Scarfi and Metro*** [findings of fact 50 and 51 therein]).

Petitioner also contends that the Division's position with respect to scrip sales amounts to the adoption of a rule promulgated contrary to SAPA's rule-making procedures; that such a rule is invalid; and that the assessment must be cancelled accordingly.

Petitioner asserts that he was not a person responsible to collect tax on behalf of Metro and that the notice of determination asserting such liability against him must be cancelled. Petitioner notes that he was not an officer or owner of Metro. Petitioner also observes that he and Metro have separate counsel in matters before the Division of Tax Appeals. Petitioner

acknowledges that he was a signatory on Metro's bank accounts, but asserts that this was for short-term, emergency situations and that this fact is insufficient to render him a responsible person for Metro for sales tax purposes.

Petitioner contends that the assessments violate his constitutional rights to due process. Specifically, he contends that he cannot simultaneously comply with both the Tax Law on the one hand and the FLSA and Labor Law on the other. Petitioner asserts that if he complies with one, he will be in violation of the other.

Petitioner further contends that the Administrative Law Judge erred in prohibiting him from proffering the substance of his employment expert, Professor Kotkin. Petitioner concedes that a short proffer was allowed, but asserts that the Administrative Law Judge erroneously precluded petitioner from making clear the substance of the proposed testimony. Relatedly, petitioner contends that the Administrative Law Judge erroneously excluded the expert testimony. That is, petitioner asserts that Professor Kotkin's expertise in employment law could have aided the Administrative Law Judge in resolving the labor law questions that petitioner claims are at the forefront of the present dispute.

The Division takes the position that the Administrative Law Judge correctly determined that scrip sales in the Clubs were subject to sales tax as admission charges under Tax Law § 1105 (f) (1). The Division notes that the definition of admission charge under the Tax Law includes any charge for entertainment or amusement. The Division notes further that case law has held that sales of scrip to purchase exotic dances are taxable. The Division also asserts that the Administrative Law Judge correctly determined that scrip sales are alternately taxable under Tax Law § 1105 (f) (3) and (d).

The Division asserts that the Administrative Law Judge correctly found that the dancers'

status as employees, independent contractors or lessees had no bearing on whether sales of scrip were taxable, and that petitioner failed to establish his claim that scrip was solely used for tipping. The Division also asserts that petitioner failed to distinguish the present matter from the prior cases, where scrip sales were determined to be taxable.

The Division agrees with the Administrative Law Judge's conclusion that petitioner's estoppel claim is baseless. The Division emphasizes the rule that each audit stands on its own. The Division also agrees with the Administrative Law Judge's finding that petitioner's policy claim, i.e., that the Division improperly adopted a rule regarding the taxability of scrip contrary to SAPA, is without merit. The Division further agrees with the Administrative Law Judge's rejection of petitioner's constitutional claims.

The Division contends that the Administrative Law Judge correctly determined that petitioner is a responsible officer of Metro for sales tax purposes. The Division agrees with the Administrative Law Judge that petitioner had sufficient authority and control over the affairs of Metro to be considered a responsible person.

The Division agrees that the Administrative Law Judge correctly excluded the testimony of petitioner's expert. The Division notes that such testimony would have related to the dancers' status as employees. The Division asserts, however, that the Administrative Law Judge found that the dancers' employment status had no bearing on the taxability of the scrip transactions. Hence, the testimony was properly excluded.

OPINION

Taxability of scrip sales

After the determination in the present matter was issued, this Tribunal issued ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.*** (Tax Appeals Tribunal, May 26, 2022

[***Matter of 44th and MLB***]). In that decision, we held that receipts from scrip sales at 44th and MLB during the period March 1, 2010 through February 28, 2014 were subject to sales tax pursuant to Tax Law § 1105 (f) (1) and (3). Notices of determination L-045794592 and L-045794594 in the present matter assert tax due from petitioner, as a responsible officer of 44th and MLB, on the same scrip transactions as were at issue in ***Matter of 44th and MLB*** (compare findings of fact 57-60 and 62-65 herein with findings of fact 56-58 and 60-62 in ***Matter of 44th and MLB***). Notice of determination L-045796580 herein asserts sales tax due from petitioner, as a responsible officer of Metro, on scrip sales made at 44th, MLB, Lace and Stiletto between March 1, 2008 and February 28, 2014 (***see*** finding of fact 92).[24] The record indicates that all four clubs in the present matter operated in a manner similar to the clubs in ***Matter of 44th and MLB***. Given this similarity, if not identity, of facts, we find that our holding in ***Matter of 44th and MLB*** controls the outcome of the present case with respect to the taxability of the scrip transactions as described herein. A discussion of our holding follows.

Tax Law § 1105 (f) (1) imposes sales tax on, generally, "any admission charge . . . to or for the use of any place of amusement in the state." An admission charge is "the amount paid for admission, including any service charge and any charge for entertainment or amusement or the use of facilities therefor" (Tax Law § 1101 [d] [2]). A place of amusement is "any place where any facilities for entertainment, amusement or sports are provided" (Tax Law § 1101 [d] [10]).

Tax Law § 1105 (f) (3) imposes sales tax on "the amount paid as charges of a roof garden, cabaret or other similar place in the state." A charge of a roof garden, cabaret or other similar place includes "[a]ny charge made for admission . . . or entertainment . . . at [such a

[24] The notice asserting personal liability against petitioner as a responsible officer of Metro is thus, to a significant extent, duplicative of the notices asserting liability against petitioner as an officer of 44th and MLB.

place]" (20 NYCRR 527.12 [b] [1]). An amusement charge is "[a]ny admission charge, dues or charge of a roof garden, cabaret or other similar place" (Tax Law § 1101 [d] [3]). A roof garden, cabaret or other similar place is, generally, any such place "which furnishes a public performance for profit" (Tax Law § 1101 [d] [12]).

Receipts from sales of drinks in a bar are subject to sales tax under Tax Law § 1105 (d). Liability under Tax Law § 1105 (d) also includes receipts from any "cover, minimum, entertainment or other charge made to patrons or customers."

A charge for a lap dance or a private dance at an adult entertainment establishment is subject to sales tax both as an admission charge for the use of a place of amusement pursuant to Tax Law § 1105 (f) (1) and as a charge of a roof garden, cabaret or other similar place pursuant to Tax Law § 1105 (f) (3) (***Matter of Gans v New York State Tax Appeals Trib.***, 194 AD3d 1209, 1211 [3d Dept 2021]; ***Matter of HDV Manhattan, LLC v Tax Appeals Trib. of the State of N.Y.***, 156 AD3d 963, 965-966 [3d Dept 2017]; ***Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341 [3d Dept 2011], ***affd*** 19 NY3d 1058 [2012], ***rearg denied*** 20 NY3d 1024 [2013], ***cert denied*** 571 US 952 [2013]; ***Matter of Greystoke Indus.***, Tax Appeals Tribunal, May 19, 2011; ***Matter of Marchello***, Tax Appeals Tribunal, April 14, 2011).

Scrip sales in an adult entertainment club are subject to sales tax where such scrip is used by customers to pay charges for admission, amusement or entertainment taxable pursuant to Tax Law § 1105 (f) (1) and (3) (***Matter of Gans v New York State Tax Appeals Trib.***, 194 AD3d at 1211; ***Matter of HDV Manhattan, LLC v Tax Appeals Trib. of the State of N.Y.***, 156 AD3d at 965; ***Matter of Marchello***; ***see also Metro Enters. Corp. v New York State Dept. of Taxation & Fin.***, 171 AD3d 1377, 1380 [3d Dept 2019]). Sales tax is collectable on such scrip sales at the time the customer purchases the scrip (***Matter of Executive Club, LLC***, Tax Appeals Tribunal,

July 24, 2019, ***confirmed sub nom Gans v New York State Tax Appeals Trib.***).

Private dance charges at an adult entertainment club are alternatively taxable under Tax Law § 1105 (d) (***Matter of 677 New Loudon Corp. d/b/a Nite Moves***, Tax Appeals Tribunal, April 14, 2010, ***affd on other grounds Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***).

All charges of any type mentioned in Tax Law § 1105 (f) and receipts under Tax Law § 1105 (d) are presumptively subject to tax until the contrary is established and the burden of proving that any such charge or receipt is not taxable is upon the person required to collect tax or the customer (Tax Law § 1132 [c] [1]). Persons required to collect tax include every recipient of amusement charges and every vendor of tangible personal property or services (Tax Law § 1131 [1]). Furthermore, it is well established that a presumption of correctness attaches to a notice of determination issued by the Division, and that the taxpayer must overcome this presumption by clear and convincing evidence (***see e.g. Matter of Wilmarth***, Tax Appeals Tribunal, June 4, 2015).

As in ***Matter of 44th and MLB***, petitioner here does not contest the foregoing principles, but rather contends that customer scrip payments to dancers were voluntary gratuities and therefore not subject to sales tax.

Voluntary gratuities are generally not subject to sales tax because such payments are not properly includible in the receipt for property or services taxable under Tax Law § 1105 (a), (c) or (d) or the charge taxable under Tax Law § 1105 (f) (***see*** Tax Law § 1101 [b] [3], [d] [2-4]; ***see also*** TSB-M-09[13]S ["Sales Tax on Gratuities and Service Charges"] [August 4, 2009]).

As the Administrative Law Judge determined, however, the record shows that the amounts paid by customers to the dancers were not voluntary. Specifically, the Clubs had a

minimum fee of $20.00 for dances (***see*** finding of fact 17). Petitioner himself advised the auditors during the audit that customers paid $20.00 for dances (***see*** finding of fact 27). Dances in private rooms cost significantly more (***see*** finding of fact 18). These facts are further corroborated by the affidavit of Ms. Dennis, a dancer at 44th's club, in the ***Dennis*** matter (***see*** footnote 10). Additionally, the contracts between the Clubs and dancers refer to, and appear to distinguish between, dance fees and tips (***see*** finding of fact 7). Further, the affidavits of petitioner and Mr. Scarfi, each dated January 30, 2018, similarly distinguishes between "tips" and "dancer fees" (***see*** finding of fact 6). These facts are consistent with the record in ***Matter of 44th and MLB***, of which the Administrative Law Judge took notice (***see*** footnote 3). Finally, we note that the Administrative Law Judge rejected the testimony of petitioner and Mr. Scarfi to the effect that no amount of scrip was used to purchase dances as lacking in credibility in light of the contradictory evidence in the record. Although we are not bound by such a credibility assessment, we find nothing in this record to alter it (***Matter of Strachan***, Tax Appeals Tribunal, June 28, 2018). Indeed, there is much in this record to support it. We thus find, contrary to petitioner's contention, that scrip was used by customers in the Clubs to purchase private dances. Consistent with prior case law, such transactions are subject to sales tax as admission charges to a place of amusement pursuant to Tax Law § 1105 (d), (f) (1) and (3). Additionally, as we found in ***Matter of 44th and MLB***, we acknowledge that some customers may have paid dancers an amount greater than the set price for a dance and that such excess amount could be deemed a voluntary gratuity not subject to tax. As also in ***Matter of 44th and MLB***, however, there is no evidence in the record of payments to the dancers that distinguish between mandatory dance fees and voluntary gratuities. Hence, given the presumption of taxability under Tax Law § 1132 (c) (1), we must consider all scrip payments by customers to the dancers for dances as taxable

charges under Tax Law §1105 (f).

Petitioner's labor law argument

Petitioner also argues that the dancers' status as employees compels a finding that the scrip transactions were not subject to sales tax. That is, petitioner contends that, as employees, the dancers were entitled to the benefit of certain FLSA and Labor Law provisions and that such provisions require a finding that the scrip payments to the dancers, even if mandatory, must be treated as gratuities. Petitioner specifically argues that where, as here, the dancers are employees who retain the payments made by customers; the customers reasonably believe such payments will be retained by the dancers; and such payments are not included in the employer's gross receipts, then the scrip payments must be presumed to be gratuities under the FLSA and Labor Law. In support of this argument, petitioner cites, among other cases, ***Hart v Rick's Cabaret Intl. Inc.*** (60 F Supp 3d 447 [SDNY 2014]), a case involving alleged violations of New York Labor Law and the FLSA, where the court found that scrip payments made by customers to dancers in an adult entertainment club should be seen as "gratuities belonging to the dancer, not as service charges belonging to the Club" (60 F Supp 3d at 457). Petitioner notes that the scrip payments to the dancers did not become part of the Clubs' gross receipts and asserts, accordingly, that such payments, even if mandatory, must be treated as nontaxable gratuities. Petitioner also notes that Labor Law § 196-d prohibits employers from demanding, accepting or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity. Petitioner further contends that amounts paid directly to an employee are properly presumed to be gratuities under Labor Law regulations (***see*** 12 NYCRR 146-2.18).

Petitioner's argument, which suggests that the amounts paid to the dancers for dances must be considered voluntary gratuities *because* the dancers were employees is similar to that

advanced by petitioners in ***Matter of 44th and MLB*** and rejected in our decision in that matter. We similarly reject petitioner's argument here.

As we observed in ***Matter of 44th and MLB***, the Tax Law, and not the Labor Law or the FLSA, determines whether payments for dances in an adult entertainment club are subject to sales tax. The taxability of such transactions is thus not contingent on whether the dancers are employees or independent contractors (***e.g. Matter of HDV Manhattan, LLC***, Tax Appeals Tribunal, February 12, 2016, ***confirmed*** 156 AD3d 963 [dancers were independent contractors], ***Matter of 677 New Loudon Corp. d/b/a Nite Moves***, Tax Appeals Tribunal, August 25, 2016 [dancers were employees]).

Petitioner's argument wrongly focuses on the treatment of the customer's payment after the transaction. As the sales tax is a transaction tax, liability occurs at the time of the transaction (20 NYCRR 525.2 [a] [2]). Persons required to collect sales tax must do so at the time of purchase (Tax Law § 1132 [a] [1]). Furthermore, the tax is payable, in the first instance, by the customer, and is in addition to the charge to which it applies (20 NYCRR 525.2 [a] [4]; Tax Law § 1132 [a] [1]). As noted, we have held that sales tax is collectable on similar scrip sales at the time the customer purchases the scrip (***Matter of Executive Club, LLC confirmed sub nom Gans v New York State Tax Appeals Trib.***). Petitioner here, like the petitioners in ***Matter of 44th and MLB***, simply failed to charge and collect sales tax from their customers at the time of the transactions. Accordingly, the treatment of customer payments to the dancers for labor law purposes does not determine the treatment of those payments for sales tax purposes.

Petitioners' argument on this point also fails on the facts. As noted, the argument rests on the presumption that the dancers retain the payments made by customers. The record, however, shows that the dancers did not retain the full amount spent by the customers to purchase dances,

as Metro's share was 25% (***see*** findings of fact 11 and 12).

Effect of ***Metro Enters. Corp. v New York State Dept. of Taxation & Fin.***

Petitioner's reliance on ***Metro Enters. Corp. v New York State Dept. of Taxation & Fin.*** in support of his contention that the subject scrip transactions are not subject to sales tax is misplaced. In that case, Metro and Mr. Scarfi brought a declaratory judgment action against the Division contesting the Division's assertion of sales tax liability against Metro on sales of scrip used to pay for private dances at adult entertainment clubs, similar to the scrip sales at issue. The court agreed with the Division that there were many factual questions regarding "the relationship between plaintiffs, the dancers and the registered clubs" and that, accordingly, the court was unable to determine the extent to which Metro's receipts were taxable (171 AD3d at 1380). As such, the court found that Metro and Mr. Scarfi failed to exhaust their administrative remedies and dismissed the complaint (***id.***).

To the extent that the Appellate Division's decision in ***Metro Enters. Corp. v New York State Dept. of Taxation & Fin.*** requires an examination of the relationships among Metro, the Clubs, and the dancers, we observe that those relationships were the focal point of the hearing and indeed the entire record in this matter. As discussed above, we find that the record shows that Metro was a recipient of amusement charges and therefore a person required to collect and pay over sales tax on the scrip transactions. As to the significance of ***Metro*** to the Clubs' liability, as we observed in ***Matter of 44th and MLB***, the issue of whether the Clubs are liable for sales tax on scrip transactions was not before the court in ***Metro***.

Estoppel and SAPA

Petitioner's estoppel argument is similar to that advanced by the petitioners in ***Matter of 44th and MLB*** and is similarly rejected. "[T]he doctrine of estoppel does not apply in tax cases

unless 'unusual circumstances support a finding of manifest injustice'" (***Matter of Ryan v Tax Appeals Trib. of the State of N.Y.***, 133 AD3d 929, 930 [3d Dept 2015] [internal quotation marks and citations omitted]). It is well-established that "previous assessments and audits are non-binding upon future years" (***Matter of Winners Garage, Inc.***, Tax Appeals Tribunal, April 16, 2014, ***confirmed sub nom Matter of Wolkowicki v New York State Tax Appeals Trib.***, 136 AD3d 1223 [3d Dept 2016]). This follows from the general proposition that an administrative agency may correct its erroneous interpretations of the law (***Matter of Liberty Coaches v State Tax Commn.***, 79 AD2d 775, 776 [3d Dept 1980]). Accordingly, reliance on the result of a prior audit does not rise to the level of manifest injustice (***Matter of Washington Sq. Hotel LLC v Tax Appeals Trib. of the State of N.Y.***, 155 AD3d 1477, 1479 [3d Dept 2017], ***lv denied*** 31 NY3d 909 [2018]). It follows, therefore, that the outcome of previous audits of other adult entertainment businesses are insufficient to estop the Division in the present matter.

We also reject petitioners' contention that the Division improperly adopted a policy that all scrip transactions in adult entertainment clubs are taxable in violation of SAPA. As in ***Matter of 44th and MLB***, we agree with the Administrative Law Judge's finding that the Division did not have such a policy and made its determinations with respect to scrip transactions on a case-by-case basis.

Constitutional Arguments

Petitioner's argument that the assessments violate his due process rights by imposing conflicting legal obligations upon Metro and its business associates (i.e., the Clubs), thereby making it impossible for them to simultaneously comply with both the Tax Law and the relevant labor laws is similar to the argument advanced by the petitioners in ***Matter of 44th and MLB***. As in that case, this is a question of whether a statute as applied to a specific set of facts is

constitutional and is within our jurisdiction (***Matter of Frog Design, Inc.***, Tax Appeals Tribunal, April 15, 2015; ***cf. Matter of A & A Serv. Sta., Inc.***, Tax Appeals Tribunal, October 15, 2009 [the constitutionality of a statute by its terms is presumed at the administrative level]). Petitioners bear the burden to prove their as-applied constitutional challenge (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992). According to petitioner, compliance with both the Tax Law and the relevant labor laws is impossible because the same monies that are considered gratuities belonging to the dancers for labor law purposes are also taxable charges under the Tax Law. We rejected this argument in ***Matter of 44th and MLB*** and we reject it here. As we found in ***44th and MLB***, even if we assume that amounts paid to the dancers were gratuities for labor law purposes, the Club operators' compliance with the Tax Law with respect to scrip sales was plainly not impossible. As we observed in ***44th and MLB***, this is because sales tax is collectible, in the first instance, from the customer at the time of the transaction and is in addition to the amusement charge to which it applies (20 NYCRR 525.2 [a] [4]; Tax Law § 1132 [a] [1]). We found in ***44th and MLB*** that the Club operators could have complied by simply charging and collecting sales tax from their customers at the time of the transactions. The same reasoning applies to petitioner here.

Metro's liability for scrip sales

Metro was a person required to collect sales tax within the meaning of Tax Law § 1131 (1). As relevant here, that provision (1) defines such persons as including "every recipient of amusement charges" (Tax Law § 1131 [1]). As noted, scrip sales are taxable as amusement charges pursuant to Tax Law § 1105 (f). A recipient for purposes of Tax Law § 1105 (f) is "[a]ny person who collects or receives or is under a duty to collect an amusement charge" (Tax Law § 1101 [d] [11]). Pursuant to its agreements with the Clubs, Metro was responsible for all

aspects of the scrip transactions in the Clubs throughout the period at issue. Metro provided and maintained credit card machines dedicated to scrip purchases on the premises of each Club. All scrip purchases were processed on Metro's machines. Metro received about 25% of customer expenditures on scrip. All such revenue was deposited in accounts controlled by Metro. Metro was also responsible to supply the Clubs with an adequate supply of scrip and sufficient cash for the redemption of scrip by dancers. Metro thus clearly collected or received customer payments by credit card in exchange for scrip. Accordingly, Metro was a recipient of amusement charges and a person required to collect tax under Tax Law § 1131 (1). Hence, Metro was liable for the tax due on scrip sales under Tax Law § 1133 (a).

The Clubs' liability for scrip sales

The Clubs were also persons required to collect sales tax pursuant to Tax Law § 1131 (1). As petitioner has noted throughout this proceeding, the dancers who solicited the scrip transactions were employees of the Clubs. Accordingly, they were under the direction and control of the Clubs. The dancers at petitioner's clubs, i.e., 44th and MLB, were under petitioner's direction and control. Moreover, petitioner considered the dancers to be an integral part of his business (***see*** finding of fact 16) and the scrip transactions at all of the Clubs generated a significant amount of revenue (***see*** finding of fact 92). The scrip transactions were facilitated by other Club employees, who were also under the direction and control of the Clubs (***see*** finding of fact 11). Club customers thus paid Club employees charges for entertainment or amusement provided by Club employees at the Clubs' places of business. The Clubs were thus recipients of those entertainment or amusement charges for purposes of Tax Law § 1131 (1) and, accordingly, liable for the sales tax due on those transactions under Tax Law § 1133 (a) (***see Matter of 44th and MLB***). That the Clubs entered into voluntary agreements with Metro to

handle credit card purchases of scrip does not change the Clubs' status as recipients of amusement charges (***id.***).[25]

Petitioner's responsible person liability

Tax Law § 1133 (a) imposes personal liability for sales tax upon every person required to collect tax. As relevant here, Tax Law § 1131 (1) defines such a person as including the following:

> "[E]very vendor of tangible personal property or services [and] every recipient of amusement charges . . . Said term[ ] shall also include any officer, director or employee of a corporation . . . who as such officer, director, or employee or manager is under a duty to act for such corporation . . . in complying with any requirement of [the sales tax law]."

Whether an individual is responsible for collecting and remitting sales tax for a corporation and thereby personally liable for the taxes not collected or paid depends on the facts of each case (***Matter of Cohen v State Tax Commn.***, 128 AD2d 1022, 1023 [3d Dept 1987]). We consider various factors in making such a determination. The holding of corporate office is one such factor, but is not determinative (***see Chevlowe v Koerner***, 95 Misc 2d 388 [Sup Ct, Queens County 1978]). Conversely, "the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation" (***Matter of Ianniello***, Tax Appeals Tribunal, November 25, 1992, ***confirmed*** 209 AD2d 740 [3d Dept 1994]). The Division's regulations provide that "[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act" (20 NYCRR 526.11

[25] As the Administrative Law Judge correctly noted, to the extent that the same tax is assessed against Metro and the Clubs, their liability is joint and several (***Matter of Sacher***, Tax Appeals Tribunal, July 2, 2015; Tax Law § 1133 [a]).

[b] [2]). Other relevant factors include the individual's economic interest in the corporation, knowledge of and control over the corporation's financial affairs, authority to hire and fire employees, and authority to sign corporate checks (***see e.g. Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.***, 116 AD3d 1176 [2014]; ***Matter of Luongo***, Tax Appeals Tribunal, July 10, 2012; ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990). "What must be considered is petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)" (***Matter of Coppola v Tax Appeals Trib. of State of N.Y.***, 37 AD3d 901, 903 [2007]). Ultimately, we seek to determine "whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (***Matter of Constantino***).

Petitioner bears the burden of proof to show, by clear and convincing evidence, that he was not a person required to collect tax under Tax Law §§ 1131 (1) and 1133 (a) (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

As noted, petitioner concedes that he was a person responsible to collect tax on behalf of 44th and MLB (***see*** finding of fact 2). Petitioner does not contest the reasonableness of the Division's audit method or the accuracy of the resulting audit calculations. Accordingly, we sustain such calculations (***see e.g. Matter of West Grenville Liqs., Inc.***, Tax Appeals Tribunal, May 9, 1996). We note that the scrip sales assessment is premised on a detailed audit of Metro's bank records, which we determined to be reasonable in ***Matter of 44th and MLB***. As to the estimated audit method for non-scrip sales, the record shows that the records made available were incomplete thereby justifying the use of an indirect audit method (***see e.g. Matter of Aum Sidhdhy Vinayak, LLC***, Tax Appeals Tribunal, December 8, 2011; ***see also*** Tax Law § 1138 [a]

[1]). Accordingly, we sustain the notices of determination assessing tax and penalties due from petitioner as a responsible person of 44th and MLB (***see*** findings of fact 60 and 65).

As to petitioner's liability for Metro's sales taxes, the record makes clear that the business activities of 44th, MLB and Metro were deeply intertwined. Employees of 44th and MLB, under petitioner's direction and control, solicited sales of scrip, processed those transactions, kept records for those transactions, issued checks to 44th and MLB drawn from Metro bank accounts, and obtained cash from Metro bank accounts to bring to those clubs to exchange scrip to cash. Metro thus depended on 44th and MLB employees to perform its day-to-day activities. Additionally, petitioner had check-signing authority for some Metro accounts associated with 44th and MLB. He exercised this authority by signing checks payable to employees of 44th and MLB.

Petitioner's authority and control over Metro, however, did not extend beyond Metro's involvement with 44th and MLB. That is, neither he nor his corporations were involved with Metro operations at Lace Entertainment, Inc., Stiletto Entertainment, LLC, or any of the four New Jersey clubs at which Metro sold scrip. He did not have check signing authority for Metro bank accounts associated with any of these clubs.

Considering that petitioner's involvement with Metro was thus limited to a segment of Metro's operations, and, further, that he was neither an officer, director, employee nor shareholder of Metro, we find that he lacked "sufficient authority and control over the affairs of the corporation" to be considered a person required to collect tax for Metro under Tax Law § 1131 (1) (***Matter of Constantino***). Accordingly, he is not personally liable for sales taxes due from Metro under Tax Law § 1133 (a) and the notice of determination assessing such tax and penalties due from petitioner must be cancelled (***see*** finding of fact 94).

Testimony of Kotkin

The Administrative Law Judge reasonably excluded the testimony of Professor Kotkin. As discussed previously, the scrip transactions as described herein are subject to sales tax irrespective of the dancers' employment status. Professor Kotkin's testimony regarding employment law was therefore irrelevant. We also find, contrary to petitioner's contention, that the Administrative Law Judge provided petitioner's representative with a reasonable opportunity to proffer testimony with respect to Professor Kotkin.

Post-exception motion

Petitioners' post-exception motion to this Tribunal is improper under our Rules of Practice and Procedure. As noted, petitioner filed this motion on or about June 14, 2022, more than four months after he filed his exception (***see*** finding of fact 99). Petitioner's motion seeks to remand this matter to the Administrative Law Judge to consider "newly discovered" evidence consisting of certain documents. Petitioner thus requests that we reopen the record. While our Rules do provide for a motion to reopen the record upon the grounds of newly discovered evidence, such a motion must be made to the Administrative Law Judge within 30 days of the issuance of the determination and may not be granted after the filing of an exception with the Tribunal (20 NYCRR 3000.16 [b]). Petitioner's motion fails on both such conditions. Additionally, newly discovered evidence for purposes of a motion to reopen means evidence that was in existence but undiscoverable with due diligence at the time of the hearing (***Matter of Frenette***, Tax Appeals Tribunal, February 1, 2001, citing ***Matter of Commercial Structures v City of Syracuse*** (97 AD2d 965, 966 [4th Dept 1983]). Petitioner's motion papers provide neither evidence nor argument to show that the attached documents fall within this definition. Petitioner's motion is thus properly denied on this basis as well.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anthony Capeci is granted to the extent indicated in paragraph 6 below, but is otherwise denied;

2. The motion of Anthony Capeci is denied;

3. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph 6 below, but is otherwise affirmed;

4. The petition of Anthony Capeci is granted to the extent indicated in paragraph 6 below, but is otherwise denied;

5. Notices of determination L-045794592, L-045794593, L-045794594, and L-045794595 (***see*** finding of fact 1) are sustained; and

6. Notice of determination L-045796580 (***see*** finding of fact 1) is cancelled.

Dated: Albany, New York
February 23, 2023

/s/ Anthony Giardina
Anthony Giardina
President

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

/s Cynthia M. Monaco
Cynthia M. Monaco
Commissioner