STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
1605 BOOKCENTER, INC.	:	DECISION DTA No. 800121
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, 1976 through August 31, 1979.	:	

Petitioner 1605 Bookcenter, Inc., c/o C & F Merchandise Company, 303 West 42nd Street, New York, New York 10036 and te Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on May 17, 1990 with respect to petitioner's 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, 1976 through August 31, 1979. Petitioner appeared by Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria (Herald Price Fahringer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel). Both parties filed briefs on exception. Oral argument, at the request of the parties, was heard on January 30, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner maintained and made available to the Division of Taxation adequate and complete books and records from which the exact amount of tax due could have been determined.

II. Whether, if adequate books and records were not maintained, the test period markup audit of petitioner's bookstore sales was reasonable.

III. Whether petitioner's receipts from the sale of certain publications were exempt from sales tax under section 1115(a)(5) of the Tax Law because they were receipts from the sale of periodicals.

IV. Whether charges imposed by petitioner for the viewing of live performances through a coin-operated apparatus were subject to sales tax.

V. Whether charges imposed by petitioner for admission to a theater where motion pictures and live performances were shown were subject to sales tax.

VI. Whether the sales tax audit was conducted in a discriminatory manner or for the purpose of curtailing petitioner's First Amendment rights.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and as stipulated to by the parties, except for the first paragraph of finding of fact "5" which has been modified. The Administrative Law Judge's findings of fact, the stipulation and the modified finding of fact are set forth below.

On July 21, 1980, the Division of Taxation issued to petitioner, 1605 Book Center, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1976 through August 31, 1979, assessing tax due of $141,686.11 plus interest. No tax was assessed for the period September 1, 1976 through August 31, 1977.

Petitioner operated a commercial establishment in New York City's Times Square area. It was in the business of selling books, magazines, newspapers and novelty items, operating a theater where movies were exhibited and live performances were given, and providing "peep" shows. Its entire business was sexually oriented and all materials and performances offered to its patrons were sexually explicit.

An audit of 1605 began in or around May 1979. By letter dated May 7, 1979, the Division informed petitioner that a field examination of petitioner's books and records for the period March 1, 1976 through February 28, 1979 had been scheduled for May 14, 1979. The

letter stated: "All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates, etc. and all Sales Tax records." The following books and records were made available by petitioner: sales tax returns and related worksheets, Federal income tax returns and related worksheets, a sales journal, a purchases journal, some purchase invoices, and a general ledger. These records were judged to be in good condition.

Petitioner's general ledger showed gross receipts broken down into three categories: taxable [bookstore], nontaxable [bookstore] and vending machines. The auditor was informed that petitioner considered one-third of its bookstore sales to be taxable. All other receipts from all other sources were deemed by petitioner to be nontaxable. None of the auditors who participated in this audit were available to testify, and it is not possible to determine from the audit documents the exact nature of the charges included in each of the three categories shown in the general ledger. The Field Audit Report indicates that four categories of sales were included by the Division under the general heading "vending machines and other income": (1) sales income from live burlesque shows; (2) sales income from live peep shows; (3) sales income from vending machines; and (4) sales income from film viewers. All of these receipts were determined by the Division to be subject to sales tax. Total vending machine and other receipts as shown in petitioner's general ledger were $1,577,592.32, with a tax due on that amount of $126,207.39.

We modify the first paragraph of finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> The Division performed a test period markup audit of petitioner's bookstore sales. The audit report indicates petitioner agreed to a test period audit. The narrative portion of the field audit report provided only a minimal description of the audit methodology employed, however, the audit workpapers were detailed and did demonstrate the method used.[1]

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[1] The first paragraph of finding of fact "5" of the Administrative Law Judge's determination read as follows:

> "The Division performed a test period markup audit of petitioner's bookstore sales. The narrative portion of the

The test period selected was June 1978. Petitioner supplied invoices from two suppliers: Model Distributors and Century Sales Company.

The auditor listed each invoice on a columnar sheet by date, invoice number and the total amount of each invoice. A fourth column was headed "taxable purchases". Publications with the following titles were deemed to be nontaxable purchases: Advocate, Screw, Pleasure, Hook, Unique, Swing, Black and several publications identified only by initials. All other publications were deemed taxable, including publications identified on the invoices only as magazines, comics or by order number or title. Those publications deemed nontaxable were not included in the markup test figures. Century invoices showed only two items, dolls and unspecified magazines; the former were films purchased for use in the film viewing booths and for sale in the bookstore.

The Model invoices generally showed a "cover price", quantity, unit purchase price, and total purchase price for each item listed. The auditor applied the cover price to the number of items purchased to calculate total taxable sales of each item. Taxable sales of each item were totaled on each invoice and entered on the auditor's worksheet as "taxable at selling". The category was referred to as audited taxable sales. Where a cover price was not shown, the auditor marked up purchases on the Model invoices by 50 percent to determine the selling price. This percentage was obtained from an individual identified in the record only by name. Total purchases shown on the Century invoices were marked up 100 percent to determine a selling price. The basis for this markup percentage is not in the record.

Both Model and Century issued credit invoices for returned items. Amounts on the credit invoices were subtracted from total purchases and taxable purchases. For the purpose of determining audited taxable sales on returned items, total credit given was marked up 66 percent

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field audit report provided only a minimal description of the audit methodology employed; however the audit workpapers were detailed and did demonstrate the method used."

We modified this finding of fact to fully reflect the record.

on Model invoices and 100 percent on Century invoices. Using this method the auditor determined that total purchases from Model were $6,952.42; taxable purchases were $4,847.34 and audited taxable sales were $7,916.60. From the Century invoices, total purchases were $5,009.95 (including a shipping and handling charge of $6.20), taxable purchases were $5,003.75, and audited taxable sales were $10,007.50. The auditor determined that petitioner purchased some films for use in its 46 film viewing machines, rather than for resale, and an adjustment was made to reflect this fact. After this adjustment was made, total purchases were determined to be $11,962.37, taxable purchases were determined to be $8,471.05, and audited taxable sales were determined to be $15,164.10. Taxable purchases were divided by total purchases to calculate a taxable ratio of 70.81 percent. The auditor also calculated a markup of 79.01 by subtracting taxable purchases from audited taxable sales and dividing the result by audited taxable sales.

Additional taxable bookstore sales were determined by applying the taxable ratio to total purchases as shown in petitioner's records to determine audited taxable purchases. The markup percentage of 79.01 was applied to audited taxable purchases to calculate audited taxable sales of $406,487.00. An error rate of .9084 was determined from a mathematical comparison of reported taxable sales to audited taxable sales. Application of the error rate to reported taxable sales yielded additional taxable sales of $193,484.00 with a tax due on that amount of $15,478.72. No tax was assessed for the period June 1, 1976 through November 30, 1977.

As an adjunct, or more likely a preliminary, to the markup test, the auditor prepared a schedule, segregating purchases shown on the June 1978 invoices into four categories: papers, pocket books, magazines and novelties. The publications placed in the category of "papers" were the same as those determined to be nontaxable in the markup test. Publications identified only as magazines or comics were placed in the category magazines. Publications clearly identified as books, those having a cover price of less than three dollars and those identified only by order number, were classified as pocket books. All other publications were classified as magazines. In the markup test audit, all magazines were deemed taxable.

When conducting a test period audit of a bookstore selling sexually explicit materials, the Division currently instructs auditors to examine each publication on sale during the test period, to record the title of the publication and some information about the contents, and to indicate whether the publication is issued periodically. There is no evidence in the record that this procedure was followed here.

Petitioner's business is no longer in operation. The only witness who was on the premises of 1605 during the audit period was Dr. Charles Winick, who was qualified as an expert in the field of so-called "adult entertainment". Dr. Winick visited 1605 in 1978 and 1979. He testified that the mechanics for observing a peep show movie, a live peep show and a private show were essentially the same. The patron entered a booth with a door that could be closed behind him. He placed coins in a slot which caused a screen or curtain to rise and enabled him to view a show of some sort, either live or on film. The booth provided the patron with privacy, screened out noise and light and ensured that each patron paid a separate charge for viewing. When coins or tokens were placed in the slot, a light went on outside the booth to indicate that the booth was in use. The length of the patron's viewing time was controlled by the number of tokens he placed in the slot. When his time ran out, the screen or curtain came down, and the patron exited the booth.

Dr. Winick personally observed a theater located on the second floor of 1605. The theater was described as being approximately 15 feet by 20 feet and large enough to hold about 50 patrons. The movies shown at that time were generally feature length pornographic films such as "Deep Throat" and "Behind the Green Door". The films were shown continuously from approximately noon until 11:00 P.M., interspersed by live performances of approximately 15 to 20 minutes in length.

At the request of petitioner's counsel, Dr. Winick conducted a survey in 1978 of publications sold by petitioner. He examined every publication in a magazine format, identifying its contents, format, publisher, date of publication, and evidence of serial publication such as a volume number, issue number and year. He inspected 351 publications and found only 29 that

lacked evidence of serial publication. The publications he examined typically contained pieces of fiction and separate articles on a variety of topics.

Petitioner offered the testimony of Scott Wexler, the comptroller since 1985 of C & F Merchandising, a holding company for 1605 and other affiliated companies, to describe the accounting methods and procedures in effect during the audit period. Mr. Wexler's testimony was based on his familiarity with petitioner's accounting system and procedures and conversations with persons employed by petitioner during the audit period. He stated that receipts from peep shows were not segregated according to the type of entertainment being provided because all peep show receipts were considered to be nontaxable. The peep show apparatus included a meter which registered the number of coins placed in the receptacle. Approximately twice a week, an employee opened the coin receptacles, collected the monies inside, read the meters and entered the meter reading for each individual apparatus on a columnar sheet. The meter readings were used as an internal control. After the monies collected were verified against the meter readings, the sheets were discarded. According to Mr. Wexler, the category in the general ledger entitled "vending machines" included receipts from the peep shows and from the theater.

Mr. Wexler testified that the bookstore used a cash register which produced a tape. The tapes were kept for at least three years. No tapes were produced at hearing. According to Mr. Wexler, petitioner and its affiliated companies regularly perform their own tests to determine what portion of their bookstore sales are subject to sales tax. Petitioner estimated that one-third of its bookstore sales were taxable based on such a test.

Mr. Wexler performed his own calculations to estimate gross receipts from the different types of peep shows.

Total revenue from all operations, taken from petitioner's books and records, was stated to be $1,404,000.00 for the period March 1, 1976 through February 28, 1979.[2] Bookstore

[2]Petitioner's sales tax returns for this period reported gross sales of $1,027,494.00.

receipts, again taken from petitioner's records, were $413,278.00. The remaining $990,722.00 was revenue from coin operated peep shows and the theater.

Mr. Wexler stated that the average movie peep show collected approximately $25.00 per day and 50 such machines were in operation during the audit period. By simply multiplying the number of machines, times average receipts of $25.00, times the number of days in a sales tax quarter (the machines were in operation 24 hours per day, 7 days per week), he estimated quarterly receipts. Quarterly receipts were aggregated to estimate total receipts for the audit period of $604,501.00. Receipts from the live peep shows and private peep shows were estimated in the same fashion. Mr. Wexler estimated that these booths collected only $10.00 per day primarily because they were operated fewer hours per day and fewer days per week. Petitioner operated 18 live peep show booths and 5 private peep show booths during the audit period. Total receipts from these booths were estimated at $87,353.00 and $24,568.00 respectively.

Theater revenue was estimated by subtracting receipts from the peep shows from total receipts. It amounted to $274,300.00.

According to Mr. Wexler's calculations, the film viewing machines accounted for approximately 59 percent of all revenue from sources other than the bookstore. The live peep shows accounted for approximately 9 percent of such revenue; the private peep shows accounted for approximately 3 percent of such revenue; and the remaining 29 percent of this revenue was produced by the theater.

Petitioner presented the testimony of Mr. Ralph Schwarz, an attorney representing MJM Enterprises, which operates a business similar to that operated by petitioner. In the course of a sales tax audit of MJM, Mr. Schwarz was informed by the Division that coin-operated machines are not subject to sales tax. He communicated this information to MJM's accountant, Norman Waxman, who wrote to the Division's Technical Services Bureau to confirm that information. By letter dated January 10, 1983, the Division advised Mr. Waxman that coin operated machines for viewing films were not subject to sales tax. Mr. Waxman again wrote to the Division asking

whether the Division's opinion would also apply to coin operated machines for viewing of a live performance. By letter dated May 5, 1983, a Division employee advised as follows:

> "Pursuant to the findings of the court in Bathrick Enterprises vs. Murphy the receipts from coin operated amusement devices are not for the rental of tangible personal property nor an admission charge to a place of amusement. We find little difference between a coin operated device which allows viewing of a live performance and those addressed in Bathrick. Both devices are permitted to operate and function by the insertion of a coin and neither grant the patron admittance to a place of amusement. Accordingly, it is our opinion that the receipts from these devices are not subject to the sales tax."

As the result of a sales tax audit, MJM Enterprises was assessed $580,000.00, including penalty and interest, premised upon the ground that MJM's receipts from all coin-operated machines were subject to sales tax. The tax assessed on such receipts was cancelled following a conciliation conference conducted by the former Tax Appeals Bureau.

Petitioner presented the testimony of Dr. Winick and Mr. Schwarz to support its contention that the sales tax assessment in dispute was conducted as part of a plan to rid the Times Square area of sexually oriented businesses. Dr. Winick testified that a major goal of the redevelopment program in Times Square was to close down businesses specializing in sex. He stated that police, building and fire inspectors were employed by the Midtown Enforcement Project to harass such businesses and involve them in costly legal proceedings. Mr. Schwarz testified that the City routinely made illegal arrests and seizures of films and projectors in order to disrupt these businesses. Petitioner's representative cited a number of court cases which document petitioner's claim that sex oriented businesses in Times Square were victims of selective law enforcement during the audit period.[3]

The Division was unable to present any witness who was present in 1605 during the audit period. Two witnesses testified regarding their observations, made within several days of this administrative proceeding, of activities taking place in an establishment similar in nature to 1605

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[3]See, Show World Center, Inc. v. Walsh, 438 F Supp 642; Blackjack Distributors, Inc. v. Beame, 433 F Supp 1297. In both of the cited cases, the courts found substantial evidence that City agencies were engaged in a course of conduct that threatened the plaintiff's First Amendment rights.

called Show World. One of those witnesses, Dr. Camille Hardy, was qualified as an expert in the field of dance. It was her opinion that the performances she observed were not works of art. The precise nature of the activities engaged in by performers in the 1605 theater is a matter of dispute between the parties. However, the testimony presented by the Division did not contradict the general description of the activities taking place in 1605 as set forth in the Stipulation,[4] and the testimony of Dr. Winick.

On August 1, 1989, petitioner and the Division of Taxation entered into the following stipulation.

STIPULATION

WHEREAS the parties agree that the following facts are true:

(a) That for the sales tax quarters in issue, the petitioner was a corporation engaged in business in New York State, offering to the public various forms of adult entertainment, and selling tangible personal property.

(b) That some sales made by the petitioner were not subject to a sales tax; some were; others are in dispute.

(c) That among those that were not, were receipts generated by patrons viewing films in "peep" show machines, regardless of whether the machine was or was not housed in a booth.

(d) That other forms of entertainment and tangible personal property offered by the petitioner to the public on the petitioner's premises included the following:

(i) Store - - The vendor sells the following merchandise: publications; newspapers; books; films; video movies; adult sexual aids, devices and games.

(ii) Live "Peep Shows" - - This is now more commonly known in the industry as "peep-a-live" shows or "live peep shows". It consists of several coin-operated machines, housed in private booths that surround a stage on which nude or partially nude females perform. A glass partition separates the patron from the performers. For each minute that the patron wishes to view the performer, he must deposit a token valued at $0.25 into a machine which raised a partition in front of the glass.

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[4]The parties stipulated that there was a theater area on the second floor of 1605 where feature length films and short films were exhibited and live performances were given.

(iii) Motion Pictures Films and Live Shows - - In a theater area on the second floor of the premises, nude female performers occasionally perform on stage. Also, feature length motion picture films and short films are exhibited in the same area. For an admission of $5, the patron can remain in the theater area for an unlimited period of time.

(iv) Private Peep Shows - - Similar to (ii) above, this is now more commonly known in the industry as "one-on-ones", or "fantasy booths". It consists of a coin-operated machine housed in a private booth which operates a glass partition which separates the patron and the female performer who is dressed in abbreviated attire. The patron can view the performer through the glass partition for a limited time and at the same time speak with her over an intercom system. For each minute that the patron wishes to continue to either view or speak with the performer he must deposit a token which has a higher value than the token required for the live peep shows.

(e) That, as described, these forms of entertainment are common to the "adult entertainment" industry and as presented, are the same as those presented in other "adult entertainment establishments" in New York City and elsewhere - - except that in some establishments they follow an "open-window policy" in the "peep-a-live" and the "one-on-ones", the patron is allowed to touch the female performer. 1605 Bookcenter did not permit "open windows" or any touching between the patron and the performer.

(f) That the use of the terms "performance", "performer", "dance", and "dancer" in this stipulation is not meant to constitute an agreement or disagreement that the live peep shows, live shows and/or private "peep shows" are musical or dramatic arts performances within the meaning and intent of Tax Law § 1105(f)(1).

(g) That, during the audit period, the petitioner also made sales from vending machines located on its premises.

(h) That, except for taxable receipts constituting "vending machine sales and other income" (audit workpaper 12), the petitioner's store was leased out during the period 6/1/76 -- 11/30/77, and the petitioner had no other taxable receipts during those periods.[5]

(i) That, based upon the expiration of the applicable period of limitations, the Audit Division cancels taxes, penalties and interest assessed for the period 3/1/76 - 5/31/76.

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[5]Audit workpaper 12 indicates that no sales were made in the category of "Vending machines and other income" for the period September 1, 1976 through September 30, 1977.

(j) That, based upon the recent holding in Adamides v. Chu (134 AD2d 776 [3d Dept 1987]), the Audit Division cancels taxes, penalties and interest assessed for the periods 3/1/79 - 8/31/79.

(k) The Division of Taxation does not object to the amended petition dated April 27, 1983, but denies each and every allegation contained therein. The petitioner does not object that it has not been served with an answer to this amended petition, and agrees that, except for those matters stipulated and agreed to herein, the issues raised in the amended petition are in dispute.

It is therefore STIPULATED AND AGREED by and between the undersigned attorneys of record for the petitioner and the Division of Taxation that the above facts shall become the facts of the above matter and shall not be disputed by either party at the formal hearing to be held in this matter.

OPINION

The Administrative Law Judge determined that the Division of Taxation (hereinafter the "Division") properly requested and examined petitioner's books and records, properly determined that such were inadequate, and was authorized to estimate petitioner's tax liability for bookstore sales (i.e., books, magazines, novelties, films, etc.) through a test period markup audit pursuant to section 1138 of the Tax Law.

The Administrative Law Judge determined that petitioner's receipts from the sale of certain of its publications were exempt from sales tax under section 1115(a)(5) of the Tax Law because they were receipts from the sale of periodicals. The Administrative Law Judge found that petitioner, through the testimony of its expert on adult entertainment, Dr. Winick, and in the absence of evidence by the Division to show what criteria it applied in arriving at its determination that no magazines sold by petitioner satisfied the definition of a periodical, met its burden of proof that 92 percent of the publications it sold qualified as periodicals and were exempt from tax. The Administrative Law Judge determined that imposition of this burden of proof on petitioner was not a denial of its due process rights.

The Administrative Law Judge determined that charges imposed by petitioner for the viewing of live peep shows and private peep shows were subject to tax. Critical to the Administrative Law Judge's determination was the conclusion that the individual booths in which a customer viewed these shows were "places of amusement" as used in section 1105(f)(1) of the Tax Law, and that the receipts from the charges to view such shows were subject to tax as admission charges to a "place of amusement."

The Administrative Law Judge determined that petitioner, through the uncontroverted testimony of Mr. Wexler, established the amount of its receipts from live peep shows as $87,353.00 and from private peep shows as $24,568.00.

The Administrative Law Judge determined that the admission charges to the theater located on the second floor were not subject to sales tax as receipts from admission to "any place of amusement" because the theater was a motion picture theater, the admission charges of which are exempt from tax pursuant to Tax Law § 1105(f)(1). The Administrative Law Judge rejected the Division's assertion that the live shows performed periodically throughout the day altered the status of the facility as a motion picture theater.

Finally, the Administrative Law Judge determined that petitioner was not the victim of selective enforcement and that the audit was not conducted to harass petitioner or in any other way to interfere with its right to conduct its business.

Petitioner, on exception, asserts: that the Administrative Law Judge erred in finding that receipts from live peep shows and private peep shows are subject to sales tax; that the Administrative Law Judge erred in finding that the audit was not harassment of petitioner; that the failure of the Administrative Law Judge to declare section 1105(f)(1) and 20 NYCRR 528.6(c)(1) unconstitutional was in error; that petitioner had adequate books and records; and that "leniency" in construing the Tax Law requires cancellation of the tax and penalty assessed against petitioner because an ordinary person would not have known nor reasonably expected that sales tax was due on the coin operated devices involved in this case.

On exception, the Division asserts: that Doctor Winick was qualified as an expert in "adult entertainment," not an expert in law or taxation and, thus, his testimony in these areas, even though uncontroverted, was insufficient to establish that 92 percent of the magazines sold by petitioner were periodicals exempt from taxation; that the Administrative Law Judge erred in determining that petitioner's theater was a motion picture theater, the admissions to which were exempt from tax; that petitioner did not meet its burden of establishing the amount of its receipts from live peep shows and private peep shows because Mr. Wexler's calculations were estimates made without benefit of documentation and, thus, were unreliable.

We uphold the determination of the Administrative Law Judge in its entirety.

We deal first with the issue of whether the Division properly requested and examined petitioner's books and records and properly resorted to estimating petitioner's bookstore sales pursuant to Tax Law § 1138.

We find nothing in the record to require us to modify the determination of the Administrative Law Judge on this issue. The Division properly requested, by the appointment letter dated May 7, 1979,[6] and examined petitioner's books and records for the entire period of the assessment at issue. It is undisputed that petitioner did not produce records of individual sales from which its ledgers and journals could be verified. While Mr. Wexler testified that petitioner maintained cash register tapes for a period of three years, no such tapes were produced on audit or at hearing.

Moreover, the fact that petitioner had available all of its purchase invoices for the audit period does not prevent the Division from conducting a test period mark-up audit to determine petitioner's taxable sales (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). Finally, we note that the narrative portion of the audit report indicates petitioner agreed to a test period (Division's Exhibit H).

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[6]Contrary to petitioner's assertion, a copy of the appointment letter was placed in evidence as part of the field audit report (Exhibit H).

We deal next with the issue of whether the receipts from the sale of certain publications by petitioner were exempt from sales tax because they were receipts from the sales of periodicals.

We find nothing in the record that requires us to modify in any way the determination of the Administrative Law Judge that petitioner proved that 92 percent of publications sold by petitioner qualified as periodicals and were exempt from tax. Dr. Winick was qualified as an expert in the field of adult entertainment. He personally inspected magazines and newspapers sold by petitioner during the audit period and determined that 92 percent of these publications satisfied the requirements of the Commissioner's regulation (20 NYCRR 528.6[c][1]). Dr. Winick's testimony was uncontroverted by the Division and obviously found credible by the Administrative Law Judge.

We also sustain that portion of the Administrative Law Judge's determination that imposition of a burden of proof upon petitioner to demonstrate that certain of the publications it sold qualified as periodicals is not a denial of its due process rights.

The California statute at issue in Speiser v. Randall (357 US 513), relied upon by petitioner, explicitly sought to condition entitlement to tax exemption on the basis of the content of certain speech and placed the burden upon the claimant to prove eligibility for the exemption at both the administrative level and upon judicial review. The court found that a state may deny a tax exemption to persons who actually engage in certain forms of proscribed speech, but held that the state must bear the burden of proof to show that the tax claimant engaged in such proscribed speech before denying the tax exemption on that basis. We agree with the Administrative Law Judge that the situation in Speiser has no parallel here. The California statute explicitly sought to condition entitlement to a tax exemption on the basis of the content of certain speech. The New York statute is neutral as to content. Furthermore, New York's courts have rejected the argument that, in discriminating between different types of publications, section 1115(a)(5) of the Tax Law is an infringement on freedom of the press or a denial of equal protection (Matter of Twin Coast Newspapers v. State Tax Commn., 101 AD2d 977, 477 NYS2d 718; Matter of G & B Publ. Co. v. Department of Taxation and Fin., 57 AD2d 18, 392

NYS2d 938, lv denied 42 NY2d 807). In light of those decisions, it is concluded that requiring petitioner to shoulder the burden of establishing entitlement to the exemption for periodicals is not a denial of its due process rights.

We deal next with the issue of whether receipts from live peep shows and private peep shows were subject to sales tax.

The Administrative Law Judge determined that the individual booths in which live peep shows and private peep shows could be viewed were "places of amusement" and that the receipts from the charges to view such shows were subject to tax as "admission charges" to a "place of amusement."[7]

The Administrative Law Judge reasoned that the essence of the transaction was the collection of a charge to watch a live sex show in a private place, the booth, something essentially different from the coin-operated automatic phonographs (jukeboxes) and bowling games at issue in Matter of Bathrick Enters. v. Murphy (27 AD2d 215, 277 NYS2d 869, affd 23 NY2d 664, 295 NYS2d 489), relied on by petitioner, and that the coin receptacles and rising screens were merely the means of collecting the charge and controlling the viewing time.

The lynchpin of petitioner's position is that the charge for admission into the booth is collected by the deposit of a coin into a coin receptacle. This fact, asserts petitioner, makes the booth an amusement device which should be treated for tax purposes exactly the same as coin operated peep show machines, the receipts from which the Division has stipulated are not subject to tax. Petitioner asserts that if "a coin operated amusement device or booth that exhibits a film is not a place of amusement, then it conclusively follows that the very same booth that permits the viewing of a woman cannot be a "place of amusement" (Petitioner's brief, pp.

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[7]Tax Law § 1105(f)(1) imposes sales tax on "[a]ny admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state" (emphasis added).

The term "place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10], emphasis added).

The term "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], emphasis added).

37-38). Petitioner continues stating that "[t]here is no way anyone can say that a booth in which a film is viewed is not a 'place of amusement' and a booth in which a live person is viewed, or is spoken to, is a 'place of amusement.' It simply doesn't make sense" (Petitioner's brief, p. 40).

We agree with the determination of the Administrative Law Judge that the booths from which these live and private peep shows can be viewed are "places of amusement" and that the receipts from the charges to view such shows were subject to tax as "admission charges." Our decision is based upon the physical description of these booths and the mechanics of their operation.

The facts are uncontroverted that the mechanics for observing a peep show movie, a live peep show and a private peep show were essentially the same.[8] The patron entered a place, the booth, with a door that closed behind the patron.

After entering the booth, the patron placed coins in a slot which caused a screen or curtain to rise and enabled the patron to view a show of some sort, either live or on film. When coins were placed in the slot, a light went on outside the booth to indicate that the booth was in use. The booth provided the patron with privacy, screened out noise and light and ensured that each patron paid a separate price for viewing.

The length of the viewing time was controlled by the number of coins the patron placed in the slot. When the patron's time ran out, the screen or curtain came down, and the patron exited the booth.

In short, each booth was a physical place which could be entered to watch a show for amusement. As such, the booths were clearly distinguishable from the coin operated automatic phonographs (jukeboxes) and bowling games located in restaurants, taverns and similar places which the court in Bathrick determined were not "places of amusement" (Matter of Bathrick Enters. v. Murphy, supra).

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[8]The taxability of charges for viewing of peep show movies is not before us. The only question before us is the taxability of receipts from live peep shows and private peep shows.

The facts here are also quite different from those in Outdoor Amusement Business Assn. v. State Tax Commn. (84 AD2d 950, 447 NYS2d 69, revd on dissenting mem. below 57 NY2d 790, 455 NYS2d 586) relied upon by petitioner. There the tax was sought to be imposed on the gross receipts of certain games operated by the taxpayer.

In his dissenting opinion, relied upon by the Court of Appeals, Judge Hancock stated:

> "[w]hether the booths or other places where the games are played are 'places of amusement' within the meaning of the statute is to me beside the point. The receipt sought to be taxed is not an 'admission charge' for admission to or for the use of a place of amusement (Tax Law, § 1105, subd. [f], par. [1]).
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> "The games in question here are those typically found at county fairs, on midways, or at firemen's field days (e.g., throwing a football through a hole in a board, tossing a basketball through a hoop, throwing a baseball at a stuffed doll, climbing a rope ladder to ring a bell, covering a red spot on a board with five discs, etc.) in which the customer pays a fee to participate in the hope of winning one of the wide selection of prizes displayed . . . It cannot be said that the charge is for 'admission to' a place of amusement as would be the case with a fee for entering a sideshow, for example . . . Nor . . . can the fee be characterized as a charge 'for the use of the facilities' . . . as would be the case with the charge for riding the Ferris wheel or roller coaster. The fee is paid for entering the contest and for the chance of winning a prize. Without that chance, no one would pay to play. Because the charge is not for admission or for the use of the facilities, it is not taxable" (Outdoor Amusement Business Assn. v. State Tax Commn., supra, 477 NYS2d 69, 71-72 [dissenting opinion Judge Hancock]).

Clearly, the fees here are not for entering a contest. If anything, they are, in fact, more akin to the fee for entering a sideshow, which Judge Hancock would have characterized as an admission charge to a place of amusement.

The facts here are also distinguishable from those in Matter of Fairland Amusements v. State Tax Commn. (66 NY2d 932, 487 NYS2d 879), relied upon by petitioner. There, the Court of Appeals agreed with the dissenters in the Appellate Division "that there is an ambiguity in the statutory scheme which must be construed most strongly in favor of the taxpayer and against the government" (Matter of Fairland Amusements v. State Tax Commn., supra).

In Fairland, the taxpayer provided portable amusement rides such as Ferris wheels and merry-go-rounds, at fund-raising activities sponsored by various organizations. The charge at

issue was to use the rides. The dissenters in the Appellate Division stated that Tax Law § 1105(f)(1) prescribed a two-step procedure to determine liability for tax:

> "First, the moneys must be paid as an admission charge, either a fee paid for entrance to a place or for the use of the facilities. Second, the tax is imposed only on the admission charge to or for the use of any place of amusement. 'Place of amusement' may be interpreted as meaning only the physical space within which the amusement is provided or the amusement facility itself. Applying the rationale of Matter of Wien v. Murphy, 28 A.D.2d 222, 284 N.Y.S.2d 303, lv. denied 22 N.Y.2d 646, 295 N.Y.S.2d 1027, 242 N.E.2d 493 and Bathrick Enterprises v. Murphy, 27 A.D.2d 215, 277 N.Y.S.2d 869, affd. 23 N.Y.2d 664, 295 N.Y.S.2d 489, 242 N.E.2d 745, it appears that if plaintiff's rides were located in a building, an admission charge to enter the building would be taxable but an admission charge to use the rides, regardless of whether admission to the building was free, would not be taxable.
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> "However, this portion of the statute is ambiguous since another interpretation may be placed on it under which an admission charge to use plaintiff's rides would be taxable. The term '[a]ny place where any facilit[y] for . . . amusement . . . [is] provided' (Tax Law § 1101[d][10]) may be interpreted to mean the ride itself or the location upon which the ride rests. Thus, by implication, a charge for the use of the facilities may be taxable.
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> ". . . [a]ccordingly, the statute and the applicable definitions must be construed to apply a tax only on the admission charge to enter the location where the amusement facilities are found" (Fairland Amusements v. State Tax Commn., supra, 487 NYS2d 879, 880).

We perceive no such ambiguity here. Petitioner's patrons entered a physical place, the booth, and paid a fee which provided them with a private space from which to watch the peep show. In short, each patron paid an admission charge to a place of amusement.

We next address the issue of whether admission charges to the theater located on the second floor of 1605 were subject to sales tax. We agree with the determination of the Administrative Law Judge. The determinative fact is "not the event to which the patrons gained admission, but the place where it was held" (Matter of United Artists Theatre Circuit v. State Tax Commn., 52 NY2d 1013, 438 NYS2d 295 [where the court invalidated the Tax Commission's construction of the statute that the exclusion ran only to moving pictures, as running counter to the indices of legislative intent]). There is no question that the theater at issue here was for the showing of motion pictures. In any case, we find nothing in the record to

suggest, as the Division asserts, that the showing of films was merely incidental to live performances which also took place there.

We deal next with the issue of whether the Administrative Law Judge properly relied upon the testimony of Mr. Wexler to establish the allocation of receipts between live and private peep shows, which are taxable, and movie peep shows, which the Division stipulates are not taxable.

We affirm the determination of the Administrative Law Judge. Clearly, Tax Law § 1132 places the burden on petitioner to prove which of its receipts is not subject to tax (see, Matter of Sol Wahba v. New York State Tax Commn., 127 AD2d 943, 512 NYS2d 542; Matter of On the Rox Liqs. v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026). Here, the Administrative Law Judge obviously found the testimony of Mr. Wexler credible, i.e., that the testimony was competent and truthful (cf., Matter of Airport Indus. Park, Tax Appeals Tribunal, April 11, 1991, [where the Administrative Law Judge determined that the testimony of petitioner's witness reconstructing the taxpayer's transactions was insufficient to establish the relationship between those transactions and the asserted capital improvements]). The testimony was specific as to the details of petitioner's business operations and was based on his review of petitioner's books and records, his general familiarity with petitioner's accounting methods and procedures, and his conversations with persons employed by petitioner during the audit period (cf., Matter of Dacs Trucking Corp., Tax Appeals Tribunal, March 21, 1991 [where we reversed the determination of the Administrative Law Judge based on the grounds that testimony of the taxpayer's witness was only to the "general nature" of the taxpayer's business and was, thus, insufficient to establish that certain of its transactions were exempt from tax as capital improvements]).

With regard to the Division's assertion that in order to carry its burden of proof it was necessary that petitioner present source documents or other forms of documentation to corroborate his testimony, we note that during the period under audit the Division's position was that all peep shows were taxable. As a result, there was no need during the period at issue to

prepare documents which segregated taxable from nontaxable receipts. It was not until 1983 when the Division issued its opinion that movie peep shows were not taxable, that segregation of the receipts from various types of shows became necessary. The effect of the Division's assertion is to require petitioner to create such records retroactively, a result with which we cannot agree.

We also agree with the Administrative Law Judge that "relevant and probative hearsay evidence is admissible in administrative proceedings; moreover it may . . . constitute substantial evidence to support the administrative agency's determination" (Matter of Flanagan v. New York State Tax Commn., 154 AD2d 758, 546 NYS2d 205, 206).

We deal next with petitioner's assertion that the Administrative Law Judge erred in failing to find, and conclude as a matter of law that § 1105(f)(1) and 20 NYCRR 528.6(c)(1) are unconstitutional.[9]

Petitioner challenges the constitutionality of Tax Law § 1115(a)(5) and 20 NYCRR 528.6(c) on the grounds that "[t]he first amendment bars the imposition of a sales tax on the magazines sold by '1605'". Petitioner asserts that use of the term "periodical -- without any definition -- in section 1115(a)(5) . . . is unconstitutionally vague, on its face and as applied" and makes the same general assertion with respect to the definition of periodical in the regulation (Petitioner's brief, pp. 69-70).

Petitioner, in its brief, indicates that it is raising these arguments to preserve them for judicial review. In so doing, petitioner recognizes that the jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass challenges to the constitutionality of

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[9]Petitioner deals only with section 1105(f)(1) and the regulation in its exception. However, in its brief, at page 57, petitioner also challenges the constitutionality of Tax Law § 1132(c) which provides in pertinent part that "it shall be presumed that all amusement charges of any type mentioned in (§ 1105[f][1]) are subject to tax until the contrary is established, and the burden of proving that any . . . amusement charge . . . is not taxable . . . shall be on the person required to collect tax . . ." Petitioner challenges the constitutionality of Tax Law § 1115(a)(5) in his brief at page 66.

legislative enactments (see, Matter of Fourth Day Enter., Tax Appeals Tribunal, October 27, 1988).

While this Tribunal has explicit authority to rule on the validity of the Commissioner's regulations (Tax Law § 2006[7]), we find no merit to petitioner's assertions concerning the regulation. Petitioner's objections to the regulation are to the criteria in it, i.e., "'general availability to the public,' 'continuity of title,' 'variety' of articles, 'different' authors, 'general literature,' 'some special industry,' or 'other fields of endeavor,' . . . deprives '1605', and all distributors of magazines, of any meaningful way to determine whether or not the publications they sell are lawfully subject to a sales tax" (Petitioner's brief, p. 70).

The fact of the matter here is that petitioner's own witness, Dr. Winick, employed these criteria to determine that 92 percent of the publications petitioner sold qualified as periodicals for purposes of the exemption in section 1115(a)(5); the Administrative Law Judge accepted this result in her determination as does this Tribunal in this decision.

We deal finally with petitioner's assertion that the audit was conducted in a discriminatory manner. We agree with the Administrative Law Judge that petitioner has not established that this audit was conducted for purposes of harassing petitioner or in any way interfering with its right to conduct its business and, therefore, there is no reason to address petitioner's legal argument concerning selective enforcement.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of the Division of Taxation and of petitioner 1605 Bookcenter, Inc. are denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of 1605 Bookcenter, Inc. is granted to the extent indicated in the Administrative Law Judge's conclusions of law "D," "F," "G," "H" and "J" but is otherwise denied; and

4. The Division of Taxation is directed to modify the Notice of Determination issued for the period March 1, 1976 through August 31, 1979 in accordance with paragraph "3" above but such notice is otherwise sustained.

DATED: Troy, New York
July 25, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner