STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

677 NEW LOUDON CORPORATION D/B/A NITE MOVES :

:

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2005 through February 28, 2010. :

In the Matter of the Petition :

of : DETERMINATION

STEPHEN DICK, JR. : DTA NOS. 824333, 824334 AND 824335

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2007 through February 28, 2010. :

In the Matter of the Petition :

of :

STUART CADWELL :

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2007 through February 28, 2010. :

Petitioner 677 New Loudon Corporation d/b/a Nite Moves filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2005 through February 28, 2010.

Petitioner Stephen Dick, Jr., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2007 through February 28, 2010.

Petitioner Stuart Cadwell filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2007 through February 28, 2010.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in Albany, New York, on April 24, 2014 at 10:30 A.M., and concluded on April 25, 2014, with all briefs to be submitted by November 26, 2014, which date began the six-month period for the issuance of this determination. Petitioners appeared by W. Andrew McCullough, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether 677 New Loudon Corporation's charges for admission and purchases of private dances were subject to sales tax pursuant to Tax Law § 1105 (d)(i); (f)(1) and (3).

II. Whether 677 New Loudon Corporation's charges for admission were exempt from sales tax pursuant to Tax Law § 1123 as admission to a musical arts performance at a cabaret or similar establishment.

FINDINGS OF FACT

1. Petitioner[1] 677 New Loudon Corporation d/b/a Nite Moves (Nite Moves) is an establishment in Latham, New York, which features semi-nude and nude dancing by females, lap or table dances and private dances. The club serves nonalcoholic beverages but not food.

2. Nite Moves was selected for a follow-up audit by the Division of Taxation (Division) after a previous audit for the period December 1, 2002 through August 31, 2005. The results of that audit were challenged by petitioner Nite Moves, but the audit results were sustained by the Tax Appeals Tribunal (Tribunal) and also upon judicial review.

3. By letter, dated April 20, 2010, the Division confirmed an audit appointment with petitioner and requested that all records pertinent to sales and use taxes for the period September 1, 2005 through February 28, 2010 (audit period) be made available for inspection. Petitioner produced records for its sales, expense purchases and capital expenditures, which the Division deemed adequate to perform a detailed audit. The detailed audit which ensued produced additional tax in two areas.

4. The Division's audit found additional tax due on expense purchases of landscaping and interior cleaning services in the sum of $9,023.35, which amount was accepted by petitioner and billed separately. No additional tax was determined to be due on capital purchases.

5. The majority of the sales tax determined to be due was sourced to admission charges, charges for private dances, beverage sales and miscellaneous other sales, the last of which were deemed miscategorized private dances. Beverage sales accounted for about 16.29% of gross

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[1]"Petitioner" refers to 677 New Loudon Corporation throughout. The liability of Mr. Dick and Mr. Cadwell is derived from that of 677 New Loudon Corporation and neither individual has disputed his liability therefor.

sales. These additional sales, the only ones remaining in issue, totaled $4,929,260.96, yielding additional tax due of $394,340.88. In its audit, the Division never indicated that the charge for admissions included the beverage sales or contended that any of petitioner's records, which were deemed adequate for a detailed audit, supported such an inclusion.

Petitioner's profit and loss statement for the period September 2005 through February 2010 reflected the following sales: couch dances[2], $3,025,151.96; cover charges[3], $955,989.00; register (beverage) sales, $923,825.00; and other sales (mischaracterized couch dances), $24,295.00. Total sales for the period were stated to be $4,923,454.22.

Petitioner's profit and loss statement for the period March 2009 through February 2010 reflected the following sales: couch dances, $865,780.00; cover charges, $203,165.00; and register (beverage) sales, $185,412.00. Total sales for the period were stated to be $1,253,029.85.

The auditor accepted the amounts stated on the profit and loss statements for admission charges, drink receipts and private dances without any inquiry into internal controls on petitioner's accounting for the number of admissions. He reconciled the drink sales to the tax returns for the period ending February 28, 2010.

6. With regard to admissions and private dance charges, the Division relied on the Tribunal's decision arising out of the prior audit, which held that these charges were taxable under Tax Law § 1105 (d)(i); (f)(1) and (3), for admission to a place of amusement, admission to a roof garden or cabaret and admission charges that include beverages, respectively.

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[2]Refers to private dance charges.

[3]Refers to admission charges.

7. The Division issued to Nite Moves a Notice of Determination, dated August 30, 2010, which asserted additional sales tax due of $394,340.88 plus interest for the audit period. Prior to the Bureau of Conciliation and Mediation Services (BCMS) conference, the Division discovered that it had erroneously failed to account for taxes paid by petitioner with its returns and brought this to petitioner's and the conferee's attention. As a result, the BCMS order, dated February 11, 2011, recomputed the tax to reflect the tax paid, resulting in additional tax due of $323,155.57, but sustaining the notice in all other respects.[4]

8. The two individuals determined by the Division to be responsible for the collection and payment of sales taxes on behalf of Nite Moves, Stephen Dick, Jr. and Stuart Cadwell, were also issued notices of determination, dated August 12, 2010, each for the shorter period June 1, 2007 through February 28, 2010, asserting additional sales tax due of $249,635.53 plus interest. Following the adjustment made for taxes paid by Nite Moves, the BCMS order sustained the notices issued to Mr. Dick and Mr. Cadwell and recalculated the tax due, yielding additional tax due of $206,942.64 plus interest.

9. Generally, Nite Moves was open seven days a week during the audit period. Prior to 5:00 P.M., the admission charge was $4.00 and thereafter, $11.00. This charge did not include beverages, which were sold separately. The drinks were almost all $3.00 each and usually sold two-at-a-time for $6.00. A caffeine drink was sold for $5.00 due to its higher cost.

Stephen Dick, part-owner and chief financial officer, explained that the drinks served were for the comfort and convenience of patrons, who preferred to have beverages on hand. He

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[4]After the BCMS conference, the Division discovered overpayments due to petitioner's reporting of gross sales figures before backing out tax. A credit of $2,531.08 was determined and petitioner was informed by letter, dated January 5, 2011, that it was eligible to claim the credits on a subsequent return.

recounted how Nite Moves has not changed its drink prices since 1997. However, the expense of providing this comfort for patrons comes at a price. He must have bartenders, compressors, coolers, ice makers and incurs the cost of the products themselves. The drinks yielded very little net revenue for Nite Moves. In contrast, door admissions have no associated costs and the net revenue is far more profitable. Since each profit center shares an equal percentage of the general overhead, the revenue from admissions is far greater than that for beverages.

10. The auditor's supervisor, Donald Haher, stated in a letter to Steven Dick, dated January 6, 2010, that he visited the club on January 5, 2010 at 1:00 P.M. and paid $10.00 to the bartender. There was no one at the door and he was approached by a bartender for his admission fee and also paid for two drinks. He took one drink immediately and got a coupon for a second. It is not clear from his testimony whether he knew that admission prior to 5:00 P.M. was $4.00 or that the two drinks cost $6.00. Mr. Haher also did not comment on the availability of additional drinks (beyond the two he paid for) or their cost. Mr. Haher stated that he had patronized Nite Moves 10 to 15 times over the course of 15 or 20 years. He was not sure if his recollections pertained to the audit period herein or one of his earlier visits. Mr. Dick stated that during his involvement with Nite Moves, it has never included drinks with admission.

11. The club has one stage in a lounge area, six rooms designated for couch dances, each about 5 by 6 feet with oversized chairs, a dressing room for employees and lavatories. The lounge area occupied the largest area of the club, approximately 28 by 34 feet, with the stage having dimensions of approximately 9 feet by 11 feet. The stage was surrounded by chairs and tables. Photographs of the lounge showed dinner-theater style table lamps, ceiling mounted spot

lighting and a service bar. It was the custom of the club to always have music playing and a performer on stage regardless of the number of customers.

The stage is illuminated by spotlights and, as stated, there is a dressing room for the dancers, who, at times, wear an array of different costumes. There are tables and seating that are oriented towards the stage to focus audience attention on the performances as well as a small service bar that has no seating. The restrooms and private rooms are removed from the performance area.

12. As of February 2009, the performers became employees of Nite Moves. During the portion of the audit period following that, the performers' compensation was based on a commissioned sales agreement, which provided that all entertainers would earn commissions from private dances, with the safety net of a minimum wage if their commissions did not outperform the current minimum wage. In addition, performers earned tips from lap dances, which were performed for customers in the public lounge area. Depending on the customer traffic, performers go through the lounge area soliciting lap dances for tips.[5] The commissioned sales agreement revealed generally the split of private dance charges with management. The total charge for each dance fee was claimed by Nite Moves in its calculation of total sales.

13. The charges for private dances varied depending on the duration, chosen by the customer, whether the performer was topless or fully nude and any discounts offered by the club. The duration was driven by three minute songs. A customer could choose three, six or twelve minutes (one, two or four songs) for which he would prepay and receive coins. The coins were

[5]During the audit period, the tips received by the performers for lap dances were not shared with the club and are not in issue herein.

then redeemed for the private dances. Upon entry into the private dance rooms, which were approximately 5 feet by 6 feet, the performer would push a button that would time her performance for the customer.

14. The record reflects various prices for the private dances, which yielded various commissions for the performers after a minimum of the equivalent of $25.00 during the day or $30.00 at night was reached. Generally, the price of a topless private dance lasting one song was $20.00, and $30.00 for a nude dance. For four songs, the topless charge was $55.00 and $75.00 for nude.

15. Mr. Dick stated that the ultimate goal at Nite Moves was and is to entice customers to purchase private dances, saying, "[i]deally, . . . I would like every customer to spend as much money as possible." This goal was repeated by one of the dancers, Taylor, who stated that her goal was to create a fantasy for customers during her stage dance so that they would buy a lap dance or private dance, because her best opportunity to make the most money resided in the latter.

16. Petitioner offered several expert reports in support of its petition. One was authored by Judith Lynne Hanna, PhD, a cultural anthropologist retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance critic. Dr. Hanna offered her expert testimony in ***Matter of 677 New Loudon Corp. d/b/a Nite Moves*** (Tax Appeals Tribunal, April 14, 2010, ***confirmed*** 85 AD3d 1341 [2011], ***affd*** 19 NY2d 1058 [2012], ***reargument denied*** 20 NY3d 1024 [2013], ***cert denied*** 134 SCt 422 [2013] (***677 New Loudon Corporation***).

Dr. Hanna has a doctoral degree in anthropology from Columbia University, specializing in nonverbal communication and the arts and society. She has training in many forms of dance, has taught dance and has danced herself for over 50 years. Her training included ballet, modern, jazz, hip-hop, flamenco, belly, swing, folk and ethnic. She has been a dance critic for dance magazines, a judge in dance competitions, received many awards for her research on dance and written 7 books and more than 150 articles on dance.

Dr. Hanna opined that dance is the purposeful, intentionally rhythmical and culturally influenced choreographed sequences of nonverbal body movements. She said that choreographers can engage in a broad range of practices that draw upon the aesthetic principles of, among others, unity, variety, repetition, contrast, transition between movements and balance.

17. Dr. Hanna prepared her report in this matter by reviewing her research findings used in ***677 New Loudon Corporation*** and her research findings in ***Matter of Greystoke Indus. LLC d/b/a Paradise Found*** (Tax Appeals Tribunal, May 19, 2011). For this proceeding, she also viewed the videos of three dancers on the stage at Nite Moves and two private dances, all of which were submitted into evidence. She did not observe any of the 2014 dancers in person at petitioner's premises and did not interview any of the Nite Moves dancers about their backgrounds and training in preparing her 2014 report.

18. Dr. Hanna stated that exotic dance meets the criteria of dance, which she believes to be purposeful, intentionally rhythmical and culturally influenced choreographed sequences of nonverbal body movements; motion with aesthetic value and symbolic potential; uses the human body as the instrument of dance; symbolically represents content or form; and requires an underlying faculty for conceptualization, creativity and memory.

19. Dr. Hanna stated that the purpose of exotic dance is to express eroticism, beauty of the body, health and fantasy. She said the dance uses the aesthetic to elicit fantasy and emotion, where movement through time and space is used to communicate fantasy, often incorporating jazz-like, improvisatory movements in its choreography, i.e., the composition and arrangement of dances.

20. Based on her education, professional expertise, the prior matters referenced above and the videos she was provided herein, Dr. Hanna concluded that the shows at Nite Moves during the audit period were live, dramatic, musical choreographed performances in a theater, presenting shows composed entirely of dance routines.

21. Petitioners presented a second expert report of Katherine Liepe-Levinson, PhD, a highly skilled dancer who trained in ballet. Dr. Liepe-Levenson has choreographed for modern dance companies and a dance studio she founded. Her doctorate was earned in Theater, and she has done research on exotic dance that focused on how clubs function as cultural and theatrical environments. Besides her background in theater (MA and PhD in Theater), Dr. Liepe-Levinson has experience in staging (Colgate University, assistant professor of theater), acting and dance, in addition to her observations of hundreds of exotic dance routines, including those at Nite Moves. She has also taught dance and choreography in a multitude of venues.

Dr. Liepe-Levinson based her opinion on the videos of performances at Nite Moves and written statements of a Nite Moves dancer, Mickey, and Stephen Dick, Jr. These sources were supplemented by her experience in viewing exotic dances at 70 venues in North America and hundreds of videos on exotic dance performances.

22. Dr. Liepe-Levinson concluded that Nite Moves was a theater because it had a marquee with the name of the establishment; charged admission to the performance space; had a designated stage with lighting and props; few distractions for patrons; and a house protocol that encouraged the audience to focus on the performers. She believed that the exotic dances performed at Nite Moves were choreographed arrangements of steps or moves that included repetition and a clear beginning and end point, set to music. Routines utilized costumes and moves associated with the exotic dance genre as well as other genres; improvisation within set structures; and props like chairs and poles, used to focus and limit movement. Dr. Liepe-Levinson noted how the larger dance community commonly incorporates elements of exotic dance into its productions, highlighting the artistic merit of the genre. She does not believe that the sexual "turn on" aspect of the dance renders its choreography moot.

23. Petitioner also offered a video of, and report prepared by Sabrina Madsen, an accomplished gymnast, who has also coached the sport on recreational and competitive levels. Ms. Madsen is a certified personal trainer, a body builder and holds a master of science degree in sports medicine. She practices and teaches pole dancing, and has a successful record in competitions including 2014 Pole Dance America's National Pole Championships and 2012 Miss Georgia Pole professional champion.

24. Ms. Madsen opined that her experience with pole dancing competitions taught her that the sport has components of pole tricks and dance, both of which are part of the judging criteria. Ms. Madsen was shown the various stage videos from Nite Moves and the music video of Alize, a Nite Moves dancer. She described the pole moves and dance steps in great detail for each and

concluded that both gymnastics and pole dancing have components of acrobatics, skills and dance choreography.

25. Petitioners presented the testimony of Lorraine McTague, owner of Lorraine Michaels Dance Center in Albany, New York. Ms. McTague has studied dance at the University at Albany in elective programs in ballet, modern dance, jazz and choreography. She has studied latin, ballroom and swing in New York City and has traveled worldwide to study various international styles.

Ms. McTague has owned the dance center at the same location for 31 years and has taught dance for over 33 years. She teaches ballroom, latin, swing, tango, hip hop, ballet, tap, country and freestyle. In addition, belly, exotic and pole dancing instruction have been included in the dance center's course offerings for over 15 years. The first teacher she hired to teach exotic dance was a dancer at Nite Moves. She said that the demand for pole and exotic dance instruction has risen dramatically, to the point where she now has multiple classes and teaching rooms with poles.

26. At petitioner's request, Ms. McTague visited Nite Moves, observed several performances, spoke with dancers and determined that the performances she witnessed were choreographed dances. Her definition of choreography was stated as the arrangement of the movements of dance. Although she observed different levels of proficiency, based on her background, knowledge and skills, she concluded that all the dancers used choreographed dance pieces. Ms. McTague noted that choreography was fluid in the sense that the dancers at Nite Moves were trying to establish a relationship with the audience. She noted that, although many pieces are created months in advance of a performance, it would be feasible for a piece to be

choreographed in far less time. What she witnessed had an entrance, a middle and an exit, with a distinct arrangement to music that was not "very, very basic."

27. Although the logistics of her observation were not disclosed, Ms. McTague watched one private dance and conversed with the dancer afterwards. She recounted that the dancer conceded that the smaller space, music from the main stage DJ and the rules of conduct applicable in the private rooms hindered her movement, but that the dancer maintained that she choreographed the private dances. She noted that the dance she witnessed was very different from the private dance recalled by the auditor's supervisor. She did not mention any touching, grinding or the use of a cloth to cover the patron. Her description of the private dance focused on the small space and the dancer only being able to "kind of move around the couch and move around the customer," and "it was kind of the same thing [as the stage dance]."

28. Steve Barnes, an award winning entertainment critic from the Albany Times Union newspaper with 25 years of specialization in arts and cultural reporting, prepared an account of a visit he made to Nite Moves on November 9, 2012 in conjunction with a televised story on "The Colbert Report" on Comedy Central Cable Television Network, which was produced to highlight the dispute between Nite Moves and the Division during the judicial proceedings pertaining to the prior audit period.

29. Mr. Barnes observed the stage show and then paid for a lap dance. After his observations, Mr. Barnes concluded that "there's no question that the dancing at Nite Moves is art, which is most broadly defined as anything created with aesthetic intent." He noted that the performances entailed rehearsals, costumes, music, an audience and a plot. He believed that the Nite Moves' performers, like actors and actresses, are paid, in part, for their faces and physiques,

exploit and merchandise their looks and emotions while playing out private acts in public. Mr. Barnes believes that it is equally valid and desirable for art to evoke grief, happiness and laughter as it is for art to arouse lust. While he believes the art performed at Nite Moves is "terrible art," he notes that one does not take away the status of art just because it is of low quality, concluding that "bad art is still art, . . . no matter how uncomfortable it makes us or how the majority views it."

30. Two dancers from Nite Moves, representative of the approximately 30 dancers employed by the club, confirmed that they choreographed their dance routines for the main stage, lap dances and private dances. Depending on the number of performers on duty, each performer could be called upon to perform on the main stage 5 to 15 times a shift. Each of the dancers had a degree of performance related backgrounds, which they supplemented with YouTube videos and peer to peer instruction.

31. One of the dancers, whose stage name was Alize, taught pole dancing at Nite Moves on Sundays. Her students consisted of exotic dancers and women from all walks of life interested in learning the art form for jobs, a workout or other personal reasons. Alize had no formal training for her job but taught herself exotic dance and pole dancing through YouTube videos and watching and learning from other dancers. Over the course of several years, she became a top dancer at Nite Moves. Her mastery of the craft was highlighted in a professionally produced music video, which she choreographed to the featured song, that was entered into evidence. Alize was also featured in video performances at Nite Moves that were entered into evidence. One of the videos was a staged private dance where the patron was played by a club employee and the filming was done by the manager, Mr. Dick.

32. Alize had three choreographed stage sets, which she varied depending on whether the music was slow, fast or rock music. She averred that she had choreographed routines for her table dances and private dances as well, which she never varied. Although the music for the lap and private dances might not have been of her choosing, she believed she was able to accommodate for that because she thought she "[could] dance to any music."

33. A second dancer, whose stage name was Taylor, had a more significant background in jazz and tap dance and athletics throughout her childhood and adolescent years. She also acted in shows that involved choreographed dance such as "The Rocky Horror Picture Show." She taught herself to pole dance by watching and conversing with other dancers, relying on her athleticism and dance experience. As she became a better dancer, Taylor returned the courtesy of teaching other dancers how to master various aspects of pole and exotic dancing.

34. Taylor's stage dance routines, which she choreographed, are performed to her own music that she chooses to appeal to different audiences. For instance, she has a routine for younger audiences and another for older audiences. At times, she asks for requests and will improvise on her set routines to accommodate the requests. Her repertoire consists of approximately 40 songs, with a basic choreographed routine for all of them.

35. Taylor also prepared taped performances of her stage and private dance routines, which were filmed by Mr. Dick and entered into evidence. She uses basic moves in the private dances, the choice of which is driven by customer preferences. She noted the limits placed on her dance movements in private dances by the room dimensions, but maintained the movements were choreographed since she had a basic set of moves she always did and then tailored them to the customer.

36. The supervising auditor assigned to this audit, Mr. Haher, had significant prior personal experience with the club and its various offerings. He stated that he had purchased private dances at Nite Moves and that they entailed entering one of the small, back rooms with the dancer, having her press a timer button, covering him with a protective cloth to prevent makeup or perspiration from soiling his clothes and then grinding and rubbing herself over his body. He recalled that if a performer had a particularly outstanding physical attribute she would highlight it in her "massage" or body rub routine. This account confirmed what the primary auditor had been told by a dancer when he asked what went on during a private dance. Although not related in the same graphic style, Mr. Dick recounted that the body cloth was a common protective cover to prevent soiling of a customer's clothing and injury to the dancer from zippers and belt buckles, intimating that there was a need for the cloth because of the intimate physical contact between the patron and performer.

Both auditors assigned to this matter admitted having almost no knowledge or background in performing arts or, more specifically, choreographed dance performance, instead relying on the outcome of the prior audit and the ***677 New Loudon Corporation*** decision of the Tribunal.

37. Mr. Dick explained that Nite Moves hired performers regardless of whether they had dance backgrounds, talent or skills. He and the other dancers worked with new performers, who also watched YouTube videos and other performers on stage to learn to dance. Mr. Dick stated that Nite Moves also used a buddy system, where an experienced dancer would be paired with a new dancer for training purposes. One of the dancers, Alize, began teaching pole dancing at Nite Moves for the general public on Sundays, although there was no evidence if this was utilized by Nite Moves dancers.

38. The Division sent an undercover criminal investigator to apply for a job at Nite Moves, who explicitly told Mr. Dick that she had no prior experience or dance background, just athleticism. She was told to return for an audition and led to believe she would be hired, but Mr. Dick denied this, saying it was his protocol to allow a tryout prior to hiring, which he follows with all new dancers. Mr. Dick has an extensive background in the exotic dancing business visiting establishments throughout the world to master the skills necessary to manage a top quality showplace. He was involved with dancer training and closely monitored the stage routines.

39. Nite Moves has approximately 40 to 42 employees and over 30 dancers. At busy times, there are sometimes 15 dancers on the premises.

SUMMARY OF THE PARTIES' POSITIONS

40. Petitioner argues that it is exempt from tax on its admission charges and its private dance charges as admissions to a theater featuring choreographed dance performances as provided for in Tax Law § 1105(f)(1) and further defined in Tax Law § 1101(d)(5) and 20 NYCRR 527.10(d)(2).

41. Petitioner contends that it is exempt also from sales tax on its admission charges and private dance charges as a roof garden, cabaret or other similar place (Tax Law § 1105[f][3]) where the sales of refreshments are merely incidental to the performance, as provided for in Tax Law § 1101(d)(12). Petitioner also maintains that Tax Law § 1123, enacted in 2006, which provides for an exemption from tax on the admission charge to a roof garden, cabaret or other similar place to attend a dramatic or musical arts performance, is applicable to Nite Moves and

provides an additional ground for relief should the Tribunal's characterization of Nite Moves as a cabaret be accepted herein.

42. Petitioner argues that it is a violation of both the First Amendment of the United States Constitution and Article 1, Section 8 of the New York State Constitution to deny a taxpayer an exemption from tax based on the content of the dance performance. It argues that the Tax Law sections under which it was taxed were unconstitutional as applied.

43. The Division maintains that this forum is bound by the prior decisions of the Tax Appeals Tribunal, the Appellate Division, Third Department, and the Court of Appeals because the issues have already been considered and decided based on virtually identical facts and applicable law.

44. The Division argues that the Tribunal has already determined that the receipts from door admissions are subject to tax under Tax Law § 1105(d)(i); (f)(1) and (3). The Division believes that the testimony of Ms. McTague and the two dancers added nothing to the facts that distinguished this matter from ***677 New Loudon Corporation*** and did not support the conclusion that the performances were choreographed dances.

45. The Division maintains that petitioner has not established that its sales of beverages were merely incidental to its performances, citing the prior case in which it was determined that beverage sales, which comprised 14.2% of all sales, were not merely incidental and, therefore, nullified the claim for an exclusion under Tax Law § 1105(f)(3) and also under the newly enacted Tax Law § 1123.

CONCLUSIONS OF LAW

A. The Division initially contends that ***677 New Loudon Corporation*** is dispositive of the issues raised in this matter based on the doctrine of stare decisis. However, stare decisis does not control when the facts have changed. The doctrine of stare decisis prevents parties from relitigating settled principles of law or legal issues; it does not apply to factual determinations (***Samuels v. High Braes Refuge, Inc.***, 8 AD3d 1110 [2004]). Contrary to the Division's contentions, petitioners' evidentiary offerings are different from the evidence adduced in the prior matter and warrant a de novo review of the Division's audit conclusions for this follow-up period. In addition, Tax Law § 1123, pertaining to the exemption from tax on the charge of a roof garden, cabaret or similar place, was enacted in 2006, and, as petitioner asserts, must be considered in the determination herein.

B. The Tax Law presumes that all of a taxpayer's sales receipts are subject to tax until the contrary is established and the taxpayer has the burden of proof in that regard (***see*** Tax Law § 1132[c]). Exemptions from tax are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the statute entitles him to the exemption (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]).

C. As in ***677 New Loudon Corporation***, the Division cites three statutory bases for the imposition of additional sales tax on petitioner's charges for admission to the establishment and for private dances. The door admission charges will be considered separately from the private dance charges because, unlike in ***677 New Loudon Corporation***, the evidence indicates a clear demarcation between the two.

Tax Law § 1105 provides that sales tax shall be imposed upon certain receipts and charges, as follows:

> (d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, *including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section)* (emphasis supplied):
>
> (1) in all instances where the sale is for consumption on the premises where sold . . . .
>
> * * *
>
> (f)(1) Any *admission charge* where such admission charge is in excess of ten cents *to or for the use of any place of amusement* in the state, *except charges for* admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances*, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools (emphasis added).
>
> * * *
>
> (3) The amount paid as charges of a roof garden, cabaret or other similar place in the state.

D. In ***677 New Loudon Corporation***, the Tribunal held that the admission and private dance charges were taxable under each of the Tax Law sections referenced above. The Tribunal first rejected the argument that the admission charges collected at that venue were excepted from taxation as admission charges to a place of amusement because they constituted admission charges for dramatic or choreographed musical arts performances (Tax Law § 1105[f][1]). The Tribunal relied on ***Matter of 1605 Book Center v. Tax Appeals Trib.*** (83 NY2d 240 [1994], ***cert denied*** 513 US 811 [1994]) in concluding that petitioner in ***677 New Loudon Corporation*** was

an adult juice club providing adult entertainment, accessible to a customer by the payment of a door admission charge. The charge for private dances was construed as a further admission charge to additional entertainment within the club. The Tribunal deemed the charges "admission charges" as defined in Tax Law § 1101(d)(2), to a "place of amusement," as defined in Tax Law § 1101(d)(10) and 20 NYCRR 527.10(b)(3)(i). The fees for private dances, which generated the most income, were deemed indistinguishable from the admission charges to the public areas of the club, except they permitted the patrons to gain access to the private rooms.

The Tribunal stressed the similarities between the coin-operated peep show and fantasy booths that were the subject of the ***1605 Book Center*** case, ultimately finding that the two venues were the same for tax purposes. In ***1605 Book Center***, the Court of Appeals concluded that a peep show and fantasy booth were places of amusement, for which an admission charge was paid. There was no claim by petitioner there that its performances qualified for the exception in Tax Law § 1105(f)(1). In fact, the performances in the ***1605 Book Center*** case were never really in issue or the subject of the Court's scrutiny. Here, the Tribunal, relying on the evidence before it, concluded that Nite Moves was not entitled to the exemption from the tax imposed by Tax Law § 1105(f)(1) citing what it believed was the difference between Nite Moves and a "theater-in-the-round contemplated by the statute and regulations." It is submitted that the Tribunal did not have the benefit of the additional facts introduced into the instant record, which prove persuasive in finding to the contrary.

Mr. Dick, owner and manager, described in detail the physical layout of the establishment with the added benefit of an architectural rendering of the premises drawn to scale. The drawing depicted the lounge area, the largest of all areas on the premises, approximately 34 by 28 feet,

which had as its focal point a 9 by 11 foot stage, surrounded by chairs and tables. Photographs revealed dinner-theater style table lamps, ceiling mounted stage lighting and a service bar. On the opposite side of the premises were six private dance rooms approximately 5 by 6 feet each, bathrooms, a DJ booth and a dressing room.

Dr. Liepe-Levinson, an expert in theater and dance, who based her opinions on video performances recorded at Nite Moves and written statements of a dancer and Mr. Dick, determined that the venue included all of the specific components necessary for designation as a theater: admission sales at the entrance or directly inside; interior designs that included performance stages and areas equipped with stage lighting; audience seating that is arranged to focus on the performance; a backstage or dressing room for the performers; costumes; and audience members whose attention and behaviors are focused on the performance.

Dr. Liepe-Levinson's opinion is accorded substantial weight given her extensive background in theater (MA and PhD in theater), staging (Colgate University, assistant professor of theater), acting and dance, and her observations of hundreds of exotic dance routines, including those at Nite Moves. Her conclusion that Nite Moves is a designated venue that exclusively features dance shows is rooted in the evidence submitted and testimony offered herein. Petitioner's failure to submit any evidence of why Nite Moves qualified as a theater was cited by the Tribunal in ***677 New Loudon Corporation*** as a reason it could not determine the venue as a theater as contemplated by the statute and regulations.

Mr. Dick credibly testified with regard to the physical layout of Nite Moves by narrating a virtual tour with the assistance of photographs. After reviewing the photographs and weighing the testimony and affidavits, it is determined that Nite Moves was a place of amusement which

clearly meets the regulatory requirement of "a place where a performance is given." (Tax Law § 1105[f][1]; 20 NYCRR 527.10[b][3][i].) There is a stage for the performers illuminated by spotlights; a dressing room for the dancers, who, at times, wear an array of different costumes; tables and seating that are oriented towards the stage to focus audience attention on the performances; a small service bar that has no seating and does not encourage it; and restrooms and private rooms that are removed from the performance area.

E. Having established that Nite Moves is a place where a performance is given, receipts from admission remain taxable unless the admission charge is to dramatic or musical arts performances (Tax Law § 1105[f][1]). The term dramatic or musical arts admission charge is defined in Tax Law § 1101(d)(5) for purposes of Tax Law § 1105 to mean any admission paid for admittance to "a theater, opera house, concert hall or other hall or place of assembly for a live, dramatic, choreographed or musical performance." (Tax Law § 1101[d][5].) The same provision is found in the regulations at 20 NYCRR 527.10(d)(2), where an example of an exempt performance is illustrated by a theater in the round, which exhibits shows consisting of dance routines, which are exempt because "choreography is included in the term musical arts." (20 NYCRR 527.10[d][2][example 4].)

In ***677 New Loudon Corporation***, the Tribunal found that petitioner had not demonstrated an entitlement to the exception set forth in 1105(f)(1) because it did not prove that the performances constituted dramatic or musical arts performances, i.e., "live dramatic, choreographic or musical performance" (Tax Law § 1101[d][5]). The Tribunal's conclusion was largely based on its finding that the lone expert proffered by petitioner, Dr. Hanna, was not credible given her critique of private dances that she had not observed yet found choreographed.

It also disagreed with her interpretation of what constituted a choreographed performance, calling it "stunningly sweeping," which only required one to move in a pleasing way to music using various elements of dance. (***See also Matter of Greystoke Indus***.) The Tribunal instead deferred to a dictionary definition of choreography that said it was the art of composing dances and planning and arranging the movement, steps and patterns of dancers (citing Random House Webster's College Dictionary 232 [2nd ed 1997]).

Faced with its failure of proof in ***677 New Loudon Corporation***, petitioner has submitted additional testimonial and documentary evidence that it believes establishes that its performances meet the requirements of the exception set forth in Tax Law § 1105(f)(1). The most compelling of petitioner's new evidence comes from Lorraine McTague, owner of Lorraine Michaels Dance Center in Albany, New York. Ms. McTague has taught all types of dance for over 30 years, and her dance center has taught exotic and pole dancing for the last 15 years. Ms. McTague visited Nite Moves and observed several stage performances and spoke with several dancers. Based on her background and her observations, she concluded the performances were choreographed dances. She also viewed the videos of dancers at Nite Moves that have been entered into evidence and concluded that those evidenced choreographed dances as well. She noted the expert use of the pole and the varied themes employed by the performers, including a country theme by one dancer. She also noted the variances in styles with the chosen music.

Ms. McTague opined that choreography does not have to be intricate, just demonstrate an arrangement of movement. She noted that in ballroom dance competitions, dancers are told only a short time in advance what type of dance they must perform and then have to arrange it quickly based on movements they know. She noted that ballroom competition dancing is unquestionably

choreographed dance and indistinguishable from the performances she observed at Nite Moves. This knowledgeable expert, who personally witnessed the stage dances, has outstanding credibility and helped bridge the gap between the theoretical and practical aspects of the dance performances.

Once again, Dr. Hanna's opinion was presented in support of an interpretation of the performances at Nite Moves being choreographed. This time, Dr. Hanna's conclusions, contained in an affidavit, were based on the videos submitted in evidence of both the stage and private dances. She concluded that the performances she observed were choreographed based on her expansive knowledge and experience and the definition of choreography she proffered herein and in the earlier case. The credibility issue with regard to Dr. Hanna in ***677 New Loudon Corporation*** does not taint her opinion herein since she did not personally observe any dances. Her opinion was based strictly on the videos produced and submitted into evidence by petitioner. Her definition of choreography is weighed in the context of all the expert opinions before this forum in the instant matter.

Three additional persons with dance and arts experience have also rendered opinions on the definition of choreography and artistic performance that resonate with Ms. McTague's and Dr. Hanna's opinions. Dr. Liepe-Levinson, a professional choreographer, Broadway dancer and theater expert, averred that the required long sets utilized various choreographic devices such as the timed removal of costumes, the repetition of basic patterns and arrangements, the timing of sequences to their choices in music and the incorporation of traditional and documented movements of exotic dance. These met the requirements of her definition of choreography, i.e.,

the purposeful arrangement or structure of steps and movements, including repetitions and clear beginning and end points, usually set to music or some kind of rhythm.

Ms. Madsen, an expert in pole dance, opined that her experience with pole dancing competitions taught her that the sport has components of pole tricks and dance, both of which are part of the judging criteria. Ms. Madsen was shown the stage videos and the music video made by Alize. She described the pole moves and dance steps in great detail for each and concluded that the pole dancing routines she watched in the Nite Moves videos have components of acrobatics, skills and dance choreography.

Mr. Barnes, entertainment critic for the Albany Times Union with 25 years of specialization in arts and cultural reporting, observed the stage show and then paid for a table or lap dance. After his observations, Mr. Barnes concluded that "there's no question that the dancing at Nite Moves is art, which is most broadly defined as anything created with aesthetic intent." He noted that the performances entailed rehearsals, costumes, music, an audience and a plot. The Nite Moves performers, like actors and actresses, are paid, in part, for their faces and physiques. They both exploit and merchandise their looks and emotions while playing out private acts in public. Mr. Barnes thought that it is as valid and desirable for art to evoke grief, happiness and laughter as it is for art to arouse lust. While he believes the art performed at Nite Moves is "terrible art," he notes that one does not take away the status of art just because it is of low quality, concluding that "bad art is still art, . . . no matter how uncomfortable it makes us or how the majority views it."

Perhaps the most persuasive evidence that the stage routines were choreographed came from the very credible and candid testimony of Alize and Taylor, two of the dancers at Nite

Moves during the audit period, who, without pretense, provided a more visceral description of the business and their art, in contrast with the theoretical opinions of the more erudite experts. Both of these women had formal dance backgrounds, not a prerequisite to working at Nite Moves or relevant to whether the dances performed were choreographed, as that term is defined by the experts.

Nite Moves hired performers regardless of whether they had dance backgrounds, talent or skills. If they passed an audition, new performers in need of further training would receive the help of more experienced dancers, watch YouTube videos and observe other performers on stage. Mr. Dick, who has an extensive background in the exotic dancing business, also helped in training and noted that during off peak hours performers often practice at Nite Moves to master their dance routines. The club also hosted pole dance lessons on Sundays, open to its dancers as well as the general public.

In an attempt to show that the Nite Moves performers did not perform choreographed dance, the Division's sent two criminal investigators to apply for jobs, all the while stating that they had no dance experience. Although invited to audition and misinterpreting a permanent job offer, it was apparent that they received the same treatment as any other prospective job applicants. Mr. Dick directly and credibly responded to the investigators' testimony, saying it was just his protocol to allow a tryout prior to hiring, which he follows with all new dancers.

The dancers made it very clear that performance on the main stage was lengthy and required a careful pairing of movements with their chosen music. Taylor had a repertoire of about 40 songs with planned movements that she used for her stage routines. She invested heavily in her costumes and shoes and they were integrated into her dances. She described her movements

in detail at the hearing while her videos were played and told of how she utilized repetition, pole movements and the use of a fictional character of her own creation to interact with the audience. When asked if she could repeat a performance and include the same moves, she credibly answered in the affirmative and confirmed that the movements were planned.

Alize, another serious student of her craft, had been highlighted in a professionally produced music video, also shown at hearing, which she choreographed at the request of the production company. Alize was also featured in video performances at Nite Moves that were entered into evidence and were viewed by the experts herein. Alize credibly testified that she had three choreographed stage sets which she chose depending on whether the music was slow, fast or rock music. Her videos were also played at hearing and she described her movements in detail. She averred that her movements and choreographed stage routines never changed.

The Division denies that any of these expert opinions constitutes new evidence, yet its auditors, albeit one with great personal experience with Nite Moves and similar establishments, had virtually no experience in the arts and relied on the Tribunal's decision in ***677 New Loudon Corporation*** in reaching their conclusions. The Division reasons that since Tax Law § 1105(f)(1) and the regulation promulgated thereunder have not changed since the first 677 New Loudon case was decided by the Tribunal on April 14, 2010, or since the subsequent judicial decisions, the legislative silence indicates acquiescence in its interpretation of the law. In other words, the Legislature's silence established a legislative intent where no written evidence thereof exists. It is more likely that the Tribunal's decision was given the respect due to it as the final arbiter of the Tax Law within the Executive Branch. Given the evidence before the Tribunal in ***677 New Loudon Corporation***, that was entirely warranted. The language of the statute is clear. There is

no question of statutory interpretation here, only whether petitioner has borne its burden of proof with respect to the exemption provided for in Tax Law § 1105(f)(1).

The Division contends that ***Matter of Greystoke Indus. LLC*** lends further support to its position that this matter merely presents the same issues for resolution. However, in the ***Greystoke*** matter, which presented much of the same evidence as that produced in ***677 New Loudon Corporation***, including the lone expert report of Dr. Hanna, the Tribunal dismissed that petitioner's argument for relief under Tax Law § 1105(f)(1) based upon a rejection of Dr. Hanna's definition of choreography and what it considered testimony that had been carefully prepared to qualify Greystoke for the statutory exemption.

Here, petitioner has offered credible testimony from several qualified experts with diverse backgrounds that support a definition of choreography that fits both the Tribunal's dictionary definition, cited in ***677 New Loudon Corporation*** and ***Greystoke***, and those suggested by Dr. Hanna, Dr. Liepe-Levinson and Lorraine McTague, and further supported by Ms. Madsen and Steve Barnes. The credible and candid testimony of Taylor and Alize indicated that their stage routines fit within those definitions and it is determined that they were choreographed, and that petitioner is entitled to the exception from sales tax provided for in Tax Law § 1105(f)(1) for its admission charges to the venue.

F. The Division's argument that the admission charge is also taxable pursuant to Tax Law § 1105(f)(3) as the charge of a roof garden, cabaret or other similar place is also flawed given the new evidence adduced herein. First, Tax Law § 1101(d)(12) excludes from places that furnish public performances for profit places "where merely live dramatic or musical arts performances

are offered in conjunction with the serving or selling of . . . refreshment . . . , so long as such serving or selling of . . . refreshment . . . is merely incidental to such performance."

It has been established that Nite Moves offers live dramatic or musical performances. The question here is whether the beverage sales were incidental to the shows.

The Division relies on the Tribunal's decision in ***677 New Loudon Corporation*** to establish that the sale and service of nonalcoholic drinks to patrons was more than merely incidental. In ***677 New Loudon Corporation***, the Tribunal cited to two of the Division's Advisory Opinions, which it believed accurately set forth the genesis of the "merely incidental" language and is also instructional in determining if the sale of food and drink was so. The following passage illustrates this:

> "The definition of 'roof garden, cabaret or other similar place' found in the sales and use tax regulation is derived from the definition contained in the former federal excise tax on cabaret charges [citation omitted]. That definition included establishments where food or drink was served to patrons while they were being provided with entertainment. It did not matter, for purposes of the federal definition, that the purchase of food or drink was not required or that customers were primarily interested in the entertainment offered, rather than the purchase of food and drink [citation omitted]. However, section 4232 of the Internal Revenue Code was amended to exclude from the federal excise tax those establishments where the sale of food and refreshments was 'merely incidental' to the entertainment offered. In construing this amendment, the federal courts have stated that the principal factor to be considered in determining whether the sale of food and refreshments is 'merely incidental' is the ratio of revenue derived from the sale of food and refreshments to gross revenue. ***Roberto v. United States***, 357 F. Supp 862, affd 518 F2d 1109; ***Dance Town U.S.A., Inc. v. United States***, 319 F. Supp 634. In this regard, several courts have held that comparable percentages of revenue from the sale of food and beverages are more than 'merely incidental'. [***Dance Town***, 45.1%; ***Billen v. United States***, 273 F. 2d 667, 50%; ***Shutter v. United States***, 406 F. 2d 906, 47%] (TSB-A-85(42)S [Tralfamador Café, Inc.]).

It is noted that the language, repeated in TSB-A-96(9)S (Empire Management and Productions, Inc.), stressed the importance of the ratio between food and beverage revenue as a percentage of total revenue. In both Advisory Opinions, the ratio was significant: in Tralfamadore, over 45%; in Empire, 78%. However, even though beverage sales accounted for only about 14% of gross sales in ***677 New Loudon Corporation***, the Tribunal held that, because beverage sales were a "profit center," with sales equal to admissions, it was neither insignificant nor "merely incidental."

In the instant matter the beverage sales were about 16.29% of total gross sales and about the same as admissions. However, since the Tribunal, and now the Division, deem beverage sales a significant "profit center" and therefore not "merely incidental," petitioner for the first time has had the ability to offer evidence on the issue.

Through credible testimony, Mr. Dick cogently explained that the drinks served were for the comfort and convenience of patrons, who preferred to have beverages on hand. He recounted how Nite Moves has not changed its drink prices since 1997, charging $3.00 for water, juice and other soft drinks. He mentioned that he charged $5.00 for an energy drink that bore a higher cost to him. However, the expense of providing this comfort for patrons comes at a price. He had to have bartenders, compressors, coolers, ice makers and incur the cost of the products themselves. The drinks provided a very small profit for Nite Moves. In contrast, admissions has no associated costs and the net revenue is far more profitable. If each profit center shares an equal percentage of overhead, then the profit from admissions is far greater than that for beverages. The new testimonial evidence proves that, in fact, beverages are neither a substantive profit center nor a significant percentage of total profit or net revenue, and are merely incidental to the musical arts

performance. (Tax Law §§ 1105[f][3]; 1101[d][12].) Thus, the admission charges are not subject to sales tax under these Tax Law sections

Since 2006, the admission charges of roof gardens or cabarets to attend a dramatic or musical arts performance were exempt if the roof garden or cabaret charged separately for admissions, separately charges for food and beverages, and makes available to the Commissioner of Taxation menus and statements of its charges. From the evidence adduced and the conclusion reached above, petitioner has demonstrated an entitlement to the exemption in Tax Law § 1123.

G. The third argument by the Division supporting the imposition of sales tax on admissions was based on Tax Law § 1105(d)(i), which provides that the receipts from every sale of "any other drink of any nature" when sold in establishments in this state, including in the amount of such receipts any "cover, minimum, entertainment or other charge made to patrons . . . ." This was clearly not the case here.

Once again, the credible testimony of Mr. Dick, who provided much of the operational details of the business based on his 17-year affiliation with the business and his experience in a myriad of managerial roles, was persuasive. He explained in no uncertain terms that Nite Moves had not included refreshments in the admission charge since he began working at the establishment in 1997. He said he was aware of this practice at other local establishments, but not at Nite Moves. He plainly stated that patrons paid admissions at the door and were then solicited for drinks by bartenders after being seated. He credibly testified that patrons were encouraged to purchase two drinks at a time, receiving one drink immediately and a coupon for another. However, there was no requirement to purchase any beverages during the audit period.

Mr. Haher's experience, as related in his testimony, was not conclusive. He did not pay a door attendant, having visited at 1:00 P.M. Instead, he took a seat and was approached by a bartender. Mr. Haher only testified that he paid $10.00, which he thought covered his admission and drinks as one charge. He did admit that he received a coupon for a second drink.

However, equally plausible and more credibly attested to by Mr. Dick, was that Mr. Haher paid the $4.00 cover charge and then purchased two drinks, receiving one immediately and a coupon for the other, or, $10.00 in total purchases. It is consistent with the business operations described by Mr. Dick, including the variance in admission charges at different times of day and beverage service protocol. Based on Mr. Dick's testimony, it is determined that the admission charge at Nite Moves does not include any other charge for drinks and therefore the admissions are not subject to sales tax pursuant to Tax Law § 1105(d)(i).

H. The front door admission charges to the stage shows have been determined to be nontaxable based on credible testimony, documentation and affidavits that established facts not before the Tribunal in ***677 New Loudon Corporation***. It is concluded that the door admissions are separate and distinct from any other charges for beverages or other services offered in the club. Door admissions are the only charges held not subject to sales tax under Tax Law §§ 1105(f)(1), (3); (d)(i) and 1123. The facts clearly establish that the admission fee entitled a patron to enter the club and view the stage shows, nothing more. Further charges were strictly optional.

The admission charges for the private dances are taxable since the expert opinions, dancer narratives and management descriptions fail to establish that they qualify for exemption from tax. Tax Law § 1105(f)(1) provides that admission charges to any place of amusement is subject to sales tax, except those charges for admission to dramatic or musical arts performances, which Tax

Law § 1101(d)(5) tells us is an admission to a theater or other place of assembly for a live choreographic musical performance. It is concluded that Nite Moves did not meet its burden of proof with respect to private dances.

The experts, with the exception of Ms. McTague, only viewed the videos of private dances which had been staged by petitioner's employees, utilizing its own dancers, employees and Mr. Dick to produce and film them. The videos did not reveal use of the protective "cloth" described by Mr. Haher and Mr. Dick, even though both men believed the cloth played a significant part in the private dance from both the customer's and dancer's perspective: the customer seeking to keep makeup, perspiration and perfume off his clothing and the dancer looking for protection from zippers and buckles.

This was not a trivial omission. The protective cloth is used because the private dance features and emphasizes physical contact. Patrons purchase admission to the private dances at a considerable expense, beyond the door admission, for an experience that transcends the stage show and lap dance. Taylor admitted that the stage show and lap dance were her way of enticing patrons to accompany her to the private rooms where she had the best opportunity to make the most money. As the record and the profit and loss statements bear out, the private dances provide the most lucrative revenue source by far at Nite Moves and are strongly encouraged and promoted by management, according to Mr. Dick.

The videos of the private dances which were made available to Drs. Hanna and Liepe-Levinson and Ms. Madsen were also played at hearing. The videos were staged and the movements appeared to be stilted and carefully directed by Mr. Dick to demonstrate

choreographed routines. They did not display the protective cloth or involve substantial touching, grinding or rubbing as described by Mr. Haher and the dancers.

While his understanding of the admission and drink charges may have been a misinterpretation of Nite Moves' policy, Mr. Haher was a credible witness with respect to private dances, having had several experiences with them on numerous visits.

Mr. Haher credibly testified that in his 10 or 15 visits to Nite Moves over the course of years he purchased one or two private dances a night. He said the private dances were very similar, even among the different performers. He experienced back rubs from some performers and women massaging him with various body parts. He admitted he was not an expert in choreography but did not think what he experienced in the private dance was choreographed. In sum, he actually experienced what the auditor had been told by a dancer: that the private dance was essentially a full body rub.

Of Ms. McTague's 46 pages of testimony in the transcript, only one page addressed the private dance she observed. She said that what she witnessed was "very different" from the description given by Mr. Haher. However, her description of the private dance was rather curt, saying only "it was kind of the same thing [as the stage dance]." She noted that "it was a bigger couch in the room" and the woman "would kind of move around the couch and move around the customer." It appears from her testimony that she did not have a good view of the private dance. Her weak personal observations were not bolstered by the comments she received from the dancer she observed, who said she choreographed the private dances but was hindered by the rules of conduct imposed by management and the DJ's choice of music, as well as the demands of the patron. Clearly, Ms. McTague's observations were severely limited and, without the dancer's

comments to her, would not demonstrate that what she had witnessed was choreographed dance. In addition, Ms. McTague did not view the private dances on video, suggesting why her description of the private dance was so brief.

For an activity that produced the most revenue for Nite Moves, it was revealing that petitioner's counsel did not explore Ms. McTague's private dance observations further. This is especially noteworthy since she was the only expert to view the dance in person.

From the evidence in the record, it is concluded that the private dances were not choreographed dance. There was no pole to perform on; the music was not chosen by the performers (in contrast to their stage dances) thereby prohibiting any forethought of the choreography; the private room space was not a stage, was less than a third of the stage area and contained an oversized, custom made chair; the performers were forbidden from performing certain, unspecified acts; and the overriding preoccupation of both management and dancers was luring patrons to small rooms for the ultimate in physical contact with the performers and having them remain there as long as possible to maximize revenue, not the performance of a choreographed dance or artistic performance. Further, the components necessary for a theater, so carefully described by Dr. Liepe-Levinson, are absent from the private dance rooms.

The charges for admission to the private dances were properly held taxable pursuant to Tax Law § 1105(f)(1) as an admission to a place of amusement and do not qualify for the exception thereto.

I. It is well settled that the Division of Tax Appeals lacks jurisdiction to consider claims alleging that a statute is unconstitutional on its face (***see Matter of A&A Service Sta., Inc.***, Tax Appeals Tribunal, October 15, 2009; ***Matter of RAF General Partnership***, Tax Appeals Tribunal,

November 9, 1995) and at the administrative level, statutes are presumed to be constitutional (***see Matter of Lunding v. Tax Appeals Trib.***, 218 AD2d 268 [1996], ***revd*** 89 NY2d 283, ***cert granted*** 520 US 1227 [1997], ***revd*** 522 US 287 [1998]).

The Division of Tax Appeals may, however, determine whether tax statutes are constitutional as applied (***Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003, citing ***Matter of David Hazan, Inc.***, Tax Appeals Tribunal, April 21, 1988, ***confirmed*** 152 AD2d 765 [1989], ***affd*** 75 NY2d 989 [1990]). The taxpayers bear the burden of proving that a statute, as applied, is unconstitutional (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992).

In the present matter, petitioners have offered no evidence that they were treated any differently than other taxpayers, similarly situated, in the application of Tax Law § 1105(f)(1); (3) and (d)(i) and they have failed to meet their burden of proof.

J. The petition of 677 New Loudon Corporation d/b/a Nite Moves is granted to the extent set forth herein, but in all other respects is denied, and the Notice of Determination, dated August 30, 2010, as modified by the BCMS order, dated February 11, 2011, and this determination, is sustained.

The petition of Stephen Dick, Jr. is granted to the extent set forth herein, but in all other respects is denied, and the Notice of Determination, dated August 12, 2010, as modified by the BCMS order, dated February 11, 2011, and this determination, is sustained.

The petition of Stuart Cadwell is granted to the extent set forth herein, but in all other respects is denied, and the Notice of Determination, dated August 12, 2010, as modified by the BCMS order, dated February 11, 2011, and this determination, is sustained.

Dated: Albany, New York
May 21, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE