STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **GREYSTOKE INDUSTRIES LLC D/B/A PARADISE FOUND** 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 June 1, 2003 through May 31, 2006.	:	DECISION DTA NO. 822532

Petitioner, Greystoke Industries LLC d/b/a Paradise Found, filed an exception to the determination of the Administrative Law Judge issued on June 24, 2010. Petitioner appeared by Bond, Schoeneck & King, PLLC (Jonathan B. Fellows, Esq., and Courtney A. Wellar, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Osborne Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Taxation has established that the door admissions and fees for private dances collected by petitioner from its customers are subject to sales tax pursuant to Tax Law § 1105(f)(1) as admission charges to a place of amusement, or whether petitioner has

established entitlement to the exemption provided under the same section for admission charges to a dramatic or musical arts performance.

II. Whether the Division of Taxation has established that the door admissions and fees for private dances collected by petitioner from its customers are subject to sales tax pursuant to Tax Law § 1105(f)(3) as amounts paid as charges of a roof garden, cabaret or other similar place.

III. Whether the Division of Taxation has established that the door admissions and fees for private dances collected by petitioner from its customers are subject to sales tax pursuant to Tax Law § 1105(d)(1), as cover, minimum, entertainment or other charges made to patrons in an establishment that provides taxable food or beverages.

IV. Whether, assuming the charges and fees in issue are subject to sales tax, the liability therefor properly rests not with petitioner but rather with the entertainers, who perform at petitioner's premises but are not employees of petitioner.

V. Whether the audit methodology utilized by the Division of Taxation, to wit, a full-day observation and recording of petitioner's receipts conducted shortly after the end of the audit period, should be either adjusted or rejected as unreasonable for failing to account for growth in petitioner's business over the course of the audit period and for failing to reflect that petitioner's business is a "seasonal" business.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "1," "6," "15," and "23," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read

as follows:

> Petitioner, Greystoke Industries LLC doing business as "Paradise Found," operated an adult entertainment club, located in Syracuse, New York, during the audit period at issue, June 1, 2003 through May 31, 2006. The entertainment provided at petitioner's premises consisted of dancers performing routines in costume for a portion of the time, and in the nude for the balance of the time, in both the public stage and surrounding areas of the premises as well as in the private rooms located in the premises. These nude and semi-nude dances were provided as adult entertainment.
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> Petitioner's establishment also offered refreshments. As petitioner offered nude entertainment, it was not allowed to sell alcoholic beverages and hence served only bottled water, juices, soda and other nonalcoholic beverages. Petitioner's business was open from approximately 5:00 P.M. to 4:00 A.M., seven days per week.[1]

To gain entry into petitioner's club, customers paid a general admission door charge, the amount of which varied among $5.00, $8.00 and $10.00, depending upon the time of entry. Customers could also purchase, at the time of entry, special packages, which included chips entitling them to a private or "lap" dance performed on a "one-on-one" basis in a small private or VIP room.[2] As described more fully hereinafter, customers could, and were encouraged to, purchase such private dances at any time they were in the premises.

By an appointment letter dated May 5, 2006, the Division of Taxation (Division) scheduled a June 21, 2006 sales and use tax field audit of petitioner's business for the period spanning June 1, 2003 through February 28, 2006. Subsequent identical appointment letters dated May 18, 2006 and June 19, 2006 were issued changing the appointment date to June 20, 2006 and thereafter to July 11, 2006, respectively. Each of these appointment letters was

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[1] We modify this fact to more accurately reflect the record.

[2] The term "nude and semi-nude dances" shall refer to all the adult entertainment offered by petitioner, including lap dances, private dances, stage dances, etc.

accompanied by a Records Required List, detailing the documents petitioner was expected to have available for review.

At the July 11, 2006 audit appointment, petitioner provided incomplete purchase records, incomplete bank statements, and Excel spread sheets in support of its sales receipts. Petitioner did not provide sales invoices or other original source documents of sales, and advised that cash register tapes of its receipts were not available because they had been destroyed in a flood in the manager's office at the premises.

The Division reviewed the books and records provided and informed petitioner that the same were insufficient for the conduct of a detailed audit. By a letter dated July 17, 2006, the Division advised petitioner that due to such insufficiency, an observation of petitioner's sales activity would be conducted for an entire day at petitioner's place of business.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> On August 11, 2006, the Division utilized four auditors and conducted an observation of petitioner's business, recording petitioner's receipts for door admissions, including special packages purchased at the door, beverage sales receipts, and fees for private dances, between the hours of 5:00 P.M. (opening) and 4:00 A.M. (closing).[3] This observation resulted in total sales receipts of $4,492.00, consisting of door admission receipts of $978.00, beverage receipts of $314.00, and private dance receipts of $3,200.00. All such sales receipts were considered by the Division's auditors to be subject to sales tax. One of the auditors observed that by 12:45 A.M. on the observation date, there were no entertainers on the floor of the club, as opposed to an average of four to six dancers observed on the floor during the hours prior to that time, and in contrast to advertisements that 20 girls were present on Friday and Saturday nights. At 2:30 A.M., the auditor noted that the "door woman" was informing customers that there were only four dancers working that night. At 3:15 A.M., he observed that

[3] The record also notes the existence of an "Oasis" room. There is scant detail in the record on this, but it appears that the same was a larger or more luxurious version of the VIP rooms utilized for private lap dances.

> customers returned to the door area to complain that there were only two dancers working. Shortly thereafter, he noted that there was only one dancer available to perform private dances and that there were five customers waiting for private dances.[4]

The Division utilized petitioner's summary spread sheets, listing petitioner's claimed sales (money collected) for the audit period, and determined therefrom that sales on Fridays were, on average, 22.5% of petitioner's weekly sales. Utilizing this information, the Division determined weekly sales to be $19,920.18, and multiplied this amount by 13 (weeks per sales tax quarterly period) to arrive at audited quarterly sales of $258,962.00. After making allowance reductions for legal holidays and other days when the business was closed, the Division calculated audited taxable sales of $3,079,460.00 for the audit period. This amount was reduced by reported taxable sales ($402,111.00), resulting in additional taxable sales of $2,677,349.00 and additional tax due in the amount of $207,321.27.

On May 7, 2007, the Division issued to petitioner a Notice of Determination, based on the results of the foregoing audit, assessing additional tax due for the period June 1, 2003 through May 31, 2006 in the amount of $207,321.27, plus penalty and interest. The initial audit appointment and records request letters had specified the period of audit as spanning June 1, 2003 through February 28, 2006. However, by a letter dated April 24, 2008, i.e., subsequent to the issuance of the notice, the Division advised petitioner that the audit period was being extended to include the sales tax quarterly period spanning March 1, 2006 through May 31, 2006. At hearing, the Division admitted that this extension did not include a proper preceding request for petitioner's records and thus conceded that the tax assessed for such quarterly period

[4] We modify this fact to more accurately reflect the record.

($17,450,27), plus penalty and interest thereon, should be eliminated from the amount at issue herein. Accordingly, the amount of tax at issue has been reduced from $207,321.27 to $189,871.00, plus penalty and interest.

Petitioner purchased the club, formerly known as Moulin Rouge, shortly before the beginning of the audit period. Petitioner changed the name of the club to Paradise Found. Subsequent to purchasing the club, petitioner made certain renovations, including changing the club interior to a tropical theme and replacing the exterior siding. Petitioner installed an automated teller machine (ATM) inside the premises, added a large exterior neon sign to advertise the club's presence, and also established radio, television and billboard advertising.

Petitioner's club is decorated in a Polynesian/tropical theme. Upon entering the club, customers are able to see entertainers dancing on a main stage, either singly or, on occasion, with another entertainer. The main stage is a "T" shaped raised area consisting of approximately 500 square feet with a large rectangle forming the top of the T and an approximately 36-square foot (3 feet by 12 feet) runway that extends outward from the rectangle at the top of the T. There is a floor to ceiling brass pole in the main rectangle area of the stage, and many of the entertainers incorporate the pole into routines they perform while on stage. The back wall of the main stage is covered with mirrors. The main stage is accessed by the entertainers either directly from the dressing rooms or from a small set of stairs that lead to the main floor of the club. The main stage has a multitude of lights (*e.g.*, spot lights, strobe lights, etc.) in a variety of different colors. There is a professional sound system that is operated by a disc jockey (DJ) from a booth overlooking the main stage. The main stage is surrounded by chairs, and there are booths from which customers are able to watch the dancers. The chairs surrounding the main stage are

separated from the stage by a brass "tipping rail," at which customers may offer tips to the dancers. There is a large bar adjacent to the main stage with stools around it. As noted, petitioner sells bottled water, soda, juices and other nonalcoholic beverages to its customers. There is no charge, other than the door admission charge, to a customer to view the entertainers on or in the areas adjacent to the main stage.

An entertainer's work schedule at petitioner's club is generally broken out into two "sets" (or shifts), typically from the 5:00 P.M. opening time until approximately 10:00 P.M. and then from 10:00 P.M. through the 4:00 A.M. closing time. Dancers sign up in advance and may choose to work either one or both shifts. A dancer typically performs on the main stage for approximately 12 to 15 minutes. This period is also known as a "set," and on a busy night, a dancer will typically do one or two, or occasionally three, such sets. The dancer chooses the music to which she will dance, which is played by the DJ while she is on the main stage, and also selects the attire or "costume" she will wear.

In addition to the main stage, entertainers also may perform dances in the area of tables and booths adjacent to the main stage, as well as in the private or VIP rooms. Customers may secure private dances in these rooms by purchasing chips from the dancers or from the bartenders. Dancers will typically mingle and engage in conversation or flirting with customers seated in the chairs surrounding the main stage, in the booths, or at the bar after, or between, the times when a dancer is performing a set on the main stage. The dancers seek, by this activity, to entice the patrons to purchase private dances. Testimony at hearing established that the dancers view the main stage performance as an "advertisement" for themselves, from which customers will want to purchase private dances, which constitute, along with the receipt of tips, the two

means by which a dancer may earn money. In this regard, testimony from one of the entertainers who performed at petitioner's club described this customer/entertainer interaction as a "sales pitch," whereas petitioner's expert witness described the same in testimony as "kind of like an 'intermission' from the staged, choreographed dance or the choreographed private dance."

Customers were able to select a particular entertainer to perform a private dance. The charge for an initial private dance with a particular dancer was $21.00, of which $1.00 went to the bartender, with the balance ($20.00) split equally between petitioner and the dancer. Customers may remain in a private room by purchasing additional private dances from the same dancer at $20.00 per dance, with the split for such additional dances being $5.00 to petitioner and $15.00 to the dancer. A customer leaving a private room and then reentering a private room with a different dancer would apparently return to the initial charge of $20.00 plus $1.00, with the same split between the dancer and petitioner as described herein for the initial and any subsequent dances. The auditors noted a sign in the club advising of the $20.00 price for a private dance. Money given by customers to the dancers is thereafter turned over to the bartenders by the dancers. The bartenders track the number of private dances and, at the end of a dancer's set, pay over the dancer's share to the dancer.

Petitioner's club has ten private rooms. The private rooms average approximately 50 square feet in size and have a chair or couch for the customer to sit on and an area in front of the chair or couch for the entertainer. There is a curtain across the entrance to each private room allowing for privacy. There is white and colored lighting (including black lighting), which can be controlled by the entertainer. Each private dance lasts approximately three minutes. The music is prerecorded and prearranged, repeats periodically and is familiar to, though not

controlled by, the dancer. When a new song starts, the entertainer begins her dance for the customer, such that the customer is then receiving the full length of the song (and any additional songs or dances purchased) as his private dance. Contact between the customer and the entertainer may include the entertainer sitting on the customer's lap (hence the term "lap dance") or putting her arms around the customer. Activities in the private rooms are monitored for security purposes by petitioner's personnel via video cameras and display screens. To protect the privacy of its customers, petitioner does not record or maintain recordings of such video monitored activities.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> Entertainers typically perform dances on the main stage and in the private rooms, although dances are also occasionally performed on the main floor of the club, near the bar, or around the booths. Petitioner's bartenders utilize a computer system to keep track of private dances performed by each dancer, but do not track the monies paid by the customers as tips to the dancers. According to testimony provided by one of petitioner's entertainers, there is a computer terminal located at the end of the bar area. Dancers could use this terminal to find their number of private dances, and then extrapolate the amount of money they earned over a given time.
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> The record is not entirely clear as to whether this computer system was tied to petitioner's receipts. Although the system purportedly maintained data relevant to petitioner's income, it claims that the computer system information was not used at all. Petitioner instead claims that other register receipts were maintained and that this information was transferred to Excel spread sheets each day or every few days as time permitted.[5]

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

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[5] We modify this fact to more accurately reflect the record.

> An entertainer who performs at petitioner's club enters into an "Entertainment Lease" with petitioner. The agreement describes the nature of the business operated at the venue as an adult entertainment establishment. It further advises the entertainer that she will be subject to full and partial nudity, that she may be subject to advance, depictions or portrayals of a sexual manner.
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> The relationship between petitioner and each entertainer is described as that of landlord and tenant involving the "joint and non-exclusive" leasing of the right to use certain areas of the venue to perform in the manner described herein. The Entertainment Lease also provides that the entertainers are not employees of petitioner, as differentiated from the door host, bartenders, security personnel, DJ and manager, who are employees.
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> Pursuant to this agreement, the entertainer schedules herself to perform on certain days and agrees to be at petitioner's club on those days and available to perform for a minimum of six consecutive hours (*i.e.*, a set). Each entertainer determines what days and hours (sets) she wishes to perform at the club, when during such time she will actually dance, where she will dance, the music that is to be played while she is dancing (on the main stage), who she will provide private dances for, what she will wear while dancing, and the duration and type of dance she will perform. The entertainers are not prohibited from dancing at other clubs. The Entertainment Lease does not specify the amount to be charged for a private dance. However, as noted previously, the $20.00 amount for such dances is set by petitioner.[6]

Pursuant to Addendum A of the Entertainment Lease, the entertainers pay a weekly fee of $60.00 to petitioner, plus $10.00 for each set performed. If an entertainer performs five or more sets in a given week, the weekly fee is reduced to $10.00, with the $10.00 per set fee remaining the same. In each instance, the fee paid by the entertainer to petitioner is described in the Entertainment Lease as a rental fee or an additional rental fee.[7]

The entertainers generate revenue for themselves via tips from customers while dancing on or in the areas adjacent to the main stage, and from fees and tips for dancing off the main

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[6] We modify this fact to more accurately reflect the record.

[7] The addendum also provides that the entertainers will pay a fee ($65.00 per 15 minutes or $110.00 per 30 minutes) for the Oasis Suite.

stage, including private dances. Petitioner, by contrast, generates receipts from three sources, which consist of door admission charges, beverage sales, and the fees for private dances. As determined from the results of the observation audit, approximately 71 percent of petitioner's receipts were derived from the fees for private dances ($3,200.00 out of total observed receipts of $4,492.00). In addition, approximately 21 percent of petitioner's receipts were derived from the door admission charges ($978.00 out of total observed receipts of $4,492.00). The door admission charges are collected by petitioner at the main entrance to the club, and payment of this charge permits a customer to access the public areas of the club, but does not entitle the customer to access the private rooms. Rather, such access follows the purchase of a private dance, with continued access to and presence in the private rooms premised upon the purchase of additional private dances. When petitioner purchased the club, it continued the practices of the prior owner with respect to sales tax, and paid sales tax, allegedly erroneously, on the reported door admission charges it collected. Petitioner also sells nonalcoholic beverages, as described. The results of the observation audit determined that approximately seven percent of petitioner's revenue was derived from the sale of beverages ($314.00 out of total observed receipts of $4,492.00). Petitioner paid sales tax on its reported beverage sales.

Petitioner introduced into evidence a DVD containing five video clips to illustrate the types of dance techniques typically employed by the entertainers. Four of the video clips depict routines being performed on petitioner's main stage and one of the video clips depicts a private dance. Three of the four main stage video clips depict individual entertainers performing movements as described utilizing or centering on the brass pole, while one of the four main stage video clips depicts two dancers who appear to be practicing movements utilizing the brass pole.

Petitioner's premises appear to be empty or nearly empty of customers in these video clips, and there is no interaction between the entertainers and any customers. The other video clip depicts a dance performed in one of petitioner's private rooms for an individual customer. This video clip depicts a customer seated in a chair, observing an entertainer located directly in front of the customer and moving to the music being played while removing a portion of her costume. As with the other video clips, there is no contact or interaction between the entertainer and the customer such as was described as occurring either when an entertainer is on the main stage, or in the areas surrounding the main stage, the booths or at the bar, or as was described to occur during a lap dance (***see*** findings of fact above).

One of petitioner's owners, who also serves as its general manager, provided many of the details of petitioner's business. He is responsible for the day-to-day business management and handles the bookkeeping for petitioner. He explained that petitioner's business had increased over the period of time covered by the audit, noting that petitioner hired additional security personnel and added an additional bartender in order to service people who lined up around the bar. He noted that the club was busiest between the hours of 10:30 P.M. and 2:30 A.M. With regard to the auditor's observations concerning the number of dancers working in the latter part of the second set on the observation date, he stated that the "downside" of petitioner's relationship with the entertainers is that "I can't control them within the club and tell them they have to get out of the dressing room and go to the floor." He also maintained that petitioner's business is "seasonal," with summer being its busiest period.

Judith Lynne Hanna, PhD, a cultural anthropologist, was retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance

critic. Dr. Hanna earned a master's degree in anthropology from Columbia University in 1975 and a doctoral degree in anthropology from Columbia University in 1976, specializing in nonverbal communication and the arts and society. Her doctoral dissertation was on a group's choreography and its meaning and style. She is a senior research scholar in the Department of Dance and an affiliate in the Department of Anthropology at the University of Maryland, College Park, Maryland. Dr. Hanna has training in a multitude of dance genres, has taught dance and courses on dance theory at the collegiate level, and has continually conducted teacher and youth dance workshops. She has served as a dance consultant and critic, has published more than 150 articles in dance periodicals, and written six books, as well as many reviews and commentaries on dance. Since 1995, Dr. Hanna has been conducting on-site research on exotic dance and adult entertainment. Along with the research approach that she has taken with other forms of dance, she has examined the characteristics and choreography of exotic dance. Dr. Hanna has been retained on 45 occasions as an expert in court matters relating specifically to exotic dance and was accepted as an expert in this field for this matter.

Dr. Hanna prepared for her testimony in this matter by reviewing six videos, provided to her by petitioner, which depicted four main stage performances and two private dances. She also observed nine dances (eight main stage dances and one private dance) performed at petitioner's premises. She also spent time interviewing the dancers about their backgrounds and training.

We modify finding of fact "23" of the Administrative Law Judge's determination to read as follows:

> Dr. Hanna stated that exotic dance contains many of the attributes of ballet and other forms of dancing, including movement, balance, dissonance, symbolism

> and emotion. She described this as a choreography, or arrangement, of about 61 different moves with theme and variation patterns with repetition. She identified the use of locomotion, gesture, pole, mirror and floor work at variable levels in response to the music being played. Dr. Hanna stated that exotic dance is theater in the sense that there is an admission charge, a raised stage, special lighting, dressing rooms, a professional sound system and a disc jockey. She explained that the entertainers' dance routines include dance moves from a variety of well recognized disciplines, including ballroom dance, gymnastics, cheerleading, belly dancing, tap, jazz, ballet and burlesque, and include arm extensions, overhead movements, undulations, hip movements, struts, shimmies, and hair tosses. The entertainers have a variety of backgrounds, training and levels of dance experience. Some have training in gymnastics, ballet, jazz, or exotic dance and refine their routines within the parameters set forth by the club, advancing their own ability and creativity over time. New steps and routines are often learned from videos, from YouTube, and from other dancers.[8]

Dr. Hanna's report discussed dance in general, and exotic dance in great detail. She noted that adult or exotic dance has a less formalized repertoire of moves than other forms of dance (*e.g.*, ballet), that there is a range in the quality of the dances performed by different entertainers, and that a large number of entertainers have no formal training in dance. Her report focused on the sequential parts of the performance, the messages of the performer, the skill it takes to perform dance routines, and the psychology of dance and its effect on the viewers. She set forth a description in detail of the choreographed sequence for each dancer and the dance that she reviewed and discussed the various characteristics of the dancers' choreography. Dr. Hanna concluded that the presentations at petitioner's premises are live dramatic choreographic performances in a theater that has shows that consist entirely of dance routines.

In contrast and response to the Division's audit, petitioner presented its own analysis and calculations in support of the claim that the Division's audit unreasonably overstates the amount of tax due by failing to account for growth in revenue over the audit period. Petitioner's premise

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[8] We modify this fact to more accurately reflect the record.

is that receipts and, consequently, any sales tax due thereon were less at the beginning of the audit period when petitioner first operated the club, and thereafter increased over time, based on improvements made to the club, to a level closer to that observed upon audit. In support of this argument, petitioner calculated $87,025.30 as audited taxable sales for the month of August 2006 (based on the Division's August 11, 2006 observation). In turn, petitioner calculated the percentage relationship between such audited taxable sales and its $27,259.83 payroll for August 2006 ($87,025.30 ÷ $27,259.83 = 319.24%), and also calculated the percentage relationship between such audited taxable sales and the $49,380.00 of ATM cash withdrawals for August 2006 ($87,025.30 ÷ 49,380.00 = 176.24%). Petitioner then applied these resulting percentage amounts, 319.24% and 176.24%, to its quarterly payroll and to its quarterly ATM withdrawals, respectively, over the course of the audit period, to calculate "taxable sales adjusted to reflect growth." Such "adjusted" taxable sales totals were reduced in each instance by reported taxable sales, to arrive at additional taxable sales and additional tax due in the respective amounts of $39,877.00 (based upon payroll growth adjustment), and $67,836.00 (based upon increased ATM withdrawals). Petitioner also determined the average of the two foregoing percentage amounts (319.24% + 176.24% ÷ 2 = 247.74%) and, using the foregoing methodology, applied such percentage to its quarterly payroll plus its quarterly ATM withdrawals to arrive at additional taxable sales and additional tax due in the amount of $53,856.00.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the primary issue was whether the admissions fees for entrance to petitioner's main area and private areas were properly subject to tax. The Administrative Law Judge observed the relevant statutes and case law on the issue,

particularly ***Matter of 677 New Loudon Corp.*** (Tax Appeals Tribunal, April 14, 2010). The Administrative Law Judge found that the facts and arguments presented by the taxpayer therein were either identical or substantially similar to the facts and arguments presented by petitioner. Accordingly, the Administrative Law Judge found that this case controlled and held that petitioner's receipts were taxable under Tax Law §§ 1105(d)(i), (f)(1) and (f)(3).

The Administrative Law Judge noted that petitioner did not challenge the Division's right to resort to an indirect audit methodology, but only that the audit methodology was unreasonable as applied.

ARGUMENTS ON EXCEPTION

Petitioner argues that the determination should be reversed because the facts presented are dissimilar from ***Matter of 677 New Loudon Corp.*** (***supra***), upon which the determination principally relies. Petitioner differentiates its establishment by stating that its beverage sales are not a substantial portion of its business and that it did not impose a drink minimum. Petitioner also argues that the testimony of Dr. Hanna should have been given more weight because she viewed the erotic dances at Paradise Found.

Petitioner additionally raises the same arguments presented before the Administrative Law Judge, stating that the admissions charges are not taxable under the Tax Law. Petitioner contends that its charges are not subject to tax under Tax Law § 1105(d)(i) because its venue is not a restaurant, tavern or a similar establishment. Petitioner contends that the subject admissions charges and revenues are not taxable under Tax Law § 1105(f)(1) because its exotic dance shows and lap dances constitute dramatic or musical arts performances akin to "[a] theater in the round [that] has a show which consists exclusively of dance routines" (20 NYCRR

§ 527.10[d][2]). Petitioner also argues that taxes imposed upon "roof gardens, cabarets, or other similar place[s]" do not apply because petitioner claims Paradise Found is not a like venue, but only a place where live choreographic, musical arts performances are offered. Accordingly, petitioner requests that we reverse the determination and cancel the Notice of Determination in its entirety.

Petitioner argues that, in any event, the Division used an improper methodology resulting in an unreasonable deficiency. Petitioner alleges that the Division's audit method was flawed because it did not take into account that the business was "seasonal" and grew over time.

The Division argues that the Administrative Law Judge properly observed and applied the statutes, based on the case law, and correctly upheld the deficiency asserted.

OPINION

Tax Law § 1105 provides for the imposition of sales taxes. Specifically at issue are Tax Law §§ 1105(f)(1), (f)(3), and (d)(1), which tax admission charges based upon the type of venue and type of service or activity offered by the taxpayer. Initially, we note that the Tax Law presumes all taxpayers' receipts to be taxable unless proven otherwise (Tax Law § 1132[c]). We also note that a presumption of correctness attaches to statutory notices (Tax Law § 689; ***see also Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [1980]), and that petitioner bears the burden of proving otherwise.

We first address the threshold issue of whether the door and private dance fees collected by petitioner meet the definition of admission charges. Tax Law § 1101(d)(2) defines an admission charge as "the amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor." Herein, petitioner

charged its patrons a door fee, which granted access to the public areas of its venue and the ability to consume the nude and semi-nude dances. Petitioner also collected fees for the use of its private rooms, wherein patrons could receive lap dances. As we found in ***Matter of New Loudon Corp.*** (***supra***), the receipts of both door and private dance fees meet the definition of admission charges within Tax Law § 1101(d)(2). Accordingly, we hold that the Administrative Law Judge properly determined that the portion of the subject receipts from door charges and private dance fees constitute admission charges.

We next turn to the issue of Tax Law § 1105(f)(1), which imposes sales tax on such receipts as admission charges to a place of amusement. This section imposes sales tax upon the following:

> Any 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, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances*, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools (emphasis added) (Tax Law § 1105[f][1]).

As relevant here, Tax Law § 1105(f)(1) taxes receipts from admission charges to places of amusement and entertainment, but exempts admission charges to dramatic, choreographic or musical arts performances from this sales tax.

The Division determined that petitioner's receipts were subject to sales tax under Tax Law § 1105(f)(1) because it is a place of amusement and entertainment. Petitioner concedes that it offers amusement and adult entertainment, but claims that it is exempt from Tax Law § 1105(f)(1) because such entertainment constitutes dramatic or musical arts performances. Specifically, petitioner contends that its venue is a theater in the round offering exclusively dance

performances, citing 20 NYCRR 527.10[d][2].[9]

Initially, we note that the Tax Law presumes that all a taxpayer's sales receipts are properly subject to tax until the taxpayer proves otherwise (***see*** Tax Law § 1132[c]). Exemptions from taxation are to be strictly construed against the taxpayer (***see Matter of Marriott Family Rests. v. Tax Appeals Trib.***, 174 AD2d 805 [1991], ***lv denied*** 78 NY2d 863 [1991]); however, our interpretation should "not be so narrow and literal as to defeat its settled purpose" (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975], ***lv denied*** 37 NY2d 708 [1975]). The taxpayer bears the burden of demonstrating not only that its interpretation is plausible, but that it is the only reasonable reading of the statute (***see Matter of Grace v. New York State Tax Commn.***, ***supra***).

Petitioner argues that ***Matter of Metromedia, Inc. v. State Tax Commn.*** (75 AD2d 341 [1980]), as well as the testimony from one of its entertainers and Dr. Hanna support its position. Petitioner also claims that ***Matter of 1605 Book Ctr. v. Tax Appeals Trib.*** (83 NY2d 240 [1994], ***cert denied*** 513 US 811 [1994]) and ***Matter of 677 New Loudon Corp.*** (***supra***) have no bearing on the instant matter because the facts herein are substantially different.

We find that petitioner misplaced its reliance on ***Matter of Metromedia, Inc.*** (***supra***). Therein, the Appellate Division affirmed a Special Term decision granting summary relief to the plaintiff because the Division did not challenge plaintiff's affidavits portraying the Ice Capes as live choreographic performances.[10] Petitioner contends that, herein, the Division similarly did

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[9] 20 NYCRR § 527.10(d)(2) provides: "a theater in the round has a show which consists exclusively of dance routines. The admission is exempt since choreography is included within the term musical arts."

[10] We also note that the decision in ***Matter of Metromedia, Inc.*** was so narrowly tailored to the specific facts presented that it did not preclude future findings that the plaintiff's shows did not meet the definition of arts performances.

not contest whether the subject nude and semi-nude dances constitute live choreographic and musical performances. We disagree. It is true that the Division does not contest that petitioner's venue offered nude and semi-nude shows both on stage and in private. However, the very issue disputed by the Division is whether such performances constitute exempt dramatic or musical arts performances as contemplated by Tax Law § 1105(f)(1). At the hearing, the Division elicited testimony from petitioner's witnesses calling into question whether the dancing met the definition of arts performances. The Division presented case law and citations to such testimony challenging whether the nude and semi-nude dancing was art. We find that this is not a situation where the Division has either accepted or not challenged that the subject shows constitute exempt art performances. Accordingly, we reject the argument that ***Matter of Metromedia, Inc.*** (***supra***) requires a reversal in petitioner's favor.

We also find that, contrary to petitioner's assertion, the Court of Appeals decision in ***Matter of 1605 Book Ctr.*** (***supra***) is germane to the issue of whether Tax Law § 1105(f)(1) imposes sales tax on petitioner's admission charges. Therein, the taxpayer operated an adult entertainment venue offering two live shows for sexual amusement through private coin-operated booths. The first type of shows involved separate, private booths surrounding a stage on which nude or partially-nude females performed. The other venue, known as the "fantasy booth," allowed a patron to converse with a scantily-dressed woman in a private booth. In both instances, a glass partition covered by a curtain or screen separated the patron from the performer. Upon depositing coins in the booth machine, the curtain or screen would part for a set amount of time, allowing the patron to either view the live performance or speak with the scantily-dressed woman. The Division determined the coins deposited into the booths to be

taxable receipts.

The Court of Appeals held that Tax Law § 1105(f)(1) imposes sales tax on the receipts because the venue provided adult entertainment and sexual amusement in the form of live nude and semi-nude performances. The Court of Appeals noted that the taxpayer's venue was unambiguously a place of amusement because of the nature of the entertainment at issue, *to wit*, viewing or speaking with live performers for sexual amusement (***Matter of 1605 Book Ctr.***, ***supra*** at 246). The Court noted that it did not matter whether the performances were viewed in public or private because the monies charged by the taxpayer still constituted an admission fee to a place where entertainment is provided. Accordingly, the Court found that Tax Law § 1105(f)(1) imposes sales tax on receipts collected from coin-operated booths offering sexual amusement.

More recently, this Tribunal addressed the application of Tax Law § 1105(f)(1) to adult entertainment and sexual amusement in ***Matter of 677 New Loudon Corp***. (***supra***). Similar to ***Matter of 1605 Book Ctr.***, the taxpayer offered sexual amusement at its adult entertainment venue in the form of nude and semi-nude performers. At the taxpayer's venue, termed an "adult juice bar," these performers would speak to patrons and provide dances on stage, as well as private and lap dances both in the open and in private rooms. The stage dances were accompanied by music and would involve a nude or semi-nude performer dancing. Private performances involved a nude or semi-nude entertainer dancing upon or otherwise touching a patron. The taxpayer collected fees at the door for general admission, as well as a separate drink minimum and also charged patrons for the private dances. The performers were not employees of the taxpayer, but independent contractors. As in ***Matter of 1605 Book Ctr.*** (***supra***), the

Division audited the taxpayer and found that the door and private dance fees were admission charges subject to Tax Law §§ 1105(f)(1), (f)(3) and, alternatively, Tax Law § 1105(d).

The taxpayer in ***Matter of 677 New Loudon Corp.*** then argued that its sales were exempt from Tax Law § 1105(f)(1) because the entertainment offered consisted of "dramatic or musical arts" performances. The taxpayer provided the testimony of Dr. Hanna, who opined that the nude and semi-nude dances provided by the taxpayer constituted musical arts performances, as defined by the statute, because the movements were choreographed expression. Dr. Hanna did not observe any of the private dances. The taxpayer also submitted the 22-minute training video provided to its performers. It also provided testimony that its dancers helped each other prepare and that they studied videos from YouTube to create their nude and semi-nude dancing routines.

We held that the taxpayer in ***Matter of 677 New Loudon Corp.*** (***supra***) failed to produce clear and convincing evidence proving that the performance in its adult entertainment venue constituted arts performances as meant in Tax Law § 1105(f)(1). We noted that the taxpayer's venue bore similarities to that in ***Matter of 1605 Book Ctr.*** (***supra***) because both provided sexual entertainment in the form of nude or semi-nude performers. We held that the record showed that the taxpayer's venue was an adult juice club and not a theater or a theater in the round as contemplated by the statute and regulations (***see*** Tax Law §§ 1105[f][1], 1101[d][5]; 20 NYCRR 527.10[b][3][i] and [d][2]). We found that Dr. Hanna's characterizations of the nude and semi-nude erotic dances merited little weight because her testimony was premised upon broad, all-inclusive definitions of dance and choreography. As such, we also found that the taxpayer did not show clear entitlement to the dramatic and musical arts exemption in Tax Law § 1105(f)(1).

We also held that the taxpayer's admission charges were properly subject to sales tax

under Tax Law § 1105(f)(3). We rejected the taxpayer's argument that its sale of beverages were merely incidental to and not a profit center for its business, because the taxpayer imposed a drink minimum and described itself as an adult juice bar. We noted that the record showed the sale of drinks to be integral as, even after the minimum was formally removed, the taxpayer still charged patrons for two drinks at the door and such receipts constituted 15% of its gross revenue. We found this to be sufficient to hold that the sale of beverages were a profit center for the taxpayer's venue and properly taxable under Tax Law § 1105(f)(3). We also noted that Tax Law § 1105(d) provided alternative grounds for imposing sales tax on the taxpayer's receipts.

We find that, contrary to petitioner's assertions, the facts herein are substantially similar to those in ***Matter of 1605 Book Ctr.*** (***supra***) and ***Matter of 677 New Loudon Corp.*** (***supra***). While petitioner contends that there is a significant distinction between the adult juice bar in ***Matter of 677 New Loudon Corp.*** (***supra***) and its own adult entertainment club, we find there to be little substantive difference between the two. Petitioner offered amusement that was similar to the booths in ***Matter of 1605 Book Ctr.*** (***supra***), and identical to the nude and semi-nude dances offered by the taxpayer in ***Matter of 677 New Loudon Corp.*** (***supra***). In each instance, the entertainers provided patrons with performances of nude or strip dancing. These services were provided both on stage and in private. In both cases, the venue set the prices for the door admission fee as well as the cost of private dances. Petitioner controlled access to the stage dances through the door fee and access to the private dances by controlling the coins required to purchase the dance.

We find that petitioner failed to show clear entitlement to the arts performance exemption in Tax Law § 1105(f)(1) because it failed to prove its adult entertainment club was a theater or a

theater-in-the-round as contemplated by the Tax Law and regulations (Tax Law §§ 1105[f][1], 1101[d][5]; 20 NYCRR 527.10[b][3][i] and [d][2]). Despite the testimony of Dr. Hanna, the record fails to convince us that mere possession of a stage makes a theater (***see Matter of 677 New Loudon Corp.***, ***supra***). Put simply, a nightclub is not a theater within the meaning of Tax Law § 1105(f)(1). In as much as the venue controls the grant of such exemptions (***Matter of United Artists Theatre Circuit v. State Tax Commn.***, 52 NY2d 1013 [1981]), we find that petitioner failed to show clear entitlement because it has not carried its burden of proving its venue to be a place where dramatic or musical arts performances are offered.

We also find that the testimony from a performer at Paradise Found fails to convince us that its shows were musical arts performances. Although the performer received some classical dance training, she testified that, like the performers in ***Matter of 677 New Loudon Corp.*** (***supra***), she developed at least some of her routines from YouTube. In her opinion, she stated that she believed the dances to be choreographed because the moves required practice. She testified that the stage dance served as an advertisement for private dances, and, for her, the ultimate goal was to generate more private dances. This testimony fails to convince us that the performances offered at Paradise Found constitute choreographic arts performances as contemplated by the Tax Law. The term "choreography," is defined as "the art of composing ballets and other dances and planning and arranging the movement, steps, and patterns of dancers" (Random House Webster's College Dictionary [2nd Ed. 1997]). While the record shows that some skill and creativity must be employed, we can find little in the record that supports finding that these shows were choreographic arts performances, especially given their purpose of advertising for and consummating the sale of sexual amusement to patrons.

We are also not convinced by the testimony of Dr. Hanna. As in ***Matter of 677 New Loudon Corp.*** (***supra***), Dr. Hanna was accepted as an expert in dance, but not an expert in taxation or law. While Dr. Hanna personally viewed stage and private dances, she made essentially the same representations. She testified that people utilize choreography when "they us[e] unity, variety, repetition, contrast, transitions, sequencing, climax, magnitude or size of movement, quality of the movement, balance, harmony, dissonance" (***see*** Tr., p. 182). It is her belief that the dancers at petitioner's venue utilized choreography because their performances had locomotion and gesture (***see*** Tr., p. 186). As in ***Matter of 677 New Loudon Corp.*** (***supra***), we do not accord much weight to Dr. Hanna's testimony and report because, although they were designed to neatly fit the exemption in Tax Law § 1105(f)(1), her views were premised upon an over-broad definition of choreography. As brought out by the Administrative Law Judge at the hearing, it is difficult to imagine what would not constitute choreography or dance to Dr. Hanna when such terms require only the combination of locomotion and music. Accordingly, we find that Dr. Hanna's testimony does not constitute clear and convincing evidence that petitioner's nude and semi-nude dance performances for sexual amusement constitute exempt choreographic and musical arts performances.

We find that petitioner's performances do not meet the dramatic or musical arts performances exemption in Tax Law § 1105(f)(1). Accordingly, we affirm this portion of the determination of the Administrative Law Judge.

Turning to the issue of whether petitioner's receipts could be taxable under Tax Law 1105(f)(3), we find that the subject receipts may be taxable as admission charges to roof garden, cabaret or similar place. However, the term "roof garden, cabaret or other similar place" does

not include,

> "a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment, or merchandise, so long as such serving or selling of food, refreshment, or merchandise is merely incidental to such performances" (Tax Law § 1101[d][12]).

We conclude that petitioner does not meet the exemption because it has not met its burden of proving the sale of refreshments is merely incidental to such performances. We agree with the Administrative Law Judge's observation that although the extent of beverage sales in this matter was less, as a percentage of overall revenue, than in ***Matter of 677 New Loudon Corp.*** (***supra***), the sales clearly constituted an integral part of the entire adult juice club experience, as well as a revenue source to petitioner's business. Accordingly, we affirm and find that the Administrative Law Judge properly determined that sales tax may be imposed upon petitioner as admission charges under Tax Law § 1105(f)(3).

We find that the forgoing analysis renders the issue of whether Tax Law § 1105(d) imposes sales tax on petitioner's admission charges moot. Tax Law § 1105(d)(i) provides:

> The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (*except those receipts taxed pursuant to subdivision (f) of this section*) . . . (emphasis added).

We have determined petitioner's admission charges for its nude and semi-nude dance performances to be taxable under Tax Law §§ 1105(f)(1) and (f)(3). As such, we need not address whether Tax Law § 1105(d) also applies to these receipts.

We hold that the Administrative Law Judge properly rejected the argument that the asserted tax liability does not fall upon petitioner because it is the entertainers' responsibility. The record

shows that the entertainers at Paradise Found were not employees of petitioner, but independent contractors who received a portion of the charge paid by a customer for each private dance purchased. Tax Law § 1131(1) provides that persons required to collect sales tax include "every vendor of tangible personal property or services; every recipient of amusement charges . . ." (***see also*** Tax Law § 1133). Tax Law § 1101(b)(8)(i) defines the term "vendor" and includes the following:

> (A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
>
> (B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;
>
> (C) A person who solicits business either:
>
> (I) by employees, independent contractors, agents or other representatives . . . .

We find that petitioner was responsible for sales tax collection and remittance under the foregoing statutory framework. Petitioner sets the rates for both the door charge and private dances. The entrance fees were collected by petitioner's employees at the door. Petitioner collected the receipts from the sales of private dances. Petitioner also controlled the coins signifying purchase of the dances, which patrons needed to present to their selected performer in order to acquire the dance. These facts remain uncontroverted. We hold that petitioner was responsible for taxes due on the admissions charges both as a vendor soliciting business by independent contractors and as a recipient of admission fees.[11] Accordingly, we affirm this

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[11] We note that the contractual relationship between petitioner and its entertainers as landlord-tenant does not alter petitioner's status as a person responsible for the collection of sales tax under Tax Law § 1131, as a vendor and recipient of admission charges. Our review of a sample contract shows that petitioner did not rent property to its entertainers but, rather, sold them licenses to perform at Paradise Found at petitioner's convenience.

portion of the Administrative Law Judge's determination.

We have considered petitioner's arguments regarding the audit methodology and find them without legal support or merit. The record shows that the Division made proper records requests for the entire audit period (***see Matter of Adamides v. Chu***, 134 AD2d 776 [1987], ***lv denied*** 71 NY2d 806 [1988]; ***Matter of King Crab Rest. v. Chu***, 134 AD2d 51 [1987]), except for March 1, 2006 through May 31, 2006. The Division concedes that the portion of the Notice of Determination for the period March 1, 2006 through May 31, 2006, be cancelled. Petitioner failed in its legal obligation to maintain adequate books and records of sales for the remaining periods at issue. Given the lack of source documentation, the Division was entitled to utilize indirect audit methodologies to determine petitioner's tax liability, if any (***see Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576 [1982]). Herein, the Division utilized a one day observation test to calculate the tax due, which the Courts have upheld as reasonable (***see Matter of Sarantopoulos v. Tax Appeals Trib.***, 186 AD2d 878 [1992]). We similarly hold that this audit methodology was reasonable and, accordingly, petitioner bears the burden of proving otherwise (***see Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858 [1981]).

Petitioner argues that the audit was unreasonable because its business grew over time and was subject to seasonal variance. In essence, petitioner takes issue with purported inaccuracies with the audit. Initially, we note that petitioner must bear the burden of resulting inaccuracies due to petitioner's failure to comply with its legal obligation. Petitioner wholly failed to introduce any clear and convincing evidence that would permit either modification or cancellation of the audit results (***see Matter of Center Moriches Monument Co. v.***

Commissioner of Taxation and Fin., 211 AD2d 947 [1995]; ***Matter of Cousins Serv. Sta.***, Tax Appeals Tribunal, August 11, 1998; ***c.f. Matter of Yonkers Plumbing & Heating Supply Corp. v. Tully***, 62 AD2d 18 [1978] [wherein a determination was cancelled because the Division ignored records and tax exemption certifications that would have altered the estimated liability]; ***Matter of 33 Virginia Place***, Tax Appeals Tribunal, December 23, 1999). Accordingly, we hold that the Administrative Law Judge properly found that petitioner failed to meet its burden and that the audit methodology was reasonable.

We have considered the remaining arguments raised by petitioner, including its contention that the Division should have utilized on-site ATM withdrawals as books and records in its audit. We find this and petitioner's remaining arguments as either properly rejected by the Administrative Law Judge or not requiring any modification to the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Greystoke Industries LLC d/b/a Paradise Found is denied;

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

3. The petition of Greystoke Industries LLC d/b/a Paradise Found is granted to the extent that the Notice of Determination is cancelled for the period March 1, 2006 through May 31, 2006, but in all other respects, is denied; and

4. The Notice of Determination, dated May 7, 2007, as modified in paragraph "3," above, is sustained.

DATED:Troy, New York
May 19, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner