STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, The Executive Club LLC, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2010 through May 31, 2013. Petitioner, Robert Gans, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2010 through May 31, 2013.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on June 13, 2017, at 10:30 A.M., with all briefs to be submitted by December 1, 2017, which date began the six-month period for the issuance of this determination.

Petitioners appeared by Ackerman, LLP (Alvan L. Bobrow, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether petitioners should be precluded from litigating issues decided by the Tribunal in a prior matter.

II. Whether the Consents to Extension of Time executed by petitioner The Executive Club LLC were valid.

III. Whether the Division of Taxation correctly determined that the receipts from the sale of scrip were subject to sales and use tax.

IV. Whether the Division of Taxation correctly determined that the surcharge added to the price of the scrip was subject to tax.

FINDINGS OF FACT

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

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

3. To allow entry to the Club, petitioners collected an admission charge of $20.00 to $30.00 dollars, depending on the day of the week. The admission charge may be paid with a

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

credit card or cash. Upon remittance of the admission charge, guests may view live performances on stage in the main area of the Club and may go anywhere within the Club except for private rooms. Petitioners collected and remitted sales tax on these charges and do not dispute that such charges are subject to tax.

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

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

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

7. Customers can pay the Club's entertainers for personal dances or to spend time with them, either in the main area of the Club or in a private room. Payment for these interactions

between the customer and the entertainer can be made in cash or scrip, also known as "executive dollars," "executive currency," or "Roberts currency."

8. The entertainer's fee is generally $300.00 for a half hour and $600.00 for an hour. According to Mark Yackow, the Club's chief operating officer, the Club allows the entertainers to negotiate the fee, "but over the fourteen years we've been here, it's stated that . . . It's accepted that the entertainer would get 600 for the hour, and 300 for the half hour." The customer may also pay the entertainer a tip in addition to the required fee. Tips paid by customers at the Club are voluntary.

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

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

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

12. Petitioner Executive Club records the 13% redemption fee charged on the redemption of executive dollars as income on its books. Beyond the 13% redemption fee, petitioner Executive Club does not report the revenue received from executive dollars as income on its books. According to Howard Rosenbluth, Executive Club's chief financial officer, the remainder of the revenue received is reported by the entertainers or whoever received the executive dollars.

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

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

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

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

17. During the audit period, executive dollars could be used to pay the entertainer fee and to tip bartenders, cocktail waitresses, security people and hosts. The entertainers can use the executive dollars to pay the house fee (***see*** Finding of Fact 6), buy a meal, and tip the bartender and other Club employees. Mr. Rosenbluth and Mr. Yackow testified that executive dollars

could not be used to pay for a private room, but can be used to pay the entertainer for private time in a room.[2]

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

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

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

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

22. Petitioners introduced a sample of the Club's financial records, including a System Financial Report for the period January 1, 2013 through July 1, 2013; schedules of private room fees and sale of executive currency control sheets dated January 4, 2013, February 26, 2013, April 17, 2013 and May 1, 2013; ten credit card receipts, seven with the heading "Roberts Currency," two of which were dated February 27, 2013 and five of which were dated April 18,

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

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

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

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

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

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

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

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

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

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

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

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

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

28. On November 27, 2012, petitioners' attorney, Alvan Bobrow, contacted the Division's auditor and informed her that he was petitioners' representative for the audit and would provide a power of attorney form. On multiple dates from November 30, 2012 through January 29, 2013, the auditor attempted to contact Mr. Bobrow to follow-up on the November 27 conversation and left messages requesting that he submit the power of attorney form. On February 6, 2013, Mr. Bobrow sent the auditor an incomplete power of attorney form. The auditor again left messages for Mr. Bobrow on multiple dates from February 6, 2013 through August 21, 2013, requesting that he provide a completed power of attorney form.

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

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

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

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

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

34. On February 27, 2014, petitioner Executive Club, by its attorney, Mr. Reed, executed another consent to extend the statute of limitations allowing the Division until December 20, 2014 to assess any taxes found due for the period June 1, 2010 through November 30, 2011 (second consent). The second consent was signed by Mr. Watson on behalf of the Division on February 27, 2014. The second consent in the record does not have the Division's raised seal.

35. On August 22, 2014, petitioner Executive Club executed a Test Period Audit Method Election, agreeing to a test period audit method for recurring expense purchases.

36. On October 14, 2014, petitioner Executive Club, by its attorney, Mr. Reed, executed a third consent to extend the statute of limitations allowing the Division until March 20, 2015 to

assess any taxes found due for the period June 1, 2010 through February 28, 2012 (third consent). The third consent was signed by Mr. Watson on behalf of the Division on October 14, 2014. The third consent in the record does not have the Division's raised seal.

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

38. For the sales of executive dollars, the auditor conducted a detailed audit of petitioners' records. To determine receipts from sales of executive dollars, the auditor used the amounts shown on Executive Club's Reports, which shows monthly revenue from food, beverage, executive currency, executive currency surcharge, room fee and tips payable, among other items. The auditor added the amount of executive currency sales indicated in the Reports for each month, to arrive at a total of gross and taxable sales of $29,186,060.00 for the audit period. The auditor calculated sales tax due on these sales in the amount of $2,590,262.85. When calculating the amount of executive dollar sales, the auditor did not include any amount listed as "tips paid" from the Reports.

39. For the surcharge on the sales of executive dollars, the auditor again used information contained in the Reports. The auditor added the surcharge amount indicated in the Reports for

each month, to arrive at total surcharges of $5,664,772.00 for the audit period, and determined tax due of $502,748.51.

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

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

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

43. The Division issued a notice of determination, number L-042229689, dated November 25, 2014, to petitioner Executive Club asserting tax of $67,686.94, plus interest, determined due

on revenue from the private room charges. This notice is no longer at issue and petitioners concede this amount (***see*** Findings of Fact 5 and 40).

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

45. The Division issued three separate notices of determination to petitioner Robert Gans as a responsible person for taxes due of the Executive Club. Notice of determination, number L-042235703, dated November 26, 2014, asserted additional tax of $1,694,477.32, plus interest, for the taxes due on executive dollar sales and surcharges for the period September 1, 2011 through May 31, 2013.[5] Notice of determination, number L-042235704, dated November 26, 2014, asserted $67,686.94 in tax, plus interest for the amount determined due on room charges for the sales tax quarter ending February 29, 2012. Notice of determination, number L-042320551, dated December 29, 2014, asserted $20,163.00 in tax, plus interest for the amount determined due for expenses and complimentary beverages for the period September 1, 2011 through May 31, 2013.[6] Petitioners do not dispute that Mr. Gans is a person responsible for Executive Club's sales tax obligations, and do not dispute the amount determined due for tax on room sales, expenses and complimentary beverages.

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

[6] ***See*** footnote 5.

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

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

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

49. Petitioners submitted 59 proposed findings of fact. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 6 - 8, 12, 14, 15, 18, 20, 22, 24, 26, 27, 31, 33, 40, and 48 - 57 have been substantially incorporated in the foregoing Findings of Fact.[7] Proposed findings 1 - 3 are rejected because they lacked a reference to the transcript or an exhibit. Proposed findings 4, 5, and 9 are rejected as not supported by the citation given. Proposed findings 10, 11, 13, 17, 19, 21, 23, 25, 28 - 30, 32, 34, 36 - 39, 41, 42, and 47 are modified to more accurately reflect the record or remove argument. Proposed findings 16, 35, and 43 - 46 are rejected as not supported by the record. Proposed findings 58 and 59 are rejected as they contain argument and not proper findings of fact.

SUMMARY OF THE PARTIES' POSITIONS

50. Petitioners argue that a portion of executive dollars sold were used by customers to tip entertainers, and that such amounts should not be subject to sales tax. Petitioners further argue

[7] The proposed facts as presented by petitioners have been condensed and renumbered as incorporated in the Findings of Fact set forth above.

that executive currency should be treated as nontaxable intangible personal property, and sales tax should not apply on its initial purchase. Petitioners also argue that the surcharges are not subject to sales tax, contending that they are "merely the administrative fee on a gift card." Petitioners additionally argue that the consents to extend the statute of limitations are not valid because they lack a raised seal, and as such, the assessments are barred by the statute of limitations. Finally, petitioners argue that the sale of executive currency does not constitute a taxable admission charge.

51. The Division argues that petitioners failed to demonstrate that a portion of scrip purchased by customers of the Club was used to tip entertainers. The Division further argues that the surcharges added to the price of the scrip are subject to tax. The Division also argues that petitioners should be precluded from litigating issues finally decided by the Tribunal in ***Matter of The Executive Club LLC*** (Tax Appeals Tribunal, April 19, 2017) (***Executive Club I***), in which the Tribunal rejected petitioners' argument that the sale of scrip was not a taxable event because the scrip was intangible property, and held that receipts from the sale of scrip at the Club are subject to tax, and that consents to extend the statute of limitations are valid even without the Division's seal. The Division additionally argues that petitioners' charges are taxable under Tax Law § 1105 (d), and also as charges of a roof garden or cabaret pursuant to Tax Law § 1105 (f) (3).

52. Petitioners argue in their reply brief, in addition to the same arguments raised in their initial brief, that issue preclusion does not apply, that the Club does not constitute a cabaret, and there are no taxable cover charges under Tax Law § 1105 (d).

CONCLUSIONS OF LAW

A. Initially, the Division's argument for issue preclusion will be addressed. The Division contends that petitioners should be precluded from litigating the issues of whether consents to extend the statute of limitations are valid without a raised seal and whether its receipts from the sale of scrip are subject to tax. The Division argues that in ***Executive Club I***, involving the Executive Club for an earlier period, the Tribunal decided that Executive Club's receipts from the sale of scrip were subject to tax, rejected petitioner's argument that the sale of scrip was not a taxable event because the scrip was intangible property, and held that the consents to extend the statute of limitations were valid even without the Division's seal. The Division contends that petitioners raise identical issues in this matter, and as such should be estopped from relitigating the identical issues.

For the doctrine of issue preclusion, also known as collateral estoppel (***see Capital Telephone Co. v Pattersonville Telephone Co.***, 52 NY2d 11 [1982]), to apply, the party seeking preclusion must show that 1) the issue as to which preclusion is sought be identical with that in the prior proceeding; 2) the issue was necessarily decided in the prior proceedings; and 3) the litigant who will be precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding (***see B.R. Dewitt, Inc. v Hall***, 19 NY2d 141 [1967]). While the Division is correct that in ***Executive Club I***, the Tribunal decided that Executive Club's sales of scrip were subject to tax, and that consents to extend the statute of limitations for the periods at issue in that matter were valid, such decision was for a period prior to the period at issue herein. It is well settled that each tax period stands on its own, and issue preclusion does not apply to a tax period different from the period previously decided (***see Matter of 677 New Loudon Corp. D/B/A Nite Moves***, Tax Appeals Tribunal, August 25, 2016 ["Each taxable period contested in a

separate and distinct adjudication receives separate consideration from the adjudicator . . ."]; ***People ex rel. Watchtower Bible & Tract Socy. v Haring***, 286 AD 676, 680 [3d Dept 1955] ["(T)he assessment for one year is a separate and different cause of action from the assessment for another year"]). Additionally, petitioner Robert Gans was not a party in the prior proceeding.

Although collateral estoppel is not appropriate, the principle of stare decisis is applicable and the parties are bound by the prior controlling precedent established by ***Executive Club I*** and other relevant Tribunal and Court decisions (***see Matter of 677 New Loudon Corp. D/B/A Nite Moves***). Petitioners raise many of the same legal arguments as those they raised in ***Executive Club I***, and they bear the burden of distinguishing the facts for the period at issue here from the facts and legal conclusions in ***Executive Club I***.

B. The next issue to be addressed is whether the consents executed by the parties served as valid consents to extend the statute of limitations for assessment, in that the consents presented into the record did not contain the Division's seal. Petitioners raise the same argument here as that raised in ***Executive Club I***, specifically, that the failure to affix the official seal makes the consents invalid and requires a finding that the notices of determination were issued beyond the applicable statute of limitations.

The Tribunal rejected this argument for the prior periods, noting that "Tax Law § 1147 (c) requires only the consent of the taxpayer to extend an applicable statute of limitations and requires no action on the part of the Division to validate such consent" (***Executive Club I***). The Tribunal found that neither the signature of the Division's employee, nor the official seal is required for a valid extension of the statute of limitations in regard to sales and use taxes, and stated, "We concur with the Division's assertion that the failure of the Division to affix the

Commissioner's seal to a document purporting to extend the statute of limitations in a given matter does not invalidate the documents" (***id.***).

Petitioners have presented no facts that would distinguish the consents for the matter at issue herein from the Tribunal's holding in ***Executive Club I***. Petitioners have not argued nor presented any evidence that the consents were not signed by duly authorized representatives. Additionally, petitioners do not dispute that by signing the consents, the parties intended to extend the statute of limitations for assessments. Petitioners argue that consents to extend the statute of limitations for personal income tax assessments require validation, and that there is no justification for treating the two tax types differently with respect to those consents. Petitioners' argument is without merit. First, it is noted that Tax Law § 683 (c) (2), requires only written consent, and does not require a seal. Second, the Tribunal noted the difference in the statutory language between Tax Law § 1147 (c), which requires only the consent of the taxpayer, and Tax Law § 683 (c) (2), which requires that the Division and the taxpayer must agree and "consent in writing" in order to extend the statutory limitation on the time allowed for the Division to assess additional income, and concluded that for sales tax purposes, neither the signature of the Division nor a seal is required (***id.***). Petitioners have presented no valid argument for a different conclusion here. Accordingly, the lack of the Division's seal on the consents does not invalidate the documents, and the assessments at issue here were timely issued.

C. Another argument raised by petitioners, that the sale of executive currency does not constitute a taxable admission charge, was also addressed in ***Executive Club I***. Petitioners argue that the sale of executive currency is not taxable as an admission charge, and attempt to distinguish the current matter from ***Matter of HDV Manhattan, LLC*** (Tax Appeals Tribunal, February 12, 2016). The Tribunal rejected the same argument in ***Executive Club I*** and

concluded that Executive Club's receipts from the sales of the executive dollars are taxable to the extent that such dollars were used for personal dances. Petitioners' contention that "the Tribunal affirmed the ALJ's determination in which it held, in no uncertain terms, that Executive Currency could not be used for admission," is disingenuous. Petitioners' argument blatantly misrepresents the Tribunal's holding in ***Executive Club I***. Indeed, the Tribunal went to great lengths to distinguish the common understanding of admission from the statutory definition of admission charges contained in Tax Law § 1101 (d) (2), noting that:

> "[i]n reaching a conclusion on this factual issue [that the executive dollars could not be used for admission to private rooms], the Administrative Law Judge appears to be utilizing the common understanding of the word 'admission' as opposed to the statutory term 'admission charges' set forth in Tax Law § 1101 (d) (2), which is inclusive of charges for 'entertainment or amusement" (***Executive Club I, n 3***).

The Tribunal discussed Tax Law § 1105 (f), which imposes sales tax on receipts from certain admission charges to or for the use of a place of amusement, and noted that for purposes of the tax, admission charge means "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor" (***id.***, quoting Tax Law § 1101 [d] [2]).

The Tribunal went on to list the similarities between HDV Manhattan and Executive Club, and found that the holding in ***Matter of HDV Manhattan, LLC*** controlled the outcome of its decision in ***Executive Club I***, in that petitioner failed in its burden to prove any distinction between the two cases that would overcome the presumption that the Division's notices were correct.

Relevant similar facts regarding the operation of HDV Manhattan, Executive Club as found in ***Executive Club I***, and Executive Club as found in the current matter include:

- All the clubs operate adult entertainment businesses;

- Customers of all three clubs paid an admission or cover charge to enter the clubs and sales tax was collected and paid by the respective taxpayers on these charges;

- All the clubs had a public area where personal dances could be purchased and private rooms where personal dances could be purchased;

- Scrip was available for purchase in all the clubs, and customers paid a 20% surcharge on the purchase of scrip at all the clubs;

- In each case, scrip could only be used to pay for personal dances, either in the public or private areas of the clubs, or to tip entertainers and other club employees; in the current case and in ***Executive Club I***, scrip could also be used to pay for spending time with the entertainers anywhere in the club;[8]

- In all three cases, entertainers fees were paid in cash or scrip and the entertainers paid the clubs a fee to perform at the respective club. In both this case and ***Executive Club I***, the entertainers redeemed the scrip they received from customers for 87% of its value through the Club;

- In each case, the clubs controlled at least the minimum price to be charged for a personal dance;

- In each case, entertainers and other employees would redeem the scrip with the clubs, for which the clubs would charge a redemption fee.

Petitioners have presented no facts to distinguish the current matter from ***Executive Club I***. Indeed, both Mr. Rosenbluth and Mr. Yackow testified that the use of executive currency has not changed since the Club's inception. Despite the similarities, petitioners continue to argue for a different outcome.

The Tribunal rejected the same argument made by petitioners that receipts from the sale of the executive dollars are not subject to sales tax as an admission charge because executive dollars do not grant a customer admittance to anything. In rejecting this argument, the Tribunal stated:

> "Petitioner points to the specific findings of the Administrative Law Judge that the executive dollars could not be used for admission to the club or for admission to

[8] In the current case, entertainers could also use executive dollars to purchase meals at the Club. I find this distinction makes no difference in the outcome.

the private rooms but could only be utilized for personal dances or spending time with the entertainers, or for tips for the entertainers or hosts.

This argument was specifically addressed in ***Matter of HDV Manhattan, LLC***. In that case, after explaining that charges for personal dances in private rooms had previously been determined to be subject to tax as admission charges (***see Matter of 677 New Loudon Corp. d/b/a Nite Moves***, Tax Appeals Tribunal, April 14, 2010, ***confirmed sub nom Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341 [2011], ***lv granted*** 17 NY3d 714 [2011], ***affd*** 19 NY3d 1058 [2012], ***reargument denied*** 20 NY3d 1024 [2013], ***cert denied*** 134 S Ct 422 [2013]; ***Matter of Greystoke Indus. LLC d/b/a Paradise Found***, Tax Appeals Tribunal, May 19, 2011), this Tribunal concluded that the fact that a customer incurred separate charges for the use of the private room and for the personal dance in the private room made no difference to the taxability of such charges. Admission charges for purposes of sales tax are statutorily defined in Tax Law § 1101 (d) (2) as including not only "the amount paid for admission," but also "any charge for entertainment or amusement" (***see also Matter of HDV Manhattan, LLC***). As personal dances constitute entertainment, the receipts from sales of the executive dollars are taxable to the extent that such dollars were used for personal dances.[8]

Petitioner attempts to distinguish the present circumstances from those presented in ***Matter of HDV Manhattan, LLC*** based upon the specific finding of the Administrative Law Judge that the executive dollars could not be used for admission to the private rooms. However as noted in footnote 3 herein, the Administrative Law Judge was referring to admission to the rooms in the common understanding of that word, as opposed to the statutory definition of admission charges, which includes not only physical access to the room itself, but also the "entertainment or amusement" provided therein (Tax Law § 1101 [d] [2]). Furthermore, the facts in ***Matter of HDV Manhattan, LLC*** are not distinguishable because in that case it was specifically found that customers were also required to pay two separate charges, a room charge to the club and a charge for the dance. The only difference in the facts is that, in the present case, the two separate charges are collected by two separate corporations. Petitioner has not explained how this distinction makes a difference in the taxability of the charges, nor do we see any difference" (***Executive Club I***).

[8] To the extent that the executive dollars were used to pay tips to the entertainers and other employees of petitioner, such receipts may not be subject to tax, but such amounts are not at issue here in that petitioner neither raised or presented evidence on the issue.

Petitioners have presented no facts or arguments that would distinguish the current matter from ***Executive Club I*** or require a different holding from ***Executive Club I*** and ***Matter of HDV***

Manhattan, LLC. As such, those cases are controlling, and petitioners' argument that the Club's sale of executive currency does not constitute a taxable admission charge is rejected.

D. As in ***Executive Club I***, petitioners also argue here that the sale of executive dollars is not a taxable event, in the same manner that the sale of a gift card is not a taxable event, because both are the sale of intangible personal property. As argued by the petitioner in ***Executive Club I***, petitioners here assert that the transaction that is taxable is the redeeming of the executive dollars with the Club's entertainers for dances and tips with the Club's other employees for tips. In addressing this argument, the Tribunal noted that a similar argument was also espoused and rejected in ***Matter of HDV Manhattan, LLC*** where it was explained that:

> "Implicit in this assertion is that the Club was not required to collect sales tax on the private dance charges. As relevant here, '[p]ersons required to collect [sales] tax' include 'every recipient of amusement charges' (Tax Law § 1131 [1]). Such a recipient 'collects or receives or is under a duty to collect an amusement charge' (Tax Law § 1101 [d] [11]). For purposes of the tax imposed under Tax Law § 1105 (f) (1), the term 'amusement charge,' as used in Tax Law §§ 1101 (d) (11) and 1131 (1) means admission charge as defined in Tax Law § 1101 (d) (2)."

In rejecting the taxpayer's argument that the sale of executive currency was a nontaxable sale of intangible property, the Tribunal noted that ***Matter of HDV Manhattan, LLC*** concluded that because of both the club's control over the transactions at issue and financial interest in those transactions, it was the club, and not the entertainers, that was responsible for collecting the sales tax, and found that the same reasoning applied to Executive Club (***Executive Club I***). Again, petitioners have presented no facts or arguments warranting a different outcome here, and the decision in ***Executive Club I*** is controlling on this issue.

E. Petitioners further argue that a portion of executive dollars sold were used by customers to tip entertainers, and that such amounts should not be subject to sales tax. In support of their argument, petitioners rely on a footnote in the Tribunal's decision in ***Executive Club I*** that states:

> "To the extent that the executive dollars were used to pay tips to the entertainers and other employees of petitioner, such receipts may not be subject to tax, but such amounts are not at issue here in that petitioner neither raised or presented evidence on this issue" (***Executive Club I***, ***n 8***).

Although petitioners raised the issue of tips in this proceeding, they have failed to present evidence sufficient to meet their burden of proving that a portion of the executive dollars were used to pay tips to the entertainers.

Tax Law § 1132 (c) (1) creates a presumption that all a taxpayer's sales receipts are properly subject to tax until the taxpayer proves otherwise (Tax Law § 1132 [c] [1]; ***see Matter of Greystoke Industries LLC d/b/a/ Paradise Found***, Tax Appeals Tribunal, May 19, 2011). Furthermore, a presumption of correctness attaches to statutory notices (Tax Law § 689; ***see also Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [3d Dept 1980]), and petitioners bear the burden of overcoming this presumption (***see Executive Club I***; ***Matter of HDV Manhattan, LLC***). As such, to the extent that the Tribunal's holding in ***Executive Club I*** states that receipts for executive dollars that were used to pay tips may not be subject to tax, petitioner bears the burden of proving such amount.

In support of their argument, petitioners presented schedules of private room fees and sale of executive currency control sheets for only four days, and only ten credit card receipts, from only two different dates (***see*** Finding of Fact 22). The credit card receipts listed for "Roberts Private," dated April 18, 2013, show charges for private rooms and do not indicate any amount for tips. The receipts entitled "Roberts Currency," for February 27, 2013 and April 18, 2013, show charges for food and beverage, a 20% surcharge, a service charge, and a "charge tip." However, the Reports provided by petitioners for February 2013 and April 2013 indicate "0.00" on the lines for tips paid. There was no explanation for the discrepancy.

The sale of executive currency control sheets for the four dates provided show the name of the customer, credit card information, the amount of the executive currency purchased, the surcharge amount, and "charge tips." The control sheets do not indicate the purpose of the executive currency purchase (i.e., they do not indicate whether the executive currency is purchased for entertainer fees or tips). Petitioners also created an "analysis of entertainer tips" which purports to show a summary of tips for the period of January 1, 2013 through May 31, 2013. Notably, both the "analysis of entertainer tips" and the executive currency control sheets indicating certain amounts on the line for "charge tips" are contradicted by the Reports petitioners introduced for the same time period, which show "0.00" on the lines for "tips paid" and "EC Tips Pd."[9] Petitioners provided no explanation for the discrepancy. Mr. Yackow's testimony regarding the mostly illegible notes on the schedules of private room fees for four days, that he claims indicates tips for the limited entries provided, is simply insufficient to meet petitioners' burden of proving that the Division's assessment was erroneous.

F. Petitioners also argue that the surcharges the Club charged customers for the purchase of executive dollars are not subject to sales tax. Petitioners charged customers an additional 20% of the face value of executive dollars purchased, such that a customer would pay $120.00 to receive $100.00 of executive currency. Mr. Yackow described the charge as a fee for the delay the Club faces receiving money from credit card charges and for "chargebacks" and inquires.

As noted above, Tax Law § 1105 (f) imposes sales tax on receipts from certain admission charges to or for the use of a place of amusement, and petitioners' receipts from sales of the executive dollars are taxable as admission charges (***see Executive Club I***; ***Matter of HDV***

[9] A review of the auditor's workpapers show that where Reports for other months that were provided during the audit indicated an amount for tips payable, the auditor did not include such amounts in her calculation of taxable receipts.

Manhattan, LLC). Tax Law § 1101 (d) (2) provides that an admission charge is "[t]he price amount paid for admission, *including any service charge* . . ." (emphasis added). As such, the 20% surcharge charged to customers on the purchase of executive currency is taxable as a service charge included in the price paid for admission.

G. The Division argues that petitioners' receipts are also subject to sales tax as charges of a roof garden or cabaret pursuant to Tax Law § 1105 (f) (3). Tax Law § 1105 (f) (3) provides that amounts paid as charges of a roof garden, cabaret, or other similar place of entertainment are subject to tax. A "charge of a roof garden, cabaret or other similar place" means "[a]ny charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place" (Tax Law § 1101 [d] [4]) and, under the pertinent regulation, includes charges for "music or entertainment . . . [or] service" (20 NYCRR 527.12 [b] [1]). The phrase "roof garden, cabaret or other similar place," in turn, means "[a]ny . . . place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances" (Tax Law § 1101 [d] [12]; ***see*** 20 NYCRR 527.12 [b] [2]).

In ***Matter of HDV Manhattan, LLC***, the Tribunal found that the club's sale of scrip was alternatively taxable under Tax Law § 1105 (f) (3). In its review of the Tribunal's decision, the Appellate Division stated:

> "The Tribunal explicitly found that the club furnished public performances for profit through its offerings of stage dances and table dances and, therefore, qualified as a cabaret or similar place within the meaning of Tax Law § 1105 (f) (3).
>
> This finding is certainly supported by the record, as there was ample testimony that entertainers would perform on one of three public stages in the main area of the club or tableside at one of the many tables surrounding the stages, all of which

> were viewable to patrons who paid general admission into the club. Accordingly, the Tribunal rationally concluded that the club is a cabaret or other similar place—that is, a place which furnishes public performances for profit (***see*** Tax Law §§ 1105[f][3]; 1101[d][12]; ***Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Trib***., 85 A.D.3d at 1346, 925 N.Y.S.2d 686). Additionally, given that 'charges of a ... cabaret or other similar place' include service and entertainment charges (***see*** Tax Law § 1101[d][4]; 20 NYCRR 527.12[b][1]), the revenue generated from the sale of scrip—which could be used to tip or purchase table dances and/or private dances—is properly taxable under Tax Law § 1105(f)(3).
>
> Petitioners argue, however, that the sale of scrip qualifies for the exclusion set forth in Tax Law § 1105(f)(3) because it is 'a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of ... refreshment or merchandise' and 'such serving or selling ... is merely incidental to such performances' (Tax Law § 1101[d] [12]). The Tribunal found that, while public performances for profit were offered in the main area of the club, the club also offered nonpublic performances in the form of private dances in one of the club's 16 private rooms, which were viewable only to the paying customer. This finding is both rational, as the Tribunal afforded the word 'public' its plain and ordinary meaning in reaching its conclusion that the private dances were nonpublic performances, and fully supported by the record. Considering that, as established by the record, the private dances made up a significant portion of the club's 'entertainment offerings,' a rational basis exists for the Tribunal's further determination that, even if the stage performances and table dances were live dramatic or musical arts performances, the club did not 'merely' offer such performances, so as to bring the sale of scrip within the ambit of the exclusion (Tax Law § 1101[d][12]). As such, we discern no basis on which to disturb the Tribunal's determination that the exclusion set forth in Tax Law § 1105(f)(3) is inapplicable" (***HDV Manhattan, LLC v. Tax Appeals Trib.***, 156 A.D.3d 963 [3d Dept 2017]).

Petitioners have offered no evidence or arguments to distinguish this matter from the holding of ***Matter of HDV Manhattan, LLC***. In both cases, the clubs offered public performances for profit in the main area of the clubs and tableside interactions with the entertainers in the public areas, all of which were viewable to patrons who paid general admission into the club, as well as nonpublic performances in the form of private dances in one of the club's many private rooms, which were viewable only to the paying customer. Similar to the club in ***Matter of HDV Manhattan, LLC***, the record here likewise establishes that the private

dances made up a significant portion of the club's entertainment offerings. As this matter is factually analogous to ***Matter of HDV Manhattan, LLC***, it is concluded that here, too, the Club's sale of scrip is alternatively taxable under Tax Law § 1105 (f) (3).

H. Finally, the Division argues that petitioners' receipts are also subject to sales tax pursuant to Tax Law § 1105 (d), which provides:

> "(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):
>
> (1) in all instances where the sale is for consumption on the premises where sold;"

In ***Matter of 677 New Loudon Corp. d/b/a Nite Moves***, the Tribunal found that admission charges of an adult entertainment venue were subject to sales tax pursuant to Tax Law § 1105 (d), stating:

> "We agree with the Division that such charges could be subject to tax under Tax Law § 1105 (d) in the alternative. We view the limiting language of Tax Law § 1105(d) (i), limiting tax under this section to receipts not taxed under subdivision "f" of this section, as merely to protect taxpayers against double taxation. Further, we find the Administrative Law Judge erred in opining that this provision would apply only in situations where petitioner's drinks were extraordinary and were the primary reason for patrons to frequent Nite Moves. The Administrative Law Judge completely ignored the broadly inclusive language of subdivision (d), i.e., '*including in the amount of such receipts any cover, minimum, entertainment or other charge* made to patrons . . .(emphasis added).'"

It is undisputed that the Executive Club sold food and beverage during the period at issue, and that customers paid a general admission charge to enter the club's main area and view live performances. Petitioners concede that these charges are subject to tax and admit that they collected and remitted tax on those charges. Customers paid a separate admission fee for entertainment offered in private rooms at the Club, and petitioners do not dispute that the charges

for the private rooms were subject to sales tax. As such, the Division's argument that those charges are "cover, minimum or entertainment" charges collected by an establishment serving food and beverages is moot and need not be addressed.

To the extent that the Division argues that the sales of executive currency are taxable pursuant to Tax Law § 1105 (d), it is noted that the only receipts introduced into the record for the executive currency sales indicate charges for "Food/Bev." As such, petitioners have not met their burden of proving that such receipts are not taxable as "any cover, minimum, entertainment or other charges . . ." as provided by Tax Law § 1105 (d).

I. The petitions of The Executive Club LLC and Robert Gans are denied, and the notices of determination dated November 25, 2014, November 26, 2014, December 26, 2014 and December 29, 2014 are sustained.

DATED: Albany, New York
May 24, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE