STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ANTHONY CAPECI	:	DETERMINATION DTA NOS. 828636,
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2008 through February 28, 2014.	:	828637 AND 828638

Petitioner, Anthony Capeci, filed 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 March 1, 2008 through February 28, 2014.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on December 1, 2020, at 10:30 a.m., and continued on January 22, 2021, at 10:30 a.m., with all briefs to be submitted by June 28, 2021, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jennifer M. Kinsley, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

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

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

III. Whether petitioner was a responsible person for Metro Enterprises Corp. within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the collection and payment of sales

tax on the sales of scrip for the period March 1, 2010 through February 28, 2014.[1]

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

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

FINDINGS OF FACT

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

Notice No.	Periods Ended	Tax	Interest	Penalty
L-045796580	05/31/08 - 02/28/14	$3,863,002.13	$4,909,599.02	$1,545,198.94
L-045794592	05/31/10 - 02/28/14	$1,798,108.53	$1,757,904.95	$719,241.65
L-045794593	05/31/10 - 05/31/12	$0.00	$0.00	$86,000.00
L-045794594	05/31/10 - 02/28/14	$501,699.02	$481,054.84	$200,678.12
L-045794595	05/31/10 - 02/28/14	$0.00	$0.00	$156,000.00

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

[1] Petitioner concedes that he is a responsible person for 44th Enterprises Corporation and MLB Enterprises Corporation and such status is not an issue in this proceeding.

Corporation (44th).

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

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

4. Mario Barnes was a manager of MLB's club, and an individual named Don[2] was a manager of 44th's club.

5. The Clubs were run in the same manner. The Clubs offered live exotic dance performances to patrons and collected general admission charges, coat check charges, charges for sales of alcoholic and non-alcoholic drinks, admission charges for the use of private rooms and private dance fees from customers, and performance fees and charges from the Clubs' dancers.[3]

---

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

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

6. Petitioner's Clubs engaged individuals to perform adult entertainment/exotic dancing services for the patrons of the Clubs.[4] A contract between the dancers and the Clubs, entitled Non-Exclusive Lease of Entertainment Facilities (contract) entered into the record provides that the dancers were required to pay MLB $150.00 per performance date, $150.00 per 30 minutes for use of the "champagne room," and $500.00 per hour for the use of the "viper room." The contract also provides that all scheduling of dancers' performances shall be arranged through Metro. However, affidavits of Anthony Capeci and John Scarfi state that the agreements between the dancers and the Clubs specify that the dancers' scheduling will be negotiated between the dancers and the Clubs.[5] Similarly, during the hearing in the matters of 44th and MLB, Mr. Capeci testified that his Clubs controlled the dancers' work hours and shifts.[6] Petitioners provided no explanation for the discrepancy between the contract entered into the record and the affidavits and testimony.

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

---

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

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

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

further provides:

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

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

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

10. Scrip (also known as vouchers, funny money or Lace dollars) is a fictitious currency patrons could purchase at the Clubs with a credit card. Scrip could be used at the Clubs to purchase dances, tip dancers and waitresses,[7] and pay for entertainment in private rooms. During

[7] Although petitioner contends that scrip could only be used to tip dancers, Mr. Scarfi presented

the audit of MLB, the club's manager informed the auditors that scrip could also be used to purchase drinks. Customers were not required to use scrip for purchases and could use cash instead.

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

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

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

14. During the hearing in the ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.***, 44th's and MLB's witness, John Scarfi, testified that scrip transactions were run on the Clubs' credit card terminals a couple of times a week when there was a problem with Metro's

---

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

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

15. Petitioner's Clubs employed waitresses, bartenders, bar backs, managers and disc jockeys to work in the Clubs. Petitioner's Clubs also engaged dancers to perform at the Clubs. Although Mr. Capeci testified during the hearing for 44th and MLB that the dancers were employees of the Clubs, during the audits of 44th and MLB, he stated that the dancers were "tenants" of the Clubs and that they were neither employees nor independent contractors. Neither petitioner nor the Clubs withheld any employment taxes or paid workers' compensation for the dancers. In the ***Dennis*** matter answer, 44th and Mr. Capeci affirmatively stated that the dancers were independent contractors, not employees. In the ***Dennis*** matter admissions, 44th and Mr. Capeci admitted that they categorized the dancers as independent contractors and that they should have categorized them as employees.[8] 44th and Mr. Capeci further admitted in the ***Dennis*** matter admissions that the dancers did not receive compensation (i.e. hourly, salaried or otherwise) from them.[9]

16. According to Mr. Capeci, his Clubs set rules for how the dancers performed their work in the Clubs, including setting the work hours and shifts, and controlling the music that the

[8] ***See*** footnote 3.

dancers used (***see*** finding of fact 6). Petitioner considered the dancers to be an integral part of the Clubs' business.

17. The Clubs had a minimum fee of $20.00 for dances. During the hearing in the ***Matter of Scarfi and Metro***, Mr. Capeci testified that the dancers could negotiate a higher or lower price for a personal dance with the customer.[10]

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

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

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

---

[9] ***Id.***

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

were prepared by the Clubs' managers.

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

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

When questioned about who prepared the ledgers, Mr. Endres testified that it was his understanding that they were "created by the entertainers and, you know, in part, Keith [Warnick] working on them to maintain the books."[11] Mr. Endres later testified that the "journals were created by Metro, in part by Keith, in part by the entertainers, as part of the transactions that occurred on a daily basis."

22. In contrast to Mr. Endres' testimony, during the hearing in the ***Matter of 44th Enterprises Corp. and MLB Enterprises Corporation***, Mr. Scarfi testified that the Clubs'

managers prepared the ledger books for the scrip transactions and payments to dancers, including the "batch report" (credit card settlement reports) that show the daily total scrip charges and the amounts of scrip that were redeemed by the dancers.

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

Audits of MLB and 44th

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

25. By separate audit appointment letters and information documents requests (IDRs) to MLB and 44th, dated January 8, 2013, the Division's auditor, Jennifer Genovese, initiated audits, initially for the period of March 1, 2010 through November 30, 2012.[12] The letters scheduled field audit appointments on January 29, 2013 and advised 44th and MLB that they must provide "any and all documentation in auditable form and electronic form (if available) which supports the sales and use tax returns as filed." The attached IDRs described the books and records required to be produced.

26. On January 22, 2013, Mr. Capeci contacted Ms. Genovese on behalf of 44th and MLB

---

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

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

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

27. On June 3, 2013, Ms. Genovese and her supervisor, Christine Scala, conducted a field appointment for the audits of 44th and MLB, and met with Mr. Capeci at his office. Mr. Capeci, explained the operations of the Clubs to the Division's auditors. He informed the auditors that the Clubs operated from 12:00 p.m. to 4:00 a.m. daily, that there is no entrance admission charge from 12:00 p.m. to 8:00 p.m., and a $20.00 admission charge from 8:00 p.m. to 4:00 a.m. Mr. Capeci explained that patrons paid $20.00 for dances performed on the Clubs' main floors, and that customers can pay for the dances by cash or "funny money" (scrip) which is processed by a third party. Mr. Capeci further explained that both of the Clubs have three registers, one at the front for admission and coat check, one for the bar, and one for private rooms. Private and semi-private rooms are available to patrons for an additional charge. The customer incurs two separate charges when utilizing a private room: a charge for the room and the dancer's fee. Mr. Capeci did not inform the auditors of the rates for private rooms at the Clubs. According to Mr. Capeci, the Clubs' taxable sales consisted of the admission charges, private room charges, drinks and coat check charges. Mr. Capeci explained that he used the Clubs' bank deposits to prepare the Clubs' sales tax returns. He provided some sales tax backup records for the audit period, but bank statements and general ledgers were not made available to the auditors during the initial audit appointment. Mr. Capeci told the auditor that the ledger needed to be "cleaned up."

28. The Division sent second IDRs, dated June 10, 2013, to 44th and MLB requesting the following: bank statements; general ledgers; federal returns; depreciation schedules; dancers'

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

29. On July 11, 2013, another field audit appointment was conducted for the audit of both Clubs. During this appointment, Mr. Capeci provided incomplete bank statements, incomplete purchase invoices for 2011, copies of promotional coupons, information regarding the company that processes the credit card transactions (Metro), and copies of a transaction for a private room rental and a "funny money" purchase. Mr. Capeci had in his possession records of these transactions for October through December 2012, including Metro's receipts for each transaction. Additionally, the following records were at Mr. Capeci's office for review, but he would not allow the auditors to take the records from his office to review: register z-out tapes for the quarter ending May 31, 2012, rental contracts signed by dancers, and credit card transactions for room rentals and scrip sales from October through December, 2012.

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

> "At our appointment on July 11, 2013, you had some z-out tapes available, dancer's contracts, and c/c transactions for 'funny money' and room charges all of

> which you requested be transcribed at your office. Since you will not allow these documents to be copied or removed from your office, please provide accommodations on August 15, 2013 for approximately 2-3 auditors for a full day."

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

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

Another field audit was conducted on September 19, 2013, and the Division's auditors transcribed the summary detail for front door, bar and room charges for the quarter ending May 31, 2012.

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

$900.00.

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

33. On November 14, 2013, Ms. Scala and Ms. Genovese toured the Clubs with Mr. Capeci. The auditors noted that the Clubs had multiple private rooms in which the dancers perform for patrons. During the tour, Mr. Capeci explained that Lace dollars can be purchased to pay for lap dances, the dancer's fee to go in a private room, and to tip employees.

34. On June 4, 2014, Mr. Capeci informed Ms. Genovese that he wanted to discuss the audits with her supervisors before they progressed any further, contending that the scrip sales were not subject to tax. In a letter from Mr. Capeci to Mario Scarpace, of the Division's Field Audit Management, dated July 24, 2014, Mr. Capeci stated, in part, that: "The underlying reason for operating the club in this fashion was to avoid lawsuits and employment tax issues in the future."[13] A telephone call was subsequently conducted between Mr. Scarpace, and Mr. Capeci, wherein Mr. Scarpace informed Mr. Capeci that the Clubs' receipts from the sales of private dances were subject to sales tax and that the Division was proceeding with the audits. In response, Mr. Capeci stated that on a previous audit he was not informed by the Division that the

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

Clubs' business model was subject to tax, and that he would send a letter to the Division's Executive Deputy Commissioner, Nonie Manion, requesting a meeting.

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

36. On September 17, 2015, Mr. Carzo, several employees from Field Audit Management, Ms. Genovese, Ms. Scala and their supervisors participated in a conference call with Mr. Capeci. During the call, the Division discussed the status of the audit, potential issues, the test of register tapes, private dances, customers' methods of payments, credit card processing and funny money. The call was concluded by agreeing that the audit team would resume audit activities and complete the review of available books and records. Mr. Capeci agreed to sign waivers extending the statute of limitations for expiring periods (waivers), and the Division agreed to have another discussion with Mr. Capeci before issuing assessments.

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

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

39. Another field audit appointment was conducted on November 23, 2015. On December 3, 2015, Ms. Genovese sent a letter to Mr. Capeci as a follow-up of the November 23, 2015 appointment, wherein she stated that to date, the Division had not received any of the documents requested in IDR number 4, and requested that he provide the documents by December 21, 2015.

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

41. During the field audit appointment on January 28, 2016, Mr. Capeci provided some of the missing bank statements that were previously requested. Ms. Genovese noted in her audit log that when she asked Mr. Capeci for the missing bank statements, he responded, "Shhh . . . okay, I will pretend like I care." Mr. Capeci also provided the auditor with some "funny money" books with a log of the dancers who worked at the Clubs. The auditor determined that the logs were not sufficient to substantiate how many dancers worked at the Clubs or how much rent the

Clubs received from the dancers. The auditor requested that Mr. Capeci allow her to take three of the funny money books to review and return to him at the end of the audit, but Mr. Capeci denied the request, stating, "No, they stay here." The auditor inquired about the difference between vouchers and "Lace $" as indicated in the books and Mr. Capeci stated there was no difference. When the auditor asked why they were broken out separately in the books, Mr. Capeci stated that she did not need to know. Ms. Genovese noted in her audit log that Mr. Capeci became agitated and began yelling and screaming at her during the appointment.

42. On January 29, 2016, Ms. Genovese discussed the January 28 field audit appointment with her supervisors and Field Audit Management. On February 1, 2016, Mr. Carzo and Mr. Vanderlinden called Mr. Capeci and left a voice message for him to return their call. On February 10, 2016, Mr. Vanderlinden called Mr. Capeci and stated that the Division was continuing with the audits of the Clubs and referred him to case law regarding the taxability of dance sales. During the call, Mr. Capeci referenced a letter from Deputy Commissioner Manion in which he claimed that the Division agreed his business model was not taxable. Mr. Vanderlinden replied that he would review the mentioned letter.

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

44. On February 25, 2016, Ms. Genovese, together with Section Head Frank Grillo, called Mr. Capeci to discuss the audits and the requested records. Ms. Genovese faxed IDRs 4 and 5 to Mr. Capeci for his review. Mr. Capeci asked what part of the general ledger the Division wished

to review and the auditors explained that they were requesting the general ledger for the entire audit period. Mr. Capeci inquired why they wanted the ledger for the entire period and the auditors explained that the Clubs had no internal controls with the records currently provided. Ms. Genovese noted in her audit log that Mr. Capeci then stated that he needed to "clean up the general ledger for 2010 through 2014" because it was full of "mis-postings from the bookkeeper." Mr. Capeci also asked why the auditors wanted to see purchase invoices and why they could not obtain them from third parties or the Division's database. The auditors explained that they needed the Clubs' original source documents. Mr. Capeci suggested that the auditors look at records for 2012 or 2013, and that he preferred 2013.

45. On February 29, 2016, a call was held between Ms. Genovese, Ms. Scala, Mr. Grillo and Mr. Capeci to discuss Mr. Capeci's request that his response to the records request be postponed until after the tax season. The auditors explained that if they received waivers from him extending the statute of limitations for the audit period of the Clubs, that they would allow additional time for the records to be provided. They also discussed scheduling an extraction of petitioners' electronic point of sales records with the Division's Technology Assist Audit (TAA) unit, and Mr. Capeci agreed.

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

For 44th, the Division was unable to extract records from the POS system for the audit

period, as the data only went back to August 2015. Petitioners and their POS company did not provide any POS records for 44th for the audit period.

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

48. After reviewing the POS records provided for MLB, the auditors selected the sales tax quarter ending November 30, 2013 as a test period to determine if the club had reported the proper amount of tax. This period was chosen for the test period because the POS records from earlier periods were incomplete in that the gross sales reported on MLB's tax returns were substantially higher than the gross sales per the POS records provided. The quarter ending November 30, 2013 was the earliest quarter for which sales recorded in the POS were at least equal to the reported sales.

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

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

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

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

53. On August 10, 2016, the Division sent letters to 44th and MLB stating its intent to impose penalties on the Clubs for failing to provide books and records for the audit period.

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

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

56. To determine whether MLB had paid the proper amount of tax due for the audit period, the Division added the club's receipts from bar sales, door admissions, coat check and

room rentals for the quarter ending November 2013 and determined audited gross receipts from those areas of $1,051,743.82 for that quarter. The club did not separately state sales tax on its invoices. Therefore, to determine audited sales, the auditor subtracted tax remitted for that quarter ($59,575.92) from audited gross receipts and determined audited gross sales of $992,167.90 for the quarter. The auditor divided audited gross sales by gross sales reported by MLB for that quarter ($671,278.00) to determine an error rate of 1.47%. The auditor then multiplied gross sales reported in the amount of $8,790,452.00 by the error rate to determine audited gross sales of $12,992,537.09, additional gross sales of $4,202,085.09, and tax due of $372,935.05 for the period at issue from MLB's door admissions, coat check, bar sales and room rentals.

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

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

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

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

and interest.

59. The Division issued two notices of determination to MLB. Notice of determination L-045789856, dated November 30, 2016, assessed additional tax of $1,798,108.53 plus penalties and interest. Notice of determination L-045790014, dated November 30, 2016, asserted penalties in the amount of $86,000.00 for MLB's failure to produce books and records for the audit period.[14]

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

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

[14] The Division of Tax Appeals issued a determination on February 18, 2021, sustaining these notices of determination (***Matters of 44th Enterprises Corporation and MLB Enterprises Corporation***, Division of Tax Appeals, February 18, 2021).

$1,683,417.89 by the tax rate to determine additional tax due from 44th of $149,403.32 from these sales.

62. The Division also determined that 44th had an additional revenue stream from the sale of scrip and that tax was due from 44th on these sales. As stated in the Division's field audit report:

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

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

63. In total, the Division determined that for the period at issue, 44th had additional taxable sales of $5,652,946.67 and owed additional tax of $501,699.02, plus penalties and interest.[15]

64. The Division issued two notices of determination to 44th. Notice of determination L-045789743, dated November 30, 2016, assessed additional tax of $501,699.02 plus penalties and interest. Notice of determination L-045789538, dated November 30, 2016, asserted penalties in

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

the amount of $156,000.00 for 44th's failure to produce books and records for the audit period.[16]

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

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

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

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

Audit of Metro

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

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

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

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

[16] The Division of Tax Appeals issued a determination on February 18, 2021, sustaining these notices of determination (***Matters of 44th Enterprises Corporation and MLB Enterprises Corporation***, Division of Tax

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

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

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

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

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

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

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

79. During the audit of Metro, Mr. Scarfi told the auditors that either he, Metro's only

---

Appeals, February 18, 2021).

employee, Keith Warech, or one of the Clubs' employees would bring cash from Metro's bank to the Clubs to cash out the dancers' scrip.

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

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

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

83. Mr. Scarfi testified during the hearing in the ***Matter of Scarfi and Metro*** that Metro did not make any payments to the Clubs and the Clubs made no payments to Metro. However, the affidavit of Anthony Capeci, included with petitioner's motion, states that the Clubs paid registration fees to Metro by cash (***see*** footnote 5).

84. Records obtained by the auditors during Metro's audit show numerous payments from

Metro to the Clubs. The Division introduced into the record in this matter the following checks from Metro's bank account showing payments to the Clubs:[17]

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

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

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

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

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

89. Metro maintained separate bank accounts for the credit card receipts from scrip sales from MLB's, 44th's, Lace's and Stiletto's clubs. The Division issued subpoenas for Metro's bank statements. The auditors transcribed the deposits from credit card receipts in Metro's bank accounts for the period at issue to compute its tax liability from scrip receipts.

90. Based on a review of Metro's bank deposits, the Division determined taxable sales

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

from the sale of scrip in the amount of $38,281,746.00.

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

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

Sales of scrip at MLB's club	$23,912,554.61
General admission, bar sales, coat check, room rental at MLB	$4,202,085.08[18]
Sales of scrip at 44th's club	$6,308,899.73
General admission, bar sales, coat check, room rental at 44th	$1,683,417.89[19]
Sales of scrip at Stiletto's club	$1,293,723.33
General admission, bar sales, coat check, room rental at Stiletto	$43,267.34[20]
Sales of scrip at Lace's club	$6,866,568.33
General admission, bar sales, coat check, room rental at Lace	$228,049.74[21]
Total Taxable Sales	**$44,438,566.05**

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

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

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

[21] To determine taxable sales at Lace's club from bar sales, door admissions, coat check and room rentals, the auditor compared the club's point of sale records to its reported sales for the quarter ending November 2013 and calculated and error rate of .16. The auditor then multiplied gross sales reported by the error rate to determine audited gross sales of $1,303,460.40 and additional taxable sales of $228,049.74 for the period September 1, 2013 through February 28, 2014.

Total Tax Due **$3,863,002.13**

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

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

95. Mr. Capeci had check signing authority on Metro's bank accounts and exercised that authority during the period at issue. Mr. Capeci signed checks from Metro's bank account payable to employees of his Clubs. The Division presented into the record several checks from Metro's bank account signed by Mr. Capeci.[23]

The Hearing Record

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

97. Petitioner entered into the record, among other items, the transcript of the hearing in the ***Matters of Scarfi and Metro Enterprises Corp.***, dated July 15, 2019, and the transcript of the hearing in the ***Matters of 44th Enterprises Corp. and MLB Enterprises Corp.***, dated January 29, 2020. Petitioner offered the testimony of Joseph Endres, Esq. (***see*** finding of fact 21) and

[22] The Division of Tax Appeals issued a determination on August 5, 2021, sustaining the notice of determination (***Matters of Scarfi and Metro Enterprises Corp.***, Division of Tax Appeals, August 5, 2021).

Professor Minna Kotkin.

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

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

---

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

CONCLUSIONS OF LAW

A. The first issue to be addressed is whether the sale of scrip at petitioner's Clubs is subject to tax. New York courts and the Tax Appeals Tribunal have repeatedly held that the sale of scrip used to purchase exotic dances is taxable:

> "As an initial matter, the question of whether payment for scrip sold used to purchase dances at an adult entertainment club is taxable as an 'amusement charge' or cabaret admission charge has been definitively answered in the affirmative in ***677 New Loudon*** and ***CMSG*** . . . . As noted, the Tax Appeals Tribunal has also repeatedly found that the sale of scrip to pay for dances and to make other payments at adult clubs constitute an amusement fee subject to sales tax" (***Metro Enterprises Corp. & Scarfi v New York State Dept. of Taxation and Finance***, Sup Ct, Albany County, August 29, 2017, Weinstein, J, Index No. 901347-17, citing ***Matter of 677 New Loudon Corp. v State of NY Tax Appeals Trib.***, 85 AD3d 1341 [3d Dept 2011], ***affd*** 19 NY3d 1058 [2012], ***cert denied*** 132 S Ct 422 [2013]; ***CMSG Rest. Group, LLC v State of New York***, 145 AD3d 136 [1st Dept 2016]; ***Matter of The Executive Club, LLC***, Tax Appeals Tribunal, April 19, 2017; ***Matter of HDV Manhattan, LLC***, Tax Appeals Tribunal, February 12, 2016; ***Matter of Marchello***, Tax Appeals Tribunal, April 14, 2011).

The evidence in this matter clearly establishes that petitioner's Clubs sold scrip that was used to purchase exotic dances at the Clubs. As discussed below, the sale of scrip is subject to sales tax as an admission charge to a place of amusement pursuant to Tax Law § 1105 (f) (1).

B. 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. An admission charge is defined as "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor" (Tax Law § 1101 [d] [2]). An amusement charge is defined as "[a]ny admission charge, dues or charge of roof garden, cabaret or other similar place" (Tax Law § 1101 [d] [3]). "Place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101 [d] [10]).

As noted above, New York courts and the Tax Appeals Tribunal have repeatedly held that the sales of scrip used to pay for exotic dances at adult entertainment clubs are subject to tax as

admission or amusement charges (***see Gans v New York State Tax Appeals Trib.***, 2021 NY Slip Op 03089 [3d Dept May 13, 2021] ["considering our prior holdings, and the statutory presumption that the sale of scrip was taxable . . . we conclude that petitioner failed to meet his burden"]; ***Matter of Marchello***, ["the sale of dance dollars . . . are properly taxable as amusement charges"]; ***Matter of HDV Manhattan, LLC***, ["the purchase of scrip to pay for a private dance constituted an admission charge within the meaning of Tax Law 1105 § (f) (1)"]; ***Matter of The Executive Club LLC and Gans***, Tax Appeals Tribunal, July 24, 2019 [receipts from the sale of scrip are taxable "as admission charges to a place of amusement and sales tax is collectable at the time the customer purchases the executive dollars"]). Indeed, in granting the Division's motion to dismiss a declaratory judgment action brought by Metro and Scarfi challenging the taxation of scrip sales at the Clubs, the court found that:

> "Any charge by a nightclub that offers exotic dancing for profit is taxable as an '[a]musement charge' within the definition of a 'roof garden, cabaret or other similar place' (Tax Law §§ 1101[d][3], [4]; 1105[f][3]; see Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib., 85 A.D.3d 1341, 1346, 925 N.Y.S.2d 686 [2011]). Further, receipts from the sale of scrip are taxable when the scrip is used to pay for a private dance at such a club (see Matter of HDV Manhattan, LLC v Tax Appeals Trib. of the State of N.Y., 156 A.D.3d 963, 966, 67 N.Y.S.3d 313 [2017]). It is 'presumed that all ... amusement charges of any type mentioned in [Tax Law § 1105(f)] are subject to tax until the contrary is established, and the burden of proving that any ... amusement charge ... is not taxable ... shall be upon the person required to collect tax' (Tax Law § 1132 [c] [1])" (***Metro Enterprises Corp. et al v New York State Dept. of Taxation and Finance***, 171 AD3d 1377 [3d Dept 2019]).

Clearly, the Clubs were places of amusement as defined by the Tax Law. The record shows that scrip was sold at petitioner's Clubs by petitioner's employees. Moreover, as discussed below, the evidence establishes that the scrip was used to purchase exotic dances at those Clubs, and not merely to tip the dancers. Such charges are therefore subject to tax as admission charges (***see Matter of The Executive Club LLC and Gans***; ***Matter of HDV Manhattan, LLC***).

Moreover, the sales of scrip are properly subject to tax even where the charges are collected by a separate entity (***see Matter of The Executive Club LLC***). In ***Matter of The Executive Club***, the Tribunal compared the circumstances in that case to those in ***Matter of HDV Manhattan***, and noted:

> "It was concluded in ***Matter of HDV Manhattan, LLC*** 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 to collect the sales tax. As pertains to this argument, there do exist some relevant factors that differ between the present case and ***Matter of HDV Manhattan, LLC***. For example, the Club in the present case does not receive the receipts from the charges for the use of the private rooms as the club in ***Matter of HDV Manhattan, LLC*** did; a separate corporation receives those receipts. However, there are more than enough similarities to find that the Club is indeed responsible for the collection of the sales taxes on the receipts from the admission charges for the personal dances. Specifically, the Club provided initial access to the public rooms (from which the private rooms could be accessed) and scrip for purchase that could be used to purchase the personal dances, and controlled the minimum prices that could be charged for the personal dances. Furthermore, the Club derived revenue from the scrip sold through both the surcharge it charged its customers and the redemption fees it charged the entertainers" (***Matter of The Executive Club LLC***).

Similar to the facts in ***Matter of The Executive Club***, while the scrip transactions here were processed through Metro's credit card terminals, they were also processed through the Clubs' terminals on occasion, the Clubs provided initial access to the public rooms from which the private rooms could be accessed, offered dances to its customers in both public and private rooms and scrip for purchase that could be used to purchase the personal dances and private rooms, and controlled the minimum prices that could be charged for the personal dances. Furthermore, the Clubs derived revenue from the scrip sold from both the entertainment in private rooms and fees collected from the dancers. As such, the charges for scrip transactions are properly subject to sales tax pursuant to Tax Law § 1105 (f) (1). The sale of scrip at petitioner's Clubs is also subject to tax as charges of a roof garden, cabaret or other similar place in the state (***see*** Tax Law § 1105 [f] [3]; ***Matter of HDV Manhattan, LLC***) and as entertainment or other

charges made to customers (***see*** Tax Law § 1105 [d]; ***Matter of 677 New Loudon Corp. d/b/a/ Nite Moves***, Tax Appeals Tribunal, April 14, 2010, ***affd Matter of 677 New Loudon Corp. v State of NY Tax Appeals Trib.,*** 85 AD3d 1341 [3d Dept 2011], ***affd*** 19 NY3d 1058 [2012], ***cert denied*** 132 S Ct 422 [2013]) .

C. Tax Law § 1132 (c) (1) creates a presumption that all amusement charges mentioned in Tax Law § 1105 (f) are subject to tax until the taxpayer proves otherwise. Moreover, a presumption of correctness attaches to a notice of determination upon its issuance and the burden is on petitioner to show, by clear and convincing evidence, that the audit method employed or the tax assessed is unreasonable (***see Matter of Hammerman***, Tax Appeals Tribunal, August 17, 1995; ***Matter of Meskouris Bros. v Chu***, 139 AD2d 813 [3d Dept 1988]; ***Matter of Surface Line Operators Fraternal Ord. v Tully***, 85 AD2d 858 [3d Dept 1981]). Here, petitioner has not met this burden.

Petitioner's contention that scrip was not used to purchase private dances is contradicted by the evidence in the record. Contrary to petitioner's argument that scrip could only be used for gratuities, Mr. Capeci testified at the prior hearings that the Clubs set a minimum price for exotic dances, charging a minimum of $20.00 for dances in the main room. The minimum charge of $20.00 for dances is consistent with what Mr. Capeci told the auditors during the audits. The fact that the Clubs set at least minimum prices for dances directly contradicts petitioner's argument that the Clubs did not sell dances and that customers' payments for such dances were entirely voluntary. Additionally, Mr. Capeci's testimony that the dancers could negotiate a lower price is contradicted by the affidavit of Ms. Dennis, a dancer at 44th's club, stating that, "I did not set the price for dances – Lace II did."[24] Moreover, the contracts between the Clubs and dancers contained in the record consistently refer to dance fees and tips. Similarly, the affidavits

submitted with petitioner's motion refer to both dance fees and tips. Additionally, the responsive pleadings of 44th and Capeci in the ***Dennis*** matter assert that some or all of the payments for performances were administrative charges, "which a reasonable customer should understand were not gratuities." These documents are consistent with the Division's findings during the field audit that in addition to a private room charge, patrons were charged a separate fee for private dances, which varied in price depending on the time spent with the dancer. While patrons may have used some scrip to tip the dancers, it is clear that scrip was also used to purchase dances. Mr. Capeci's and Mr. Scarfi's testimony, as contained in the transcripts introduced by petitioner, that no amount of scrip was used to purchase dances lacks credibility in light of the contradictions in the record. Indeed, in the decision dismissing Metro's declaratory judgment action, the court stated that the scrip could be used "***to purchase dances*** or tip exotic dancers at the clubs" (***Metro Enterprises Corp. et al v New York State Dept. of Taxation and Finance***, 171 AD3d at 1378 [emphasis added]).

Petitioner has taken the position that all scrip was used for gratuities and has offered no evidence as to how much scrip sold was used for mandatory performance fees and how much was used for tips. As noted, all amusement charges are subject to tax unless the taxpayer proves otherwise and petitioner bears the burden of proving what amount, if any, of the scrip was used for tips rather than dance fees (***see*** Tax Law § 1132 [c] [1]). Petitioner introduced incomplete ledgers for only a handful of dates, rather than complete ones for the entire audit period. Such sparse records do not support petitioner's contention that all scrip was used for gratuities (***see Gans v New York State Tax Appeals Trib.***).

Furthermore, the testimony of petitioner's witness, Mr. Endres, that the ledgers introduced as exhibit 3 were created by the entertainers and Metro's employee, Keith Warnick, is directly

---

[24] ***See*** footnote 3.

contradicted by the testimony of Metro's owner, Mr. Scarfi, that the ledgers were created by the Clubs' managers. Mr. Scarfi also testified that scrip transactions were not recorded in Metro's books and records and that he had no documents that would show a receipt for tips. As such, Mr. Endres's testimony and petitioner's exhibit 3 are accorded no weight.

D. Petitioner's reliance on the Labor Law and Fair Labor Standards Act as support for the contention that that the scrip was used only for voluntary gratuities and was not subject to sales tax is rejected as meritless. Petitioner's argument that he could not retain any portion of the scrip under the Labor Law and Fair Labor Standards act because the scrip was solely meant as a gratuity fails on two grounds: it is based on the premises that 1) the scrip was used solely as voluntary gratuity and 2) petitioner did not actually retain any portion of the scrip proceeds. The record shows that both premises are false.

First, while petitioner contends that under the Labor Law and Fair Labor Standards Act, employers cannot retain employee gratuities, he has failed to show what amount, if any, of the scrip was actually a voluntary gratuity given to the dancers. As discussed above, the evidence contradicts petitioner's assertion that payments from customers to dancers were "voluntary" and instead shows that scrip was used for the purchase of dances, to pay the required "minimum" for such dances, and to pay the dancer's fee in the private rooms, in addition to possible tips. Additionally, MLB's manager informed the auditors that scrip could also be used to purchase drinks. Having failed to present evidence distinguishing how much of the scrip was used for dance fees, as opposed to tips, petitioner has failed to meet his burden of proving what amount of scrip was actually paid over to the dancers as tips (***see Gans v New York State Tax Appeals Trib.*** [upholding the Tax Appeals Tribunal's decision that the administrative law judge correctly concluded that petitioners failed to meet their burden of proving the amount of tips based upon

the unconvincing nature of their records and the contradictory nature of the evidence]).

Second, the record clearly shows that contrary to petitioner's contention, the Clubs did not pay the full amount of scrip purchased by customers to the dancers. Contrary to petitioner's claim that all of the proceeds from scrip transactions belonged to the dancers, the evidence establishes that from the amounts of scrip that were redeemed by dancers, in addition to deducting Metro's redemption fee, the Clubs deducted and retained other charges such as house fees, rent, and late charges, as admitted by 44th and Mr. Capeci in the ***Dennis*** matter. Indeed, their admissions and affirmative statement in the ***Dennis*** answer that "some or all of the payments received by [the dancers] for performances were administrative charges, which a reasonable customer should understand were not gratuities" are incongruous with petitioner's position here. As such, petitioner has failed to meet his burden of proving what amount of scrip was paid over to the dancers as voluntary gratuities.

Petitioner further insists that the dancers were employees of the Clubs, but the evidence in the record clearly shows that during the period at issue, the dancers were not treated as employees. Whether the dancers are employees, independent contractors, or lessors of Club space has no bearing on the determination of whether the scrip was used to tip dancers, or whether the scrip was used to pay mandatory performance fees. Petitioner's Labor Law and Fair Labor Standards Act argument is based on the false proposition that the scrip was used solely for tipping and is rejected.

E. The Division also properly assessed sales tax against MLB and 44th for door admission charges, coat check fees, room rentals and beverage sales. The Division's auditor made numerous clear and unequivocal written and oral requests for books and records of the Clubs' sales. Petitioner's Clubs failed to produce such books and records. Based on the lack of records

provided, the Division reasonably concluded that petitioner's Clubs did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period. Having established the unavailability of required books and records, the Division properly estimated the tax from the information available in order to determine petitioner's Clubs' sales and sales tax liability (***see Matter of AGDN, Inc***., Tax Appeals Tribunal, February 6, 1997). Petitioner has presented no evidence or argument that the audit methodology or the amount of the assessment was erroneous regarding the assessment of additional tax for the Clubs' door admission charges, coat check fees, room rentals and beverage sales and has thus failed to meet his burden of proof (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

F. Petitioner argues that the Division should be estopped from assessing sales tax against him for the period at issue, contending that he detrimentally relied on prior audits and statements made by the Division, and further that the Division violated the State Administrative Procedure Act.

"In order to impose estoppel upon a party, three elements must be established: (i) conduct which amounts to a false representation or concealment of material facts; (ii) intention that such conduct will be acted upon by the other party; and (iii) knowledge of the real facts" (***Matter of Rashbaum v Tax Appeals Trib.,*** 229 AD2d 723, 725 [3d Dept 1996]). Additionally, the doctrine of equitable estoppel may not be invoked against a government agency charged with the administration of taxes unless exceptional circumstances are present and application of the doctrine is necessary to prevent a manifest injustice (***see Matter of Salh v Tax Appeals Trib.,*** 99 AD3d 1124 [3d Dept 2012], ***lv denied*** 20 NY3d 863 [2013]; ***Matter of Sodexho, USA, Inc.***, Tax Appeals Tribunal, November 21, 2007).

Petitioner has not established that the Division should be estopped from asserting tax against him. Petitioner has not shown that the Division made a false representation or concealed material facts, nor intended that he would rely on such conduct. Petitioner asserts that equitable estoppel should apply based on his claim that the Division conducted prior audits of other similarly situated entities and did not determine that tax was due on the sale of scrip for exotic dances. Specifically, petitioner maintains that he reasonably relied on prior audit results of West 20th Enterprises Corp. (West 20th) and Pacific Club Services Corp. (PCS), which are separate entities from petitioner's Clubs.

Petitioner has not established any representation made by the Division wherein the Division advised him that his Clubs' sales of scrip used to purchase exotic dances is not subject to tax. First, the prior audit results petitioner claims to have relied upon involved separate entities other than his Clubs. Additionally, petitioner has not shown that in either of the prior audits the Division stated that the sale of scrip to purchase dances is not subject to tax. It is noted that although petitioner cites to testimony from the Metro hearing regarding the PCS and West 20th audits, petitioner did not introduce into the record the documents that the testimony was discussing. In the ***Matter of Scarfi and Metro***, it was determined that the letters introduced by the taxpayers during the testimony regarding the PCS and West 20th audits did not support such testimony and did not state that the sale of scrip to purchase dances is not subject to tax (***Matters of Scarfi and Metro Enterprises Corp.***, Division of Tax Appeals, August 5, 2021).

Moreover, it is well settled that each tax period stands on its own, and results from prior audit periods are not binding on later audits (***see Matter of 677 New Loudon Corp. D/B/A Nite Moves*** ["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], ***lv granted*** 11 AD2d 605 [3d Dept 1960] ["(T)he assessment for one year is a separate and different cause of action from the assessment for another year"]; ***Matter of Winners Garage, Inc.***, Tax Appeals Tribunal, April 16, 2014 ["it is well established that audits are limited to the tax years at issue, and previous assessments and audits are non-binding upon future years"]). As petitioner relies on audits from prior periods and other non-party taxpayers, his argument for estoppel is rejected.

Petitioner further argues that the Division "adopted a policy that scrip is always subject to sales tax" in violation of the State Administrative Procedure Act. Contrary to petitioner's argument, the testimony of Ms. Scala, as well as the documentary evidence, show that the Division did not maintain such a "policy" and rather that determinations are made on a case by case basis. In this case, petitioner failed to provide proof to show that the scrip was used solely for voluntary gratuities.

G. The Division assessed sales tax against petitioner as a responsible person for MLB, 44th, and Metro. There is no dispute that petitioner was a responsible person for MLB and 44th during the period at issue. As such, he is personally liable for the collection and payment of sales tax due on behalf of MLB and 44th for the period at issue (***see*** Tax Law §§ 1133 [a], 1131 [1]). As it has been determined that the Division properly assessed sales tax against MLB and 44th for the period at issue, such sales tax liability flows through to petitioner as a responsible person.

In addition to issuing notices to petitioner as a responsible person for MLB and 44th, the Division also assessed tax due against petitioner as a responsible person for Metro. Petitioner argues that he was not responsible for the collection and remittance of sales tax on behalf of Metro. Petitioner bears the burden of proof to show, by clear and convincing evidence, that he

was not a person required to collect tax under Tax Law §§ 1131 (1) and 1133 (a) (***see Matter of Kieran***, Tax Appeals Tribunal, November 13, 2014; ***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

A person required to collect tax is defined to include, among others, every vendor of tangible personal property or services, every recipient of amusement charges, and corporate officers, directors and employees who are under a duty to act for such corporation in complying with the requirements of article 28 (Tax Law § 1131 [1]). The term "vendor" includes, in part, a person making sales of tangible personal property or services the receipts from which are taxed under article 28 of the Tax Law, a person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, of tangible personal property or services taxable under article 28, and a person who solicits business either by employees, independent contractors, agents or other representatives (Tax Law § 1101 [b] [8] [i] [A], [B], and [C]). A recipient is defined as "[a]ny person who collects or receives or is under a duty to collect an amusement charge" (Tax Law § 1101 [d] [11]). For purposes of taxes imposed under Tax Law § 1105 (f), an amusement charge includes any admission charge (Tax Law § 1101 [d] [3]), and admission charge, in turn, is defined as "the amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor" (Tax Law § 1101 [d] [2]).

Petitioner's Clubs were both vendors and recipients of amusement charges. Petitioner's Clubs were vendors of scrip, which was sold at his Clubs, and used to purchase dances at his Clubs. As discussed above, the receipts from the sale of scrip are taxable under article 28 of the Tax Law. Petitioner's Clubs were also recipients of amusement charges from the sales of scrip at the Clubs. Petitioner solicited the sale of scrip through his employees, namely, the Clubs'

managers who transacted the sales of scrip with the Clubs' customers. While the scrip sales were processed through both Metro's and the Clubs' credit card terminals, petitioner controlled the Clubs' employees who sold the scrip, processed the credit card transactions, and kept the books for the scrip transactions. Petitioner's Clubs were thus vendors and recipients of amusement charges and were under a duty to collect sales tax on such charges from the sale of scrip at the Clubs. Petitioner was a responsible person for MLB and 44th, and as such, he, in turn, is personally liable for the collection and payment of sales tax that MLB and 44th were determined to be responsible for on behalf of Metro for the sales of scrip for the period at issue (***see*** Tax Law §§ 1133 [a], 1131 [1]).[25]

Petitioner contends that he was not a responsible person for Metro, arguing that he was not an owner or officer and had no duty to act on behalf of Metro. However, personal liability under Tax Law § 1131 (1) is not limited to persons who are officers, directors or employees of the corporation (***see Matter of Ianniello***, Tax Appeals Tribunal, November 25, 1992, ***confirmed*** 209 AD2d 740 [3d Dept 1994]). Rather, as discussed above, responsible persons include vendors and recipients of amusement charges, petitioner's Clubs fall within those definitions, and petitioner was a responsible person on behalf of the Clubs. Furthermore, as noted, individual liability is not limited to offers, directors, and employees and whether an individual is personally liable for tax under Tax Law § 1131 (1) must be determined upon the particular facts of each case (***Matter of Cohen v State Tax Commn.***, 128 AD2d 1022 [3d Dept 1987]; ***Matter of Hall***, Tax Appeals Tribunal, March 22, 1990, ***confirmed*** 176 AD2d 1006 [3d Dept 1991]; ***Matter of Martin***, Tax Appeals Tribunal, July 20, 1989, ***confirmed*** 162 AD2d 890 [3d Dept 1990]; ***Matter of Autex Corp.,*** Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the

[25] To the extent that the same tax is assessed against Metro, MLB, and 44th for the same sales, they are all jointly and severally liable (***see Matter of Sacher***, Tax Appeals Tribunal July 2, 2015; ***Matter of Tafeen***, Tax

individual had or could have had sufficient authority and control over the affairs of the corporation (***see Matter of Ianniello***). Factors to be considered include the individual's status as an officer, the individual's knowledge of and control over the financial affairs of the corporation, the authority to write checks on behalf of the corporation, responsibility for maintaining the corporate books, authority to hire and fire employees, and the individual's economic interest in the corporation (***see Matter of Kieran***; ***Matter of Ianniello***; ***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990; ***Matter of Cohen*** at 1023). As noted by the Tribunal:

> "The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer's surface acts. Indeed, a person's officer status can be offset by the circumstances, such as where the officer's actions were done under the supervision and control of persons later convicted on criminal racketeering charges . . . . Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation" (***Matter of Ianniello***).

Thus, regardless of whether petitioner was an officer or employee of Metro, he could still be found liable for the sales tax assessed against it (***see Matter of Kieran*** ["holding of corporate office is one such factor, but is not determinative"]). In ***Matter of Ianniello***, petitioners, who were neither officers, directors nor employees of the company against which tax was assessed, were determined to be personally liable. As the Tribunal noted:

> "That petitioners had a substantial economic interest in, and substantial control over, the finances of P & G Funding is evidenced by the fact that they received $2,000,000.00 of unreported sales income over a four-year period. Certainly the definition of 'persons required to collect tax' in Tax Law § 1131(1) does not act as a shield to protect petitioners from sales tax liability simply because they devised a scheme to conceal their involvement with P & G Funding. As argued by the Division's counsel, petitioners acted as de facto officers or directors [footnote omitted]" (***Matter of Ianniello***).

Petitioner here possessed both the indicia of control and exercised actual authority and control over the affairs of Metro to make him personally liable for the collection of sales tax

---

Appeals Tribunal, January 3, 2002; ***Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995; Tax Law § 1133 [a]).

assessed against Metro. The record shows that petitioner had substantial financial interest and control over the sales for which Metro was assessed sales tax. Petitioner signed checks from Metro's bank accounts and made payments to his Clubs' employees through Metro's bank accounts. Petitioners' Clubs also received substantial unexplained payments from Metro. Petitioner hired and managed the Clubs' employees who performed the daily functions for Metro. Petitioner's employees performed the day-to-day functions of Metro, including managing the sale of scrip, processing patron's credit cards for the purchase of scrip, maintaining the books for the scrip transactions, and obtaining cash from Metro's bank to bring to the Clubs for the exchange of scrip to cash. Petitioner has thus failed to meet his burden of proving that he was not a person required to collect tax on behalf of Metro under Tax Law §§ 1131 (1) and 1133 (a).

H. Petitioner asserts that the assessments violate his constitutional right to due process, contending that "the Tax Department has established a legal landscape so complex and disjointed that Metro and its business partners cannot simultaneously comply with both the federal and state labor laws and the New York state sales tax law." To the extent that petitioner's argument challenges the constitutionality of the applicable provisions of the Tax Law on its face, the Division of Tax Appeals lacks jurisdiction over such constitutional challenges, and statutes are presumed to be constitutional on their face (***see Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003; ***see also Matter of Geneva Pennysaver***, Tax Appeals Tribunal, September 11, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988). To the extent that petitioner raises a constitutional challenge on an "as applied" basis, his argument is rejected as meritless. First, petitioner's argument must fail as he has failed to meet his burden of proving that the Division applied the Tax Law to him in a manner different than any other similarly

situated taxpayer (***see Matter of HDV Manhattan, LLC***; ***Matter of Finch, Pruyn & Co., Inc.***, Tax Appeals Tribunal, April 22, 2004). Second, petitioner's argument that the Division's assessment violates his due process rights by allegedly making it impossible to simultaneously comply with both the tax laws and labor laws is based on petitioner's groundless assertion that the scrip was paid to dancers as voluntary gratuities. As discussed above, there is no support in the record for petitioner's claim that scrip was used solely for voluntary gratuities.

I. Petitioner argues that Professor Kotkin's testimony was improperly excluded. The Tax Appeals Tribunal Rules of Practice and Procedure (Rules) allow for testimony and evidence offered at a hearing that is "relevant and material to the issues" in the matter (20 NYCRR 3000.15[d]). Professor Kotkin's testimony was properly excluded as irrelevant and immaterial to the issues of the case. The Division properly argued that the matter at issue is whether petitioner is a responsible person for the collection and payment of sales tax for the sales of scrip, admission charges, and other sales at the Clubs, and that the witness's opinions and conclusions on employment law issues was irrelevant. As determined above, whether the dancers are employees, independent contractors, or lessors of Club space has no bearing on the determination of whether the scrip was used to tip dancers, or whether the scrip was used to pay mandatory performance fees. As such, the testimony was properly excluded as irrelevant.

Moreover, expert testimony as to a legal conclusion is improper (***see Morris v Pavarini Constr.***, 9 NY3d 47, 51 [2007]; ***Buchholz v Trump 767 Fifth Ave.***, 5 NY3d 1, 7 [2005]; ***Lopez v Chan***, 102 AD3d 625 [1st Dept 2013]; ***McCoy v Metropolitan Transp. Auth.***, 53 AD3d 457, 459 [1st Dept 2008]; ***Flores v Infrastructure Repair Serv., LLC***, 52 Misc 3d 664, 667 [Sup Ct 2015]; ***see also Densberger v United Technologies Corp.***, 297 F3d 66, 74 [2d Cir 2002]; ***Hygh v Jacobs***, 961 F2d 359, 363 [2d Cir.1992]. Expert opinions which embody legal conclusions

interfere with the court's duty to interpret statutes and reach legal conclusions (***see e.g. Marguart v Yeshiva Machezikel Torah D'Chasidel Belz***, 53 AD2d 688, 689 [2d Dept 1976]; ***Measom v Greenwich & Perry Street Housing Corp.***, 268 AD2d 156, 159 [1st Dept. 2000]). Expert testimony is admissible where it assists the Court to understand the evidence or to determine a fact in issue (***see Santa Monica Pictures, LLC v C.I.R.***, 89 TCM 1157 [TC 2005]; ***ASAT, Inc. v Commissioner***, 108 TC 147, 168 [1997]. Expert testimony that expresses a legal conclusion does not assist the court and is not admissible (***see Alumax, Inc. v Commissioner***, 109 TC 133, 171 [1997], affd. 165 F3d 822 [11th Cir 1999]; ***Hosp. Corp. of Am. & Subs. v Commissioner***, 109 TC 21, 59 [1997]; ***FPL Group, Inc. & Subs. v Commissioner***, T.C. Memo.2002–92). Moreover, an expert who is merely an advocate of a party's position does not assist the court to understand the evidence or to determine a fact in issue (***see Sunoco, Inc. & Subs. v Commissioner***, 118 TC 181, 183 [2002]; ***Snap–Drape, Inc. v Commissioner***, 105 TC 16, 20 [1995], ***affd.*** 98 F3d 194 (5th Cir 1996). Determining whether expert testimony is helpful is a matter within the sound discretion of the court (***see Laureys v Commissioner***, 92 TC 101, 127 [1989]). As petitioner's questioning sought only Professor Kotkin's legal conclusions as to the employment relationship between the Clubs and the dancers, such testimony was properly excluded.

Petitioner further contends that the administrative law judge erred in not allowing petitioner's representative to proffer testimony. Contrary to petitioner's argument, the representative was given an opportunity and did proffer testimony. The representative was then given the opportunity to ask the witness other questions involving factual issues, beyond her legal conclusions. The representative then persisted along the same irrelevant line of questioning regarding the witness's legal conclusions related to employment law and the Division objected.

The administrative law judge properly sustained the Division's objection and the representative requested to again proffer testimony, which was denied. Such denial was proper, as the further proffer was irrelevant and repetitive of petitioner's proffer that was initially allowed in the first instance.

J. As noted above, petitioner introduced into the record the hearing transcripts from the ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.*** and the ***Matter of Scarfi and Metro Enterprises Corp***. In the ***Matter of Scarfi and Metro Enterprises***, the undersigned administrative law judge determined that the testimony of Anthony Capeci and John Scarfi lacked credibility. Based on a review of the entire record in this matter, I again find that the testimony of Mr. Scarfi and Mr. Capeci, as set forth in the transcripts presented into the record, lacks credibility.

The determination of whether testimony is credible rests with the trier of facts, "who has the opportunity to view the witnesses first-hand and evaluate the relevance and truthfulness of their testimony" (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992). A determination of testimonial credibility rests on the twin components of "competency," which is the "[o]pportunity and capacity to perceive combined with capacity to recollect and communicate," and "veracity," which is the "truthfulness of the witness" (***Matter of Impath***, Tax Appeals Tribunal, January 8, 2004). As noted by the Tribunal:

> "Any additional evidence relied on in support of specific testimony given, referenced to refresh the recall of a witness, or otherwise augmenting the testimony given concerning a claim of event, date, time and place, can itself offer insight as to whether the witness's recall is credible and correct . . . . So too, careful and objective review of such evidence and of any accompanying testimony or other evidence may reveal significant inconsistencies weighing against the likelihood that the testimony, thought honestly given, might through the fallibility of human memory, simply be incorrect or not clear and convincing evidence. It is against this background that the evidence in this case, including the testimonial evidence, must be evaluated" (***Matter of Robertson***, Tax Appeals Tribunal, September 23,

2010).

I find the testimony of Mr. Scarfi and Mr. Capeci, as reflected in the transcripts entered into the record, was vague, elusive, and unreliable. The veracity of Mr. Scarfi's and Mr. Capeci's testimony is called into question by the myriad of contradictions between their testimony and documentary evidence, inconsistencies in the testimony during each hearing, and the misrepresentations made in their affidavits.

K. The petitions of Anthony Capeci are denied, and the notices of determination dated December 1, 2016 are sustained.

DATED: Albany, New York
December 23, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE