

DIVISION OF TAX APPEALS

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

Petitioner, Ronald J. Doherty, Jr., d/b/a Eerie Productions, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2010 through February 28, 2013.

A hearing was held before Kevin R. Law, Administrative Law Judge, in Albany, New York, on August 25, 2016 at 10:30 a.m., with all briefs to be submitted by April 20, 2017, which date commenced the six-month period for issuance of this determination. By letter dated October 2, 2017, this six-month period was extended for an additional three months (Tax Law § 2010 [3]). Petitioners appeared by Hodgson Russ, LLP (Andrew W. Wright, Esq., and Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUES

- I. Whether petitioner was required to collect and remit sales tax on amounts paid by his patrons to enter his haunted attractions.
- II. Whether penalties should be abated.

FINDINGS OF FACT

1. Petitioner Ronald Doherty, Jr., d/ b/a Eerie Productions, operates a haunted attraction called “Frightworld” in Buffalo, New York. Petitioner’s business is billed as “America's Screampark,” and it is geared towards children as well as adults. Customers come in for the purpose of being entertained.

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

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

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

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

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

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

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

9. The common area contained about 25,000 square feet of space, roughly equal in size to

¹ Petitioner also referenced the attractions as “haunted houses.”

the combined square footage of all five haunted attractions.

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

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

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

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

14. During the 2010-2012 seasons, patrons paid \$23.00 for the ability to access the five haunted attractions within Frightworld.

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

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

erected and tested.

17. The attractions were free standing. The interior walls of each attraction, which contained the themed sets, were not attached to the floor, ceiling, or four exterior walls of the building. Patrons entered on foot and traversed each attraction on foot. No mechanical devices conveyed patrons through the attractions.

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

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

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

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

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

23. Petitioner trained its actors to "scare forward" to move patrons through the attractions.

24. The manner in which the actors "scared forward" was dependent upon the theme of the attraction, but could include: jumping out from behind walls, slamming doors, using curtains or other scare spots; using thematically-appropriate props (e.g., a dentist's drill, a chainsaw, an axe, a CO2 gun, sparks, or noisemakers); using distractions (e.g., an animation like a mummy or spider distracted a patron while an actor simultaneously scared them forward); or using the element of surprise (e.g., where an actor placed a feather duster through a hole in the wall to hit

patrons around the ankle while they waded through an area that looked like a swamp).

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

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

27. In the Wicked Woods attraction, which operated during each of the 2010-2012 seasons, patrons encountered the following major special effects: a 12-foot waterfall; a tilted room designed to look like a slanted shack at the end of which was an actor with a CO2 gun who shot patrons forward; a gravity tilt bridge inside a cave; and a 26-foot downward sloping ramp with an airbag effect designed to look like the patron was wading through water.

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

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

30. These methods of moving patrons through the five haunted attractions ensured that

patrons were conveyed through the attractions in a timely manner and did not get injured.

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

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

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

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

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

36. On November 30, 2012, a Stipulation for Discontinuance of Proceeding was filed with the Division of Tax Appeals reflecting a settlement in the amount of \$8,360.00 plus interest thereon. The settled upon amount reflects the amount of tax due expense purchases, as assessed in the subject notice.

37. The Stipulation of Discontinuance contained no provision indicating that the Division considered petitioner's admission charges were not subject tax, nor did it indicate that petitioner

was to collect tax on a prospective basis.

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

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

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

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

42. On August 8, 2013, during the course of the audit for the current period, petitioner requested another advisory opinion from the Division concerning the taxability of the admission charges. It was petitioner's contention that the facts submitted in the first advisory opinion were inaccurate.² Petitioner was advised by his current representatives to continue not collecting sales

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

tax on the admission charges to the haunted attractions.

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

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

44. Petitioner submitted 41 Proposed Findings of Fact. Petitioner's proposed finding of fact 1 through 14, 16 through 20, 24, 27, 28, 31, 33 through 37, and 39 through 41 are accepted and substantially included in the findings of fact set forth herein. Petitioner's proposed finding of fact 15, 21, 22, 23, 25, 26, 29, 30, 32 and 38 are rejected as not supported by the record.

45. The Division submitted 53 proposed findings of fact. The Division's proposed findings of fact 1 through 9, 18 through 22, and 25 through 32 are accepted and are substantially included in the findings of fact set forth herein. The Division's proposed findings of fact 10 through 17 and 23 are rejected as not supported by the record. The Division's proposed findings of fact 24 and 33 through 53 are rejected as conclusory, or as containing legal argument, or as not relevant to the present proceeding.

SUMMARY OF THE PARTIES' POSITIONS

46. Petitioner alleges that no sales tax is due on the amounts its patrons paid to enter the haunted attraction located within Frightworld. Petitioner contends that the attractions are amusement devices rather than places of amusement. Petitioner also alleges that even if the tax

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

is sustained, reasonable cause exists to justify the abatement of penalties.⁴

47. The Division, in response, contends that the haunted attractions are themselves places of amusement for which tax is due on the admission charges collected by petitioner, and that penalties are warranted in this case.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (f) (1) imposes sales tax on admission charges in excess of 10 cents to or for the use of a place of amusement in New York. Tax Law § 1101 (d) (2) defines an admission charge as “the amount paid for admission, season ticket or subscription to any place of amusement, including any service charge or any charge for entertainment or amusement or for the use of the facilities therefor.” The term “place of amusement” is defined by Tax Law § 1101 (d) (10) as “[a]ny place where any facilities for entertainment, amusement, or sports are provided.”

B. Petitioner, relying upon *Fairland Amusements v State Tax Commn.*, (110 AD2d 952 [3rd Dept 1985] [Mikoll, J., dissenting] ***reversed in accordance with dissenting opinion below*** 66 NY2d 932 [1985]), contends that the place of amusement is Frightworld itself, for which no admission is collected. Petitioner maintains that his patrons pay for the use of amusement devices, the charges for which are not taxable. In essence, the question becomes: whether the haunted attractions within Frightworld are amusement devices, for which the charge paid is not subject to sales tax in accordance with *Fairland*; or whether the haunted attractions are also places of amusement contained within the larger place of amusement. Based upon the record, it

⁴ Petitioner initially challenged the audit methodology employed by the Division, and also asserted that the Division failed to give adequate notice that the admission charges were subject to tax. Both of these challenges have since been abandoned.

is determined that the haunted attractions themselves are places of amusement, and the fees paid for entrance therein are subject to sales tax under Tax Law § 1101 (d) (2).

B. In this case, the haunted attractions are places of amusement. They have an entrance and an exit, have walls, and are akin to a room or a structure, albeit contained within a larger structure. In order for a patron to gain access to Frightworld's attractions, the patron was required to pay a fee. The tax law is clear that ". . . an admission charge includes any additional cost for entertainment or amusement that must be paid to gain access to the place of amusement. . ." (*Matter of HDV Manhattan v Tax Appeals Tribunal*, __AD3d__ [3d Department, December 7, 2017]); *Matter of 1605 Book Center v Tax Appeals Tribunal*, 83 NY2d 240 (1994).

Petitioner's reliance on *Fairland*, is misplaced as petitioner's haunted attractions are not rides or coin operated games; they are places of amusement.

C. Petitioner's argument that the haunted attractions are amusement devices under the Labor Law and therefore by default are not places of amusement, is rejected. First, the classification under the Labor Law has no relevance to whether the attractions are a place of amusement under the Tax Law (*see St. Joe Resources Co. v New York State Tax Commn*, 72 NY2d 943 [1988]). In *Matter of Bathrick Enterprises v Murphy* (50 Misc 2d 14 [Sup Ct, Albany County 1966], *rev'd* 27 AD2d 215 [3d Dept 1967], *aff'd* 23 NY2d 664 [1968]), the court held that amusement devices were not places of amusement under the Tax Law. The court, however, was not speaking of structures, such as petitioner's haunted attractions, but was addressing coin-operated amusement devices, such as automatic phonographs and bowling games. Petitioner's haunted attractions are more analogous to the private rooms at issue in *HDV Manhattan*, and the private booths at issue in *1605 Book Center*, notwithstanding that the type

of amusement contained therein is quite different.

D. Having determined that the amounts paid by petitioner's patrons to gain access to the haunted attractions within Frightworld are taxable admission charges, it must be determined whether petitioner has established reasonable cause for abatement of penalties. Penalties were imposed against petitioner pursuant to Tax Law § 1145 (a) (1) (i) and (vi). Tax Law § 1145 (a) (1) (i) states that any person failing to file a return or pay over any sales or use tax "shall" be subject to a penalty. Tax Law § 1145 (a) (1) (vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount "shall be subject to a penalty equal to ten percent of the amount of such omission." Both such penalties must be sustained unless the failure was due to reasonable cause and not willful neglect (*see* Tax Law § 1145 [a] [1] [iii]).

E. Petitioner argues that he is not liable for penalties based upon his interpretation of the law and reasonable reliance upon counsel. "Advancement of a reasonable legal theory in good faith or reliance upon professional advice, in the absence of inquiry to ascertain the position of the Department of Taxation and Finance, does not constitute reasonable cause . ." (*Matter of CBS Corp. v Tax Appeals Tribunal*, 56 AD3d 908 [3d Dept 2011] *lv denied* 12 NY3d 703 [2009]). In this case, petitioner did seek the position of the Division by submitting a request for an advisory opinion during the previous audit. However, petitioner proceeded to ignore the advice set forth therein, alleging that the advisory opinion was incorrect and that his then-representative did not set forth all the relevant facts. Petitioner did so at his own peril. Petitioner's claims that the facts set forth in the first advisory opinion were inaccurate or incomplete is unavailing. The prudent thing to do would have been to collect the tax while

seeking clarification from the Division. Petitioner chose not to collect tax upon advice of counsel. Petitioner's deliberate choice to not collect tax does not establish reasonable cause. Therefore, penalties are sustained.

F. Accordingly, the petition of Ronald J. Doherty, Jr., d/b/a Eerie Productions, is denied and the notice of determination dated January 27, 2015 is sustained.

DATED: Albany, New York
January 18, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE