STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN SCARFI	:	DETERMINATION DTA NOS. 828745
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2008 through February 28, 2014.	:	AND 828746

In the Matter of the Petition	:	
of	:	
METRO ENTERPRISES CORP.	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2008 through February 28, 2014.	:	

Petitioner, John Scarfi, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2008 through February 28, 2014.

Petitioner, Metro Enterprises Corp., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2008 through February 28, 2014.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, in Albany, New York, on July 15, 2019, at 10:30 a.m., with all briefs to be submitted by February 9, 2021, which date began the six-month period for the issuance of this determination. Petitioners appeared by Barton, LLP (Alvan L. Bobrow, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether petitioners have shown that no material facts are in dispute and they are entitled to a determination in their favor as a matter of law.

II. Whether petitioners have met their burden of proving that the sales of scrip at adult entertainment establishments were not subject to tax.

III. Whether petitioner Metro Enterprises Corp. was a responsible person within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the collection and payment of sales tax for general admission charges, bar sales, coat check fees and room rentals of 44th Enterprises Corporation, MLB Enterprises Corporation, Lace Entertainment, Inc., and Stiletto Entertainment LLC for the period March 1, 2010 through February 28, 2014.

IV. Whether petitioner John Scarfi was a responsible person within the meaning and intent of Tax Law §§ 1131 (1) and 1133 (a) for the collection and payment of sales tax for 44th Enterprises Corporation and MLB Enterprises Corporation, for the period December 1, 2013 through February 28, 2014.

V. Whether petitioners are entitled to estoppel against the Division of Taxation.

VI. Whether petitioners have shown that the assessments violate the federal and state constitutions.

VII. Whether petitioners have shown that alleged irregularities in proceedings constitute grounds to invalidate the Division of Taxation's assessments.

VIII. Whether petitioners have met their burden of showing reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. By letter dated April 21, 2014, the Division of Taxation (Division) scheduled a field

audit with petitioner, Metro Enterprises Corp. (Metro), for the period March 1, 2008 through February 28, 2014 (the period at issue or audit period). 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 information document request (IDR) describing the books and records to be produced.

2. Petitioner, John Scarfi was an officer, director and shareholder of Metro during the period at issue.

3. In Mr. Scarfi's affidavit, dated January 30, 2018, attached to petitioner's exhibit 1, he states that he is the sole officer of Metro. Mr. Scarfi's sworn statement is contradicted by Metro's bank signature card that lists Debra Zarucka as Metro's vice president.

4. Metro's audit was commenced as a result of audits the Division was conducting of two other entities, 44th Enterprises Corporation (44th) and MLB Enterprises Corporation (MLB). The audits of Metro, 44th, and MLB were conducted by the Division's auditor, Jennifer Genovese, under the supervision of auditor Christine Scala.

5. 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.

6. 44th, MLB, Lace and Stiletto (collectively referred to as the Clubs) operated adult entertainment clubs in New York, New York, during the period at issue.

7. During the audits, the auditors determined that Metro's role with the Clubs was integral, and they were structured in a way that one could not exist without the other. The auditors found that transactions were commingled between Metro and the Clubs and could not be distinguished. The auditors also determined that the same employees were working for and

receiving payments from both Metro and the Clubs.

8. 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.

9. The Clubs offered live exotic dance performances to patrons and collected general admission charges, admission charges for dances in private rooms, private dance fees, charges for alcoholic and nonalcoholic beverages, and coat check fees from customers. The Clubs also collected performance fees from the dancers in the amount of $150.00 per performance date (***see*** finding of fact 25).

10. 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. Scrip (also known as funny money or Lace dollars) is a fictitious currency patrons could purchase at the Clubs with a credit card. Scrip could be used to purchase exotic dances at the Clubs. In Mr. Scarfi's affidavit, dated January 30, 2018, attached to petitioners' exhibit 1, he affirms that "[p]atrons often used scrip for 'tips' in addition to 'dancer fees.'"

11. An example of the scrip dispensed by Metro was introduced into the hearing record by the Division. The scrip is in a denomination of "20," prominently displays that club's name, "Lace," and lists the club's address, and further states "visit our sister club, Lace 2" and lists the address. There is fine print at the bottom that is mostly illegible, the legible portion of which states "property of Metro Enterprises" and contains an expiration date in December 2013.

12. Customers could pay for exotic dances at the Clubs with cash or scrip. The use of scrip allowed customers to pay for dances with a credit card rather than using cash. A customer would purchase scrip through the Clubs' employees, who would run the charge through a credit

card terminal maintained by Metro. Metro charged patrons a 20% surcharge on every purchase of scrip (i.e., a customer is charged $120.00 in order to receive $100.00 of scrip). Metro charged the dancers a 10% or 20% redemption fee when they redeemed the scrip for cash.[1]

13. Metro had credit card terminals at each of the 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 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 and it is unclear from his testimony whether it was Metro's or the club's terminal that went down or what charges were placed on the other's terminal.

14. MLB's and 44th's credit card terminals were also used to process scrip transactions on occasion.

15. Entertainment Services Agreements (agreements) between Metro and the Clubs provided that Metro would refer exotic dancers to perform at the Clubs. The agreements provided that Metro agreed to schedule dancers for performance dates at the Clubs, Metro would provide the Clubs with adequate supplies of "funny money," Metro agreed to place on the Clubs' premises its credit card machines for all patron purchases of "funny money," and Metro agreed to be solely responsible for all credit card transactions conducted on its credit card machines. The agreements further provided that all customer credit card purchases of "funny money" shall be made exclusively on Metro's credit card machines, "the income from which shall be exclusively owned by Metro," and that the Clubs agreed to make no claim of any right, title or interest in the proceeds from Metro's credit card machines.

[1] Although Mr. Scarfi testified that the redemption fee is 10%, a contract between Metro and a dancer presented into the record provides that Metro retains 20% of the face value of the scrip.

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

17. In order for dancers to redeem scrip received from a customer into cash, they were charged a 10% (or 20%, ***see*** footnote 1) redemption fee by Metro. 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 Metro's redemption fee. The cash used to redeem the scrip came from Metro's bank accounts and was kept in safes located in the Clubs. The managers who sold the scrip to the patrons and exchanged the scrip into cash for the dancers were employees of the Clubs.

18. During the audit, Mr. Scarfi told the auditors that either he, Metro's 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.

19. Mr. Scarfi testified 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, Metro's business records show repeat payroll expenses to Catherine Navarro, Viktoryia Arbolay, Olga Deulina, Leticia Johnson, Brianna, Zurec, Jennifer Padilla, Jessica Stankowski, Krystle Rivera, Evtenlya Fletcher, and Ulrike Wrage. In addition to Metro's records showing payroll expenses, the Division introduced into the record numerous checks from Metro made out to these individuals and others, including but not limited to Alyshia Holland, Mario Barnes,[2] Jacqueline Martino, Jennifer Saffi, Sandra

[2] Mr. Barnes was a manager at MLB (***see Matter of 44th Enterprises Corp. and MLB Enterprises Corp.***, Division of Tax Appeals, February 18, 2021, finding of fact 2). Official notice of the record of proceedings in ***Matter of 44th***

Harting, Keema Jamison, Yvonne Fentelli, Daniella Visocky, Barbara Gallo, Greg Alfredo, Joseph Labetti, Phil Compargio, and Richard Kennedy. When questioned regarding the checks from Metro to these individuals, Mr. Scarfi testified that checks were made out to "Richard and Jessica and [Ulrike], those are employees of the club," and were for reimbursements of tips left by patrons when credit card transactions were processed by Metro. According to Mr. Scarfi, "[s]o what happened was, when the credit card terminals spits out a receipt customers wanted to leave the waitress money. So they would write, I want to leave this girl, I don't know five dollars, ten dollars whatever the amount was . . ." and added that it "only happened in one club." Mr. Scarfi did not identify which club or provide an explanation for the other checks in the record made out to the other individuals and checks that exceeded $5.00 or $10.00. During the audit of Metro, Mr. Scarfi told the auditor that the checks were written to the Clubs' employees.

20. Alyshia Holland, an employee of 44th, had signatory authority on Metro's bank account and withdrew money from Metro's account and delivered it to the Clubs when needed. Mr. Scarfi testified that he never paid Ms. Holland. Metro's bank records show checks paid from Metro to Ms. Holland as follows:

- 12/28/07, check #1298, $645.00
- 1/24/08, check #1490, $520.00
- 1/18/08, check # 1480, $1,025.00
- 3/13/08, check #1586, $590.00
- 4/3/08, check #1618, $705.00
- 5/23/08, check #1715, $955.00
- 8/1/08, check #1838, $580.00
- 8/15/08, check #1865, $1,135.00
- 8/28/08, check #1888, $845.00
- 9/18/08, check #1928, $760.00
- 11/21/08, check #2034, $685.00

Enterprises Corp. and MLB Enterprises Corp. 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]).

- 12/11/08, check #2082, $880.00

21. Mr. Scarfi testified that Metro did not make any payments to the Clubs and the Clubs made no payments to Metro. Contrary to Mr. Scarfi's testimony, the affidavit of Anthony Capeci, attached to petitioners' exhibit 1, states that the Clubs paid registration fees to Metro by cash.

When questioned further as to whether payments or loans were made by Metro to the Clubs, Mr. Scarfi testified that at one club, for about six months, either Metro's credit card terminal or the club's terminal went down and they "swapped out terminals." He did not identify the one club where he claimed this occurred or specify the alleged six month period. Metro's bank statements show the following payments to the Clubs:

Date	Club	Amount
11/25/08	MLB	$20,000.00
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
12/31/10	Stiletto	$3,728.00
12/31/10	Lace	$13,263.00
1/31/11	Lace	$45,347.00
4/11/11	Lace	$55,347.00
12/31/11	Lace	$67,056.00
3/13/12	Lace	$59,256.00
6/5/12	Lace	$48,836.00
1/20/14	44th	$15,000.00
1/23/14	44th	$2,173.00
1/24/14	44th	$10,000.00
1/31/14	44th	$10,000.00
2/24/14	44th	$10,000.00

There was no explanation in the record for the discrepancy between Mr. Scarfi's testimony and the documentary evidence.

22. During the audits, the auditors were informed by the Clubs' managers 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. The charges varied depending on the size of the room and the amount of time spent with the dancer.

23. The Clubs had a minimum fee of $20.00 for dances. Petitioners' witness, Anthony Capeci, testified that the dancers could negotiate a higher or lower price for a personal dance with the customer.[3]

24. The Division introduced into the record copies of Professional Exotic Dancer Registration and Referral Service Contracts (referral contracts) between Metro and the dancers, obtained by the auditors during the audit of Metro. The referral contracts provide that dance customers may use Metro's credit card machine to "purchase private dances" and Metro is entitled to retain 10% or 20% "of the face value of all 'Funny Money' purchased by patrons at any Registered Adult Nightclubs and used to pay DANCER for her services of rendering private dances."

25. The auditors also obtained copies of contracts between the Clubs and the dancers entitled Non-Exclusive Lease of Entertainment Facilities (contracts). The contracts provide that the dancers will pay the club $150.00 per performance date, and that all scheduling of dancers' performances shall be arranged through Metro.[4] The contracts also provide that the "Club agrees

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[3] It is noted that in ***Dennis v 44th Enterprises Corp. and Capeci***, (Sup Ct, NY County, Freed, J, Index No. 153420/2016), plaintiff Louisa Dennis, a dancer at 44th's club, stated in an affidavit that "I did not set the price for dances – Lace II did." Official notice of the record of the proceedings in ***Dennis v 44th Enterprises Corp. and Capeci***, 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]). Petitioners' witnesses testified regarding the ***Dennis*** matter and entered a portion of the pleadings into the record, but did not enter the entire record of proceedings. As such, official notice of the full record of proceedings in the ***Dennis*** matter is taken.

[4] The affidavits of both Mr. Scarfi and Mr. Capeci included with petitioners' exhibit 1 state that the agreements between the dancers and the Clubs specify that the dancers' scheduling will be negotiated between the dancers and the Clubs. Petitioners provided no explanation for the discrepancy between the contracts and the affidavits.

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.'" The contracts further provide as follows:

> "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."

26. Mr. Scarfi testified that dancers, waitresses and bartenders were all employees of the Clubs. Mr. Capeci testified that during the audit period, the Clubs were not treating the dancers as employees and were not reporting tips, withholding payroll taxes or paying worker's compensation insurance for the dancers. During the audit of Metro and the Clubs, the auditors were told that the dancers were tenants of the Clubs. In the ***Dennis*** matter answer (***see*** footnote 3), 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 the dancers did not receive compensation (i.e. hourly, salaried or otherwise) from them.

27. Mr. Scarfi offered contradictory testimony as to whether records were maintained for the 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.

28. Petitioners did not introduce into the record any documents with regard to patrons' credit card transactions for scrip or dancers' redemption of scrip for cash. The Division

introduced into the record copies of 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, March 23, 2012, June 2, 2012, June 14, 2012, July 10, 2012, July 23, 2012, and August 2, 2012 obtained during the audit. Mr. Scarfi identified the documents as business records of Metro. Attached to the ledger pages are settlement reports for the corresponding dates showing a summary of charges for Visa, Mastercard, and American Express, described by Mr. Scarfi as "batch reports." Metro's name and address appears at the top of the batch reports. The batch reports do not contain a tip line showing amounts paid for tips, and do not identify individual transactions. The amounts in the ledgers are inconsistent with the batch reports and petitioners offered no testimony to explain the records. When questioned whether he had any documents that would show a receipt for tips, Mr. Scarfi testified that he did not.

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

30. During the audit of Metro, the Division requested that Metro provide its books and records for the period at issue. Similarly, during the audits of the MLB, 44th, Lace and Stiletto, the Division requested that each provide their books and records for the audit period.

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

32. Metro maintained separate bank accounts for the credit card receipts from scrip sales from each of the 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.

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

34. The auditors also determined that Metro was responsible for taxes due on additional audited taxable sales made in each of the Clubs. During the audits of the Clubs, the Division determined tax due from the sales of beverages, room rentals, general admission charges and coat check charges.

35. For sales at MLB's club, the auditors 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 and additional taxable sales of $4,202,085.09 for the period March 1, 2010 through February 28, 2014 from MLB's door admissions, coat check, bar sales and room rentals.

36. The Division used the same method detailed in finding of fact 35 to determine the additional gross sales from bar sales, door admissions, coat check and room rentals at 44th's club for the period March 1, 2010 through February 28, 2014. For the quarter ending November 2013, 44th's audited gross receipts from bar sales, door admissions, coat check and room rentals were $662,326.08. 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 the quarter. The club had reported gross sales of $457,720.00 for that quarter. The auditor divided audited gross sales by gross sales reported to determine an error rate of 1.35%. The auditor then multiplied gross sales reported ($4,698,853.00) by the error rate to determine audited gross sales of $6,382,270.89 and additional taxable sales of $1,683,417.89 for the period March 1, 2010 through February 28, 2014 for door admissions, coat check, bar sales and room rentals at 44th's club.

37. The Division used a similar audit method to determine the taxable sales at Lace's and Stiletto's clubs from bar sales, door admissions, coat check and room rentals. Although Lace and Stiletto did not provide complete and adequate books and records as requested for the entire audit period, they provided some computerized point of sales records for the quarter ending November 2013. The auditors compared the point of sales records to the sales reported by Lace and Stiletto for that quarter.

38. For Lace, the auditor compared its point of sale records to its reported sales for the quarter ending November 2013 and calculated an 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 from door admissions, coat check, bar sales and room rentals at Lace's club.

39. For Stiletto, the auditor compared its point of sale records to its reported sales for the quarters ending November 2013 and February 2014 (no point of sale system 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 from door admissions, coat check, bar sales and room rentals at Stiletto's club.

40. 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 club	$23,912,554.61
General admission, bar sales, coat check, room rental at MLB	$4,202,085.08
Sales of scrip at 44th club	$6,308,899.73
General admission, bar sales, coat check, room rental at 44th	$1,683,417.89
Sales of scrip at Stiletto club	$1,293,723.33
General admission, bar sales, coat check, room rental a Stiletto	$43,267.34
Sales of scrip at Lace	$6,866,568.33
General admission, bar sales, coat check, room rental at Lace	$228,049.74
Total Taxable Sales	**$44,438,566.05**
Total Tax Due	**$3,863,002.13**

41. 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.

42. The Division issued four notices of determination, each dated December 1, 2016, to petitioner Scarfi. Notice of determination L-045796581 asserted tax due of $3,863,002.13 plus penalties and interest for the period March 1, 2008 through February 28, 2014 from Mr. Scarfi as a responsible person of Metro. Notice of determination L-045794591 asserted tax due of $94,622.50 plus penalties and interest for the period ended February 28, 2014 from Mr. Scarfi as a responsible person of MLB. Notice of determination L-045794596 asserted tax due of $25,339.55 plus penalties and interest for the period ended February 28, 2014 from Mr. Scarfi as a responsible person of 44th. Notice of determination L-045794597 asserted penalties of

$10,000.00 from Mr. Scarfi as a responsible person of 44th, for 44th's failure to provide books and records for the period ended February 28, 2014.

43. Mr. Capeci had check signing authority for Metro and signed checks on occasion. Mr. Capeci testified that he signed checks from Metro's account for employees when Mr. Scarfi wasn't available, but he did not specify whose employees he signed checks for. Mr. Scarfi testified that Metro only had one employee, Keith Warech, and Mr. Capeci signed checks on Metro's account for other individuals, at least some of whom were employees of the Clubs. The Division presented into the record copies of at least 28 checks from Metro's account signed by Mr. Capeci during the audit period. In contrast to the testimony and documentary evidence, Mr. Scarfi affirmed under oath in his affidavit introduced with petitioners' exhibit 1 that Mr. Capeci never exercised his check signing authority for Metro.

44. Mr. Scarfi had signatory authority on MLB's and 44th's bank accounts.

45. Mr. Capeci was the owner and officer of MLB and 44th.

46. In addition to the testimony of Mr. Scarfi and Mr. Capeci, petitioners offered the testimony of Jennifer Kinsley. When the nature of the witness's testimony was questioned by the Division's counsel, petitioners' representative stated that Ms. Kinsley was an expert in state and local sales tax. The Division objected to her qualifications as a sales tax expert and Ms. Kinsley admitted that she is not an expert in state and local taxation. Rather, she stated that she is "an expert in other legal matters that will not be relevant today" but could "factually . . . offer information . . . ." The administrative law judge instructed the parties that the witness would not be recognized as an expert witness for purposes of testimony, that opinion testimony would not be allowed, and the testimony was limited to factual issues for which Ms. Kinsley had first-hand knowledge. Ms. Kinsley testified that she is an attorney and has represented Mr. Capeci, MLB

and 44th in various employment-related lawsuits, and discussed the posture of the ***Dennis*** matter and a declaratory judgment action by MLB. She testified that Metro has a contractual relationship with 44th and MLB. Ms. Kinsley further testified regarding MLB's and 44ths club setups. She described that the Clubs sell beverages and have a public stage area where customers can view exotic dancers, as well as private party rooms where dancers perform for customers. She further testified that Metro provides machines in the Clubs which exchange customers' credit card payments for scrip, which, according to Ms. Kinsley, enables the customer to offer a credit card gratuity to the entertainers. During cross examination Ms. Kinsley claimed that patrons were never charged dance fees, that there were no dance fees that the club sets, and that patrons paid gratuities to entertainers of their own choice. Ms. Kinsley further testified that she did not look at ledgers or "in and out list of transactions" that showed Metro paying scrip value over to the entertainers, but later testified that she did see books and records showing that a transfer of scrip payments from Metro to the dancers took place. However, she did not identify or describe what books or records she was referring to, and petitioners did not offer any into evidence.

47. In the ***Dennis*** matter answer, 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).

48. Petitioners served first requests for admissions, dated June 20, 2019, and second requests for admissions, dated June 25, 2019, on the Division. The Division timely responded to petitioners' first and second requests for admissions on July 10, 2019 and July 15, 2019,

respectively.

49. On July 5, 2019, petitioners filed a motion for summary determination. Included with the motion was a memorandum of law, an affirmation from Mr. Bobrow dated July 3, 2019, affidavits from ***Metro Enterprises Corp. & Scarfi v New York State Dept. of Taxation and Finance*** (Sup Ct, Albany County, Index No. 901347-17) of John Scarfi, dated January 30, 2018, Glenn Orecchio, dated January 30, 2018, and Anthony Capeci, dated January 29, 2018,[5] copies of the following pleadings from ***Dennis v 44th Enterprises Corp., et al.***, (Sup Ct, NY County, Index No. 153420/2016): class action complaint, defendants-stakeholders' interpleader complaint against plaintiffs-claimants and third party defendants-claimants and cross-complaint for declaratory and injunctive relief against cross-defendants-claimants, answer and claim in interpleader of defendant-claimant Metro Enterprises Corp., and defendants-stakeholders 44th Enterprises and Anthony Capeci's response to plaintiffs' first request for admissions. Petitioners also included a copy of a complaint for declaratory and injunctive relief from ***MLB Enterprises Corp. v New York State Dept. of Taxation and Finance*** (US District Court, Southern District of NY), copies and petitioners' first and second requests for admissions, and a copy of a document entitled tax field audit record for MLB Enterprises Corp.

By letter dated July 8, 2019, the undersigned administrative law judge informed petitioners that pursuant to 20 NYCRR 3000.5 (e), the filing of a motion does not constitute cause for postponement of a hearing from the set date and the hearing would not be adjourned. Petitioners were told that issues raised in their motion may be raised during the scheduled hearing and would be ruled on in the determination in this matter. Petitioners presented a partial copy of their motion for summary determination into the record during the hearing, consisting of the

[5] The affidavits of Scarfi, Orecchio and Capeci each reference attached exhibits; however, no exhibits were attached to the affidavits.

notice of motion, memorandum of law and affirmation of Mr. Bobrow, and the above mentioned affidavits from ***Metro Enterprises Corp. & Scarfi v New York State Dept. of Taxation and Finance*** of Mr. Scarfi and Mr. Capeci, without the referenced exhibits attached, and an unsigned affidavit of Mr. Orecchio, without the referenced exhibits attached. At the time the motion was offered into the record the administrative law judge asked Mr. Bobrow whether it was the complete document that was previously filed, to which he responded yes. However, a comparison reveals that motion introduced into the record consisted of only a portion of the papers originally filed.

50. Petitioners presented a letter dated December 24, 2008 from Carla Adsit-Vassari, Director of the Division's sales tax audit bureau, addressed to petitioners' representative, Mr. Bobrow. The letter provides in pertinent part, as follows:

> "New York State Department of Taxation and Finance Director of Tax Audits, Nonie Manion, asked me to respond to your letter dated October 14, 2008, regarding West 20th Enterprises Corp. and Notices and Demand, L-027740782 and L-027759052, issued against the corporation and responsible person Anthony Capeci, respectively. Also at issue is refund claim #2007-05-0477 for the period June 1, 2002 through August 31, 2002.
>
> In your letter you refer to conversations you had with Joseph Carzo. According to Mr. Carzo, he spoke to you on August 16, 2007 and informed you that if appropriate books and records were provided to corroborate the 'unique' business model of West 20th and the records reflect the business scenario as discussed in theory, then refund #2007-05-0477 representing the tax paid on Notice and Demand L-027740782, for the quarter ended August 31, 2002, would be approved and submitted for payment, subject to the approval of the State Comptroller. Applicable books and records for the refund claim period, June 1, 2002, through August 31, 2002, are needed to support any adjustment. As of this date, you have not provided records to support your position that the dance revenue is not subject to sales tax. Accordingly, until complete books and records are supplied to substantiate the business model of West 20th Enterprises, the refund will not be approved."

51. Petitioners also introduced a letter dated January 7, 2011, addressed to Mr. Bobrow, that notified him that after performing a sales tax audit of Pacific Club Services, Inc., for the

period December 1, 1999 through November 30, 2004, the Division determined that no additional tax was due.

52. Petitioners also introduced a redacted, unsigned letter dated July 30, 2004, allegedly from Frank Susi, Tax Technician II of the Division's Sales Tax Instructions & Interpretations unit. The name and address of the party to whom the letter was sent is redacted. The letter states, in pertinent part:

> "I am writing in response to your letter dated July 16, 2004, [redacted] operates a gentlemen's club and cabaret in [redacted] New York. The club offers a full service bar and live entertainment, but does not serve food. You ask if the performance of private dances for patrons are subject to sales tax.
>
> Section 527.10 of the Sales Tax Regulations provides, in part:
> (a) Imposition. (1) A tax is imposed upon any admission charge in excess of ten cents to or for the use of any place of amusement in this State.
> * * *
> (b)(4)(i) Amusement charge. Any admission charge, dues or charge of a roof garden, cabaret or other similar place.
>
> Accordingly, if a gentlemen's club charges admission to enter the premises, the charges are subject to tax. Private dances, in and of themselves, which are performed for individual patrons, are not subject to tax. However, if private dances are performed in a separate room, then the charges for the private dances are considered to be admission charges subject to tax."

Petitioners did not offer any testimony authenticating the letter.

CONCLUSIONS OF LAW

A. The first issue to be addressed is petitioners' argument that material facts are not in dispute and they are entitled to a determination in their favor as a matter of law. On July 5, 2019, a mere ten days before the scheduled hearing in this matter, petitioners filed a motion for summary determination (***see*** finding of fact 49). The undersigned administrative law judge informed petitioners that the filing of a motion did not constitute cause for postponement of the hearing (***see*** 20 NYCRR 3000.5 [e]), that the hearing would not be adjourned, that they could

raise the issues raised in their motion during the scheduled hearing, and such issues would be ruled on in the determination in this matter (***see*** finding of fact 49). Petitioners presented a partial copy of their motion for summary determination into the record during the hearing and contend in their post-hearing brief that no material facts are in dispute and they are entitled to a determination in their favor as a matter of law.

Petitioners' motion for summary determination is denied. Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Vil. of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]). "If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts," then a full trial is warranted and the case should not be decided on a motion (***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]).

Petitioners' motion listed 73 alleged facts that petitioners claimed were not in dispute and stated that "Metro has served on the Department 73 separate requests for admission pursuant to Tax Appeals Rule 3000.6(b) [footnote omitted] and has not received a response as of the filing of this Motion. Nevertheless, Metro anticipates that the Department will admit each and every one

of the following facts . . .” Petitioners’ statement that they did not receive responses from the Division and assume the Division will admit each item is disingenuous in that their motion was brought prior to the dates the Division’s responses were due. Petitioners’ first and second requests for admissions were dated June 20, 2019 and June 25, 2019, respectively, and the motion was dated July 5, 2019. Assuming the requests were served, as dated, on June 20 and 25, 2019, the Division’s response deadline would have been July 10, 2019 and July 15, 2019, respectively. For petitioners to assert facts based on their “anticipation” that the Division would admit such facts is entirely meritless. When the Division timely responded, it did not admit to the majority of the alleged facts.

The only papers petitioners offered with their motion in support of the alleged facts were affidavits, from a separate matter, of Mr. Scarfi and Mr. Capeci, and an unsigned affidavit purporting to be from Mr. Orecchio. Each of the affidavits contain the caption for ***Metro Enterprises Corp. & Scarfi v New York State Dept. of Taxation and Finance***, and not for this matter, and state that they are “in support of Plaintiffs’ motion to renew Defendants’ motion to dismiss this declaratory judgment action, vacate the Decision and Order summarily determining the action on the merits; reinstate the Complaint, and permit the parties to litigate the action on the merits.” While the affidavits refer to attached exhibits, no exhibits were attached. Petitioners’ motion and affidavits provided no supporting documents or other sufficient evidence to eliminate any material issues of fact.

Although not included in the copy of petitioners’ motion introduced into the record, when petitioners originally filed their motion, in addition to the affidavits (without the referenced exhibits attached), petitioners included, in part, the following pleadings from ***Dennis v 44th Enterprises Corp., et al.***: copies of the class action complaint, defendants-stakeholders’

interpleader complaint against plaintiffs-claimants and third party defendants-claimants and cross-complaint for declaratory and injunctive relief against cross-defendants-claimants, answer and claim in interpleader of defendant-claimant Metro Enterprises Corp., and defendants-stakeholders 44th Enterprises and Anthony Capeci's response to plaintiffs' first request for admissions (***see*** finding of fact 49). Noticeably absent from the motion papers was defendants' answer to the class action complaint in the ***Dennis*** matter. Significantly, while petitioners' motion relies on the ***Dennis*** class action complaint as support for their argument that scrip belonged to the dancers as a gratuity issued by the patrons directly to them (citing paragraph 33 of the complaint), they failed to disclose that in the answer to the class action complaint, 44th and Capeci specifically denied that allegation (***see Dennis v 44th Enterprises Corp., et al.***, defendants' answer to class action complaint [NYSCEF Doc. No. 120 at ¶ 33) 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 . . . " (***id.*** at p. 10, fifth affirmative defense).

While petitioners submitted affidavits from ***Metro Enterprises Corp. et al v New York State Dept. of Taxation and Finance*** in support of their motion and as a basis for their claim that there are no questions of fact, they failed to mention that their motion for renewal, to vacate an order and judgment, and reinstate a verified complaint was denied by the court in that matter (***Metro Enterprises Corp. et al v New York State Dept. of Taxation and Finance***, 171 AD3d 1377 [3d Dept 2019]). Importantly, the court found that the scrip sold by Metro could be used "***to purchase dances*** or tip exotic dancers at the clubs" (***id.***, emphasis added). Such finding is directly contrary to petitioners' contention here that neither Metro nor the Clubs sold dances and that scrip was only used as a gratuity.

In ***Metro Enterprises Corp. et al v New York State Dept. of Taxation and Finance***, Metro and Scarfi brought a declaratory judgment action against defendants, Department of Taxation and Finance and Commissioner of Taxation and Finance, seeking a declaration that their business was not a vendor, that neither business nor owner was a person required to collect tax, and that the owner and business could not be held liable for sales tax obligations incurred by the clubs. The court granted defendants' motion to dismiss, holding 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]). Accepting the allegations in the complaint to be true, we find, like Supreme Court, that Metro may be deemed a 'recipient of amusement charges' required to collect sales tax (Tax Law §§ 1101[d][3], [11]; 1131[1])" (***id.***).

The court further found that: "As defendants argued in support of their motion to dismiss, however, there are myriad questions of fact regarding the relationship between plaintiffs, the dancers and the registered clubs" and that Metro and Scarfi failed to exhaust their administrative remedies to challenge the tax assessments (***id.***). Notably, the court found the existence of questions of fact despite the affidavits submitted by plaintiffs in that matter, which are the same as those submitted herein with petitioners' summary determination motion.

Petitioners' recycled affidavits now presented in support of their motion for summary determination are insufficient to eliminate any material issues of fact. Such questions of fact presented here are not properly resolved by summary determination, and the administrative hearing, as was held in this matter, was the appropriate procedure to develop a complete record

on which to resolve the factual questions. Such determination on the issues of fact and law presented requires a close examination of testimony, subject to cross examination, and documentary evidence presented into the record, and cannot be resolved on the basis of the motion papers.

Contrary to petitioners' argument, there are, indeed, numerous facts in dispute, which must be resolved by the fact finder based on a review of the entire record. Indeed, the evidence in the record disproves the facts as alleged by petitioners. Moreover, as discussed below, a review of the entire record shows that the facts do not support a determination in petitioners' favor.

B. The next issue to be addressed is whether petitioners' sale of scrip is subject to tax.

> "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 petitioners sold scrip that was used to purchase exotic dances at the Clubs. As discussed below, petitioners' sale of scrip is subject to sales tax as an admission charge to a place of amusement pursuant to Tax Law § 1105 (f) (1).

C. 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 sale 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"]).

Clearly, the Clubs were places of amusement as defined by the Tax Law. 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, Metro's sales of scrip are properly subject to tax regardless of whether the Clubs are operated by separate entities (***see Matter of The Executive Club LLC***). While the Clubs provided the public and private rooms where the dancers performed, Metro processed the credit card transactions for the scrip sales that could be used to purchase the private dances,

controlled the dancers schedules, and derived revenue from the scrip sold. As such, the scrip transactions are properly subject to sales tax as admission charges to a place of amusement (***id.***). Petitioners admit that Metro charged both a surcharge to its customers when purchasing scrip and a redemption fee to the dancers. The surcharges and transaction fees on the processing of scrip are likewise subject to sales tax (***see*** Tax Law § 1101 [d] [2]). Metro, as a vendor of scrip and recipient of amusement charges, was under a duty to collect and remit sales tax on such sales (***see*** Tax Law §§ 1101 [b] [8] [i] [A],[B],[C]; 1101 [d] [2], [3], [11]; 1131 [1]).

D. 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 petitioners 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, petitioners have not met this burden.

Petitioners' contention that scrip was not used to purchase private dances is contradicted by the evidence in the record. Contrary to petitioners' witnesses' testimony that alleges that scrip could only be used for gratuities, Mr. Capeci testified 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 their argument that they 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, wherein she stated "I did not set the price for dances – Lace II did."[6] Moreover, all the contracts between the Clubs and dancers contained in the record consistently refer to dance fees and tips. Similarly, the affidavits submitted by petitioners refer to both dance fees and tips. The agreements between Metro and the dancers provide that "dance customers may use Metro credit card machine to purchase private dances" and "dancer agrees that . . . Metro shall be entitled to retain ten (10%) percent [or 20% in some instances] of all the face value of all 'Funny Money' purchased by patrons at [the Clubs] and used to pay Dancer for her services of rendering private dances." 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. Petitioners' witnesses' testimony that no amount of scrip was used to purchase dances lacks credibility in light of the contradictions in the record.

Petitioners have taken the position that all scrip was used for gratuities and have 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 petitioners bear 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]). Petitioners did not introduce into the record any documents that showed how much of the scrip sold was used for tips. The

[6] ***See*** footnote 3. While petitioners submitted portions of the ***Dennis*** record into the record for this matter, they failed to include Ms. Dennis's affidavit.

incomplete ledgers included in the Division's exhibits that were obtained by the auditors from Metro during the audit were for only a handful of dates, rather than the entire audit period, and do not support petitioners' claim. Indeed, when asked if he could point to any documents in the record that showed tips paid by customers, Mr. Scarfi admitted that he could not. Having failed to present any evidence in this regard, petitioners have not met their burden of proof (***see Gans v New York State Tax Appeals Trib.***).

E. Petitioners' reliance on the Labor Law and Fair Labor Standards Act as support for their contention that that the scrip was used only for voluntary gratuities and was not subject to sales tax is rejected as meritless. Petitioners' argument that they 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) petitioners did not actually retain any portion of the scrip proceeds. The record shows that both premises are false.

First, while petitioners contend that under the Labor Law and Fair Labor Standards Act, employers cannot retain employee gratuities, they have 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 petitioners' 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. Having failed to present evidence distinguishing how much of the scrip was used for dance fees, as opposed to tips, petitioners have failed to meet their 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 such records and the contradictory nature of the evidence]).

Second, the record clearly shows that contrary to petitioners' contention, they did not pay the full amount of scrip purchased by customers to the dancers. Petitioners admit that they retained a redemption fee from the scrip, and the contracts show that petitioners kept at least 10% to 20% of the redeemed scrip. Furthermore, contrary to petitioners' claim that all of the proceeds from scrip transactions belonged to the dancers, the agreements between Metro and the Clubs provide that the income from all customer credit card purchases of "funny money" "shall be exclusively owned by Metro" and the Clubs agree to make no claim of any right, title or interest in the proceeds therefrom. This begs the question, if the dancers are employees of the Clubs and are entitled to all of the scrip proceeds as claimed by petitioners, why do the agreements between Metro and the Clubs provide that all of the income from customer credit card purchases of scrip belong to Metro?

The evidence further 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 admissions. 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 petitioners' position here. As such, petitioners have failed to meet their burden of proving what amount of scrip was paid over to the dancers as voluntary gratuities.

Petitioners further insist 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. Petitioners' 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.

F. In addition to determining that Metro was liable for sales tax on the sales of scrip, the Division also determined that Metro was a responsible person for the collection and payment of sales tax for general admission charges, bar sales, coat check fees and room rentals of 44th, MLB, Lace, and Stiletto for the period March 1, 2010 through February 28, 2014. Tax Law § 1133 (a) imposes upon any person required to collect the tax imposed by article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. 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 "person" includes corporations (Tax Law § 1101 [a]). 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]).

As discussed above, Metro was a vendor of scrip and recipient of amusement charges, and was under a duty to collect and remit sales tax on such scrip sales (***see*** Tax Law § 1131 [1]). The next question is whether Metro was also under a duty to collect and remit sales tax for general admission charges, bar sales, coat check fees and room rentals of 44th, MLB, Lace, and Stiletto.

General admission charges, bar sales, coat check fees and room rentals are all subject to sales tax (***see*** § 1105 [d]), 1105 [f] [3]). Based on the information garnered during the audits of Metro and the Clubs, the Division determined that Metro and the Clubs jointly operated the businesses and that Metro was a vendor responsible for the collection of sales tax on the general admission charges, bar sales, coat check fees and room rentals at the Clubs. The Division had a rational basis to determine that Metro was responsible for the collection and remittance of sales tax on such sales. The record shows the commingling and overlapping of the business operations between Metro and the Clubs – Metro and the Clubs conducted their operations at the same physical locations; Metro and the Clubs shared employees, with Metro admittedly using Clubs' employees to process the credit card transactions for scrip purchases, exchange scrip for cash for the dancers, record the scrip transactions, and withdraw cash from Metro's bank accounts and bring it to the Clubs; Metro's business records show payments listed as "payroll" to the Clubs' employees; Metro's bank records show checks made out to numerous individuals, at least some of whom were the Clubs' employees; Metro's bank records also show a number of unexplained checks in significant amounts made out the Clubs over the entire audit period; the example of scrip that is in the record predominantly displays the club's name, Lace, and address, as well as a "sister" location for Lace II, and in fine print states property of Metro; and Metro was in charge of recruiting, booking, and scheduling the dancers, who were integral to the Clubs' business.

Most significantly, Metro and the Clubs both concededly used each other's credit card terminals for sales. While Mr. Scarfi and Mr. Capeci attempted to downplay such occurrences, claiming that it only occurred at one club for a brief period when one of the terminals was down, their testimony was vague, evasive and unconvincing. They could not identify which club Metro "swapped" terminals with, whose terminal went down and which business was using the other's terminal, nor could they specify when this occurred. Additionally, Mr. Scarfi's testimony here that Metro and a club "swapped" credit card terminals for only six months is contradicted by his testimony in ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.*** that such transactions occurred a couple of times a week (***see Matter of 44th Enterprises Corp. and MLB Enterprises Corp.***, Division of Tax Appeals, February 18, 2021, finding of fact 11). Furthermore, while Mr. Scarfi claimed that when the Clubs used Metro's credit card terminals or vice versa, Metro reported it in a form 1099-K filed with the Internal Revenue Service (IRS), petitioners presented no documentary evidence on this point. Mr. Scarfi's testimony is contradicted by Mr. Capeci's testimony in ***Matter of 44th Enterprises Corp. and MLB Enterprises Corp.***, that Metro and the Clubs did not use any tax form or other forms to reconcile or explain Metro's use of the Clubs' credit card terminals (***see id.***).

Petitioners bear the burden of proof to show that Metro did not have sales for general admission, beverages, coat check and room rentals. By their own concession, Metro "swapped" credit card terminals with at least one of the Clubs during some period of time for sales. Petitioners have burden to prove the amount of sales that occurred on their credit card terminals and that sales tax was collected and remitted on such sales. Since petitioners presented no evidence to show that sales from door admission, room rentals, beverage sales and coat check were not charged on Metro's credit card terminals, the time frame or the Club with whom Metro "swapped" terminals, the amount of the charges for such transactions processed on Metro's

terminal, or that sales tax was collected and remitted on such sales, petitioners have not met their burden of proving that the Division's determination was erroneous and therefore the notice must be presumed correct. As such, the Division properly asserted tax due from Metro for general admission charges, bar sales, coat check fees and room rentals.

G. The Division assessed sales tax against Mr. Scarfi individually as a responsible person for Metro, MLB and 44th. There is no dispute that Mr. Scarfi was a responsible person for Metro during the period at issue. As such, he is personally liable for the collection and payment of sales tax due on behalf of Metro for the period March 1, 2008 through February 28, 2014 (***see*** Tax Law §§ 1133 [a], 1131 [1]). As it has been determined herein that Metro was properly assessed sales tax on the sale of scrip, general admission charges, bar sales, coat check fees and room rentals for the period at issue, such sales tax liability flows through to Mr. Scarfi as a responsible person of Metro.

As noted above, in addition to issuing a notice to Mr. Scarfi as a responsible person for Metro, the Division also issued separate notices to Mr. Scarfi as a responsible person for MLB and 44th. While the liability for the taxes assessed against MLB and 44th for which Metro was held responsible extends to Mr. Scarfi by virtue of his responsible person status for Metro, for the sake of a complete record it must be determined whether Mr. Scarfi was individually a responsible person for MLB and 44th.

As discussed above, 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]). Mr. Scarfi was a vendor and recipient of amusement charges only through his responsible person status as an officer and owner of Metro. But for his responsible person status with Metro, he was not personally making

general admission sales, bar sales, coat check sales and room rentals at the Clubs.

The mere holding of corporate office does not, per se, impose tax liability upon an office holder (***see Matter of Vogel v New York State Dept. of Taxation & Fin.***, 98 Misc 2d 222 [Sup Ct 1979]; ***Matter of Chevlowe v Koerner***, 95 Misc 2d 388 [Sup Ct 1978]; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed sub nom Matter of Landau v Tax Appeals Tribunal,*** 214 AD2d 857 [3d Dept 1995], ***lv denied*** 86 NY2d 705 [1995]). Additionally, personal liability under Tax Law § 1131 (1) is not limited to persons who are officers, directors or employees of the corporation (***Matter of Ianniello***, Tax Appeals Tribunal, November 25, 1992, ***confirmed*** 209 AD2d 740 [3d Dept 1994]). Rather, 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 individual had or could have had sufficient authority and control over the affairs of the corporation (***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, and the individual's economic interest in the corporation (***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***).

There is no evidence in the record here that Mr. Scarfi was an officer, director or employee of MLB or 44th, nor does the Division argue such. While the evidence shows that Mr. Scarfi had check signing authority for MLB and 44th, it is unclear from the record whether he exercised that authority. He did sign checks for employees of the Clubs and to the Clubs directly from Metro's bank accounts, but such checks are signed in his capacity as a responsible person of Metro. Additionally, while he signed contracts with the dancers and the Clubs, such contracts were between Metro and the dancers and Clubs, and not him individually. Similarly, while Metro controlled the schedules of the dancers, as indicated in the contracts, the parties to the contracts were Metro and the dancers, and not Mr. Scarfi individually. There is also no evidence that Mr. Scarfi signed corporate returns for MLB or 44th or had the authority to do so. The record does not show that Mr. Scarfi individually, outside of his position with Metro, had sufficient authority and control over the affairs of MLB and 44th. As such, notices of determination numbers L-045794591, L-045794596, and L-045794597 must be canceled.

H. Petitioners argue that the Division should be estopped from assessing sales tax against them for the period at issue, contending that they 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 Tribunal***, 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 Tribunal***, 99 AD3d 1124 [3d Dept 2012], ***lv denied*** 20 NY3d 863 [2013]; ***Matter of Sodexho, USA, Inc.***, Tax Appeals Tribunal, November 21, 2007).

Here, petitioners have not established that the Division should be estopped from asserting tax against them. Petitioners have not shown that the Division made a false representation or concealed material facts, nor intended that petitioners would rely on such conduct. Petitioners assert that equitable estoppel should apply based on their 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, petitioners maintain that they reasonably relied on prior audit results of West 20th Enterprises Corp. (West 20th), which was another entity that had previously been operated by Mr. Capeci, and Pacific Club Services Corp. (PCS), Metro's predecessor.[7]

Petitioners have not established any representation made by the Division wherein the Division advised petitioners that their sales of scrip used to purchase exotic dances is not subject to tax. First, the letters introduced by petitioners involved separate entities other than petitioners. Additionally, neither of the letters state that the sale of scrip to purchase dances is not subject to tax. Rather, the letter regarding PCS merely states that based on a review of records, no additional tax was due for the period December 1, 1999 through November 30, 2004. The letter regarding West 20th states that if the "unique business model" could be documented, then a refund would be granted. Petitioners made no credible showing that West 20th established that a

[7] As noted in finding of fact 52, in addition to a letter regarding PCS and a letter regarding West 20th, petitioners introduced a redacted, unsigned letter dated July 20, 2004. Because the letter is unsigned, does not indicate to whom it was sent nor what taxpayer it is regarding, and was not authenticated at hearing, it is accorded no weight. Further, it is noted that contrary to petitioners' argument, the letter specifically states that "if private dances are performed in a separate room, then the charges for the private dances are considered to be admission charges subject to tax."

"unique business model" existed. Furthermore, the claim that the Clubs have a similar "unique business model" in that they do not charge for exotic dances has been proven false for the periods at issue here.

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 petitioners rely on audits from prior periods and other non-party taxpayers, their argument for estoppel is rejected.

Petitioners further argue that the Division "adopted a policy that scrip is always subject to sales tax" in violation of the State Administrative Procedure Act. Contrary to petitioners' 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, petitioners failed to provide proof to show that the scrip was used solely for voluntary gratuities.

I. Petitioners assert that the assessments violate their 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 petitioners' 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 petitioners raise a constitutional challenge on an "as applied" basis, their argument is rejected as meritless. First, petitioners' argument must fail as they have failed to meet their burden of proving that the Division applied the Tax Law to petitioners 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, petitioners' argument that the Division's assessment violates petitioners' due process rights by allegedly making it impossible for them to simultaneously comply with both the tax laws and labor laws is based on petitioners' groundless assertion that the scrip was paid to dancers as voluntary gratuities. As discussed above, there is no support in the record for petitioners' claim that scrip was used solely for voluntary gratuities.

J. Petitioners allege that "irregularities in the proceedings undermine the validity of the [Division's] assessments." First, petitioners contend that the Division's attorney failed to conference with petitioners' attorney in accordance with 20 NYCRR 3000.11 and allege that it was prejudiced by its inability to proofer "factual stipulations." However, petitioners claim as to factual items they contend should have been stipulated were in fact items in dispute and not supported by the record. Furthermore, petitioners have made no showing that they submitted a proposed stipulation of facts to the Division pursuant to 20 NYCRR 3000.11. Had petitioners submitted such proposed stipulation to the Division, and had the Division not complied with the regulations in responding to a proposed stipulation, petitioners' remedy would have been to file a motion to compel stipulation pursuant to 20 NYCRR 3000.11 (f). Petitioners made no such

motion prior to the hearing in this matter and their arguments are rejected as meritless and moot.

Second, petitioners claim that the Division improperly denied requested admissions. 20 NYCRR 3000.6 (b) (iii) provides that requests for admissions "shall pertain to matters as to which the party requesting the admission believes there can be no substantial dispute at the hearing, and which are within the knowledge of the adverse party or can be ascertained by him or her upon reasonable inquiry." The Division properly objected to and denied the admissions requested by petitioners, as such items were in substantial dispute or not within the Division's knowledge.

Petitioners next contend that the Division misrepresented Mr. Capeci's status as a non-party witness. Petitioners' argument is meritless, as Mr. Capeci was not a named petitioner in these proceedings and the petitions at issue in this matter were not filed by or on behalf of Mr. Capeci. Indeed, at the beginning of the hearing, petitioners' representative identified Mr. Capeci as "the owner of one of the related entities. . . . I subpoenaed him, he is one of my witnesses," rather than stating that he was a party to the proceedings. When asked that he wait outside of the hearing room until called to testify if he was not a party to the proceeding, Mr. Bobrow responded "Okay." Petitioners' assertion that the Divisions' counsel misrepresented Mr. Capeci's status is baseless.

Petitioners also argue that the Division questioned witnesses about documents it did not identify in its hearing memorandum. Petitioners do not identify the documents they allege were improper. A review of the transcript pages cited by petitioners reveal that during testimony of the Division's witness, two items were not introduced into the record but were merely shown to the witness to refresh her recollection. Any written memorandum or entry may be used to refresh a witness's recollection (***see Huff v Bennett***, 6 NY 337, 337 [1852]). As such, petitioners' argument in this regard is rejected.

Petitioners further argue that the Division's closing argument was improper. Petitioners claim that the Division raised facts not in evidence or that were disproven is not supported by the record and is rejected as meritless.

Finally, petitioners argue that consent forms to extend the period of limitation for assessment are defective, contending that they do not contain the Commissioner's seal. It is unclear as to what consent forms petitioners are referring, as they do not point to any in the record. Indeed, Metro did not file any sales tax returns for the period at issue and as such, no consents to extend the period for limitation would be required because no statute of limitations would apply (***see*** Tax Law 1147 §[b]).

If petitioners are referring to consents to extend the statute of limitations for the Clubs' assessments, for which Metro was held responsible, petitioners have again failed to point to any consents in the record to support their argument. Furthermore, the Tribunal rejected the same argument regarding seals on consents in ***Matter of The Executive Club LLC*** (Tax Appeals Tribunal, April 19, 2017), noting that "Tax Law § 1147 (c) requires only the consent of the taxpayer to extend an applicable statute of limitations and requires no action on the part of the Division to validate such consent." The Tribunal found that neither the signature of the Division's employee, nor the official seal is required for a valid extension of the statute of limitations in regard to sales and use taxes, and stated, "We concur with the Division's assertion that the failure of the Division to affix the Commissioner's seal to a document purporting to extend the statute of limitations in a given matter does not invalidate the documents" (***id.***; ***see also Matter of Executive Club LLC & Gans***). As such, petitioners' argument is rejected as frivolous.

K. While petitioners did not specifically raise the issue of the Division's assertion of penalties, such issue will be addressed herein. The Division asserted penalties against petitioners

pursuant to Tax Law §§ 1145 (a) (1) (i) and 1145 (i).

Tax Law § 1145 (a) (1) (i) imposes a penalty for the failure to timely file a return or pay any tax imposed by articles 28 and 29 of the Tax Law. Penalties may be abated if such failure or delay was due to reasonable cause and not due to willful neglect (Tax Law § 1145 [a] [1] [(iii]). Consistent with this statute, the regulations provide that penalty imposed under Tax Law § 1145(a) (1) (i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1 [a] [1]).

Petitioners bear the burden of proving that the failure to report and pay the required amount of sales tax was due to reasonable cause and not due to willful neglect (***see Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, January 16, 1992). "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***Matter of MCI Telecommunications, Corp.***, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). Petitioners here have not established reasonable cause and have failed to meet this burden.

Tax Law § 1145 (i) imposes additional penalties for failure to maintain or make available sales tax records to the Division. Such provision provides for a penalty of up to $1,000.00 for the first quarter or part thereof for which the failure occurs, and not to exceed $5,000.00 for each additional quarterly period or part thereof for which the failure occurs. Such penalties may be abated if petitioners prove that such failure to maintain and produce records was due to reasonable cause and not willful neglect (Tax Law § 1145 [i]).

Petitioners have failed to meet their burden of proving that their failure to maintain and

produce requested books and records was due to reasonable cause and not due to willful neglect. The Division made numerous oral and written requests for petitioners' books and records. Petitioners failed to provide all of the records requested, and those that were provided were incomplete. As petitioners have presented no evidence to show that their failure to maintain and produce the requested books and records was due to reasonable cause and not willful neglect, the imposition of such penalties is proper. Nevertheless, to the extent penalties were asserted personally against Mr. Scarfi as a responsible person of 44th (notice no. L-045794597), such penalties are canceled in accordance with conclusion of law G above.

L. Based on a review of the entire record, it is determined that the testimony of Mr. Scarfi and Mr. Capeci 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 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, and the misrepresentations made in their affidavits. Additionally, Ms. Kinsley's testimony that the Clubs did not charge dance fees is accorded no weight, as it is inconsistent with the documentary evidence in the record. Also, Ms. Kinsley's testimony that the dancers were employees of the Clubs is contradicted by her client Mr. Capeci's testimony that during the period at issue the dancers were not treated as employees, as well as 44th's and Mr. Capeci's responsive pleadings in the ***Dennis*** matter.

M. The petition of John Scarfi is granted to the extent indicated in conclusion of law G, but is otherwise denied, notices of determination numbers L-045794591, L-045794596, and L-045794597 are canceled, and notice of determination number L-045796581 is sustained; the petition of Metro Enterprises Corp. is denied and the notice of determination number L-045794061, dated December 1, 2016, is sustained.

DATED: Albany, New York
August 5, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE