STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
HDV MANHATTAN, LLC, ANTHONY F. GRANT, MICHAEL A. GRANT, JOSEPH A. SULLO AND JASON MOHNEY	:	DECISION DTA NO. 824229, 824231, 824232 824233 AND 824234
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2006 through November 30, 2008.	:	

Petitioners, HDV Manhattan, LLC, Anthony F. Grant, Michael A. Grant, Joseph A. Sullo and Jason Mohney, each filed an exception to the determination of the Administrative Law Judge issued on January 30, 2014. Petitioners appeared by Morrison & Foerster, LLP (Hollis L. Hyans, Esq., and R. Gregory Roberts, Esq., of counsel) and Shafer & Associates, PC (Bradley J. Shafer, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. The Division of Taxation filed a brief in opposition. Petitioners filed a brief in reply. Oral argument was heard in New York, New York on August 13, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. President Moseley Nero took no part in the consideration of this matter.

ISSUES

I. Whether sales tax is due on the sale of scrip at petitioners' adult entertainment business.

II. Whether sales tax is due on amounts paid by floor hosts to work at petitioners' adult entertainment business.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 7, 9 through 12, 15 and 17. We have also added additional findings of fact, numbered 29 through 50 herein. We make these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. Petitioner CMSG Restaurant Group, LLC (CMSG) (f/k/a HDV Manhattan, LLC) is a Nevada limited liability company with its principal place of business in New York, New York.

2. CMSG is owned by four members. Jason Mohney owns a 50% interest and Joseph A. Sullo, Anthony F. Grant and Michael A. Grant each own identical 16.67% interests in CMSG.

3. CMSG owns and operates the Hustler Club, which is an adult entertainment business offering live adult entertainment. The Hustler Club is located at 641 West 51st Street, New York, New York (the Club).

4. The Club is open every day. Customers pay a cover charge upon entering the Club. Mondays through Fridays, the cover charge is $20.00; on Saturdays the cover charge is $25.00; and on Sundays, there is no cover charge. CMSG remitted tax on receipts from such cover charges during the period in issue.

5. CMSG offers beverages for sale to its customers, and it remitted tax on receipts from sales of beverages during the period in issue.

6. CMSG offers various merchandise for sale to customers, and it remitted tax on receipts from sales of merchandise during the period in issue.

7. CMSG sold scrip, called Beaver Bucks, to customers, who used it to purchase private dances in one of the private rooms located within the Club. The scrip could also be used to purchase table (or lap) dances in the main areas of the Club and to tip the entertainers, the floor hosts and bartenders. The scrip was not used to pay the cover charge to enter the Club, to purchase drinks or to purchase merchandise. Each Beaver Buck indicates on its face that it is "Good for Entertainers and Tips Only."

8. A 20% surcharge is imposed on each purchase of scrip. For example, if a customer wishes to purchase $100.00 in scrip, the customer's credit card will be charged $120.00.

9. During the period in issue, receipts from sales of scrip on which tax has been asserted totaled $23,816,540.00. The amount of such scrip sales does not include the 20% surcharge on the customers' purchase of scrip.

10. Mr. David Shindel works for an accounting firm hired by CMSG for tax compliance. He testified that he is knowledgable regarding the accounting and bookkeeping practices of CMSG. He testified that Beaver Bucks are sold during the day and, at the end of the day, they are redeemed for cash. Therefore, any entertainer, floor host, bartender and anyone else working at the Club who was in possession of Beaver Bucks would redeem them at the end of the day. In fact, 99% of all scrip sold by the Club during the audit period was redeemed. The Club charged its workers a fee to redeem their scrip. Such redemption fees varied based on the worker's job at

the Club. The Club collected 10% of the face value of the entertainers' scrip and 30% of the face value of the floor hosts' scrip.

11. Mr. Shindel was asked to explain exhibits 6 and 7 submitted into evidence, entitled "Sales Breakdown by Month June 2006 through November 2008." He explained that the Beaver Bucks' transactions were tracked in a column titled "Admissions, Beaver Bucks Sales, Entertainment, Service Sales." Exhibit 6 reflected total amounts sold, whereas exhibit 7 reflected net sales after redemption. There was no accounting entry on the exhibits that addressed the redemption rates.

12. During the period in issue, the total amount paid to the Club by the floor hosts on which tax has been asserted totaled $1,318,255.00. The Club records such payments in its books and records as service fee income. No floor host testified at the hearing and there was no documentation regarding any business arrangement between a floor host and the Club. Mr. Shindel testified that floor hosts were required to pay the Club 30% of their tips at the end of each day.

13. John Nelson, of Deja Vu Consulting, was hired to take pictures of areas in the Club, as well as taking a videotape of entertainers at the Club.

14. This video footage consisted of routines by entertainers on the main stage in the Club. This footage was representative of the acts performed at the Club except for the fact that the video was taken when the Club was closed; therefore, there were no patrons in attendance, no theatrical lighting; and the DJ did not announce the names of the entertainers before their performances. Moreover, the entertainers did not remove their clothing as they would during an actual performance at the Club.

15. In addition to the performances on the main stage, the Club offered private dances in 16 private rooms, called VIP rooms, located in the Club. In order to obtain a private dance, the Club required customers to pay a fee to the Club by credit card and a fee to the entertainer by scrip. The Club deemed the fee payable to it a "room charge." Such room charges were the Club's greatest source of revenue during the audit period. Similarly, entertainers made most of their money from private dances. Such dances were a considerable expense to customers. For a half hour in a private room, customers paid a room charge of $225.00 to the Club by credit card and $300.00 to the entertainer by scrip. An hour in a private room cost $450.00 payable to the Club by credit card and $500.00 payable in scrip to the entertainer.

16. Entertainers also offered lap (or table) dances to customers.

17. Petitioners presented two witnesses who each discussed the agility required in order to perform the routines at the Club. One entertainer, Gina, explained her dance background and where in the Club she performs.

Specifically, Gina stated that she began taking ballet lessons when she was eight or nine years old, received ballet scholarships, and began taking classes at the Broadway Dance Center in New York City when she was 19. Gina had prior experience as an exotic dancer when she was hired as an entertainer at the Club.

Gina, like all entertainers at the Club during the period at issue, performs on any of the three stages in the Club (***see*** finding of fact 34); on the floor (i.e., lap or table dances); and in the private rooms.

Gina has set routines for her performances on stage. She plans such routines herself and practices at the Club before it opens. The Club's DJ has a list of her preferred music and he

usually plays songs from that list. She has a set sequence of moves that she incorporates into her routines. If the DJ plays a song that Gina has never heard, she will improvise by incorporating her other dance routines into that particular song, depending on the song's rhythm.

Dawn Beasley, an exotic dancer with 14 years' experience, who performs at another adult entertainment establishment, testified as to some of the moves that she saw performed in the videotape and she used certain names to describe the movements performed by the entertainers on the dance pole.

Petitioners also presented two witnesses, Alexandra Beller and Madonna Grimes, who were dance experts. Ms. Beller was offered and accepted as an expert in choreography and dance performance. Ms. Grimes was offered and accepted as an expert in dance choreography.

Both Ms. Beller and Ms. Grimes visited the Club on two occasions prior to the hearing, where they received tours of the Club and viewed performances on the stages, on the floor and in the private rooms. Each also received a private dance in one of the Club's private rooms and interviewed several entertainers who performed at the Club.

Ms. Beller was of the opinion that the performances she saw at the Club were dramatic and choreographic performances. She noted the repetition of sequences of events and the high level of virtuosity. Ms. Beller considered the performances to be dramatic because, in her view, the entertainers' costumes, their stage names, their main stage performances, their table dances and private dances, the way they converse, and even the way they stand all contribute to the building of a character and an atmosphere.

Ms. Beller believed that the dictionary definition of choreography that informs certain decisions of this Tribunal and the New York courts was lacking in that such definition fails to

take into account many common features of contemporary dance, such as improvisation, chance events, and cause and effect.

Ms. Grimes was also of the opinion that the performances were choreographic, as she noted the repetition in the entertainers' steps. In commenting on the similarity between the video footage that was entered in evidence and the dancing she observed at the Club, including the private dances, she noted that the entertainers "don't have a whole lot of moves, so it is pretty much the same." She considered the performances dramatic because, in her view, when the entertainers are working, they are not being themselves. According to Ms. Grimes, an entertainer becomes a "different person."

18. The Division of Taxation (Division) conducted a sales and use tax audit of HDV Manhattan, LLC (n/k/a CMSG Restaurant Group, LLC) for the period June 1, 2006 through November 30, 2008. The auditor did not visit the Hustler Club.

19. Based upon a test period audit to determine additional tax due on expenses, the Division determined additional tax due on expenses of $11,222.55.

20. On August 10, 2009, the Division issued a notice of determination, L-032393476, to HDV Manhattan, LLC asserting a tax deficiency of $4,874,873.71, plus penalties and interest for the audit period.

21. Petitioner was given credit for tax paid during the period in the amount of $1,108,085.53.

22. On August 10, 2009, the Division issued separate notices of determination to petitioners Anthony F. Grant (L-032400370), Michael A. Grant (L-032400371), Joseph A. Sullo

(L-032400368) and Jason Mohney (L-032400369) asserting a tax deficiency of $4,874,873.71 each, plus penalties and interest for the audit period.

23. All of the petitioners filed timely requests for conciliation conferences protesting the notices in their entirety.

24. On April 30, 2010, the Division's auditor sent a letter to the conciliation conferee explaining that the tax deficiency asserted in the notices was being reduced from $4,874,873.71 to $3,140,703.90 to reflect that the 5% surcharge on sales of entertainment or information services delivered by means of telephony or telegraphy was being removed.

25. On December 17, 2010, conciliation orders were issued granting in part and denying in part the requests for conciliation conferences filed by petitioners.

26. The conciliation orders reduced the asserted tax deficiency to $2,113,204.38 and abated all penalties.

27. The remaining tax deficiency is attributable to (i) petitioners' sale of scrip, (ii) amounts classified as "service fee income" on the books and records of CMSG and in the Division's work papers and (iii) additional tax due on sales where petitioners remitted tax, but the Division determined that additional tax was due.

28. On March 3, 2011, petitioners timely filed petitions for redetermination with the Division of Tax Appeals.

29. During the course of the audit, it was the understanding of the Division's auditor that the scrip could be used to purchase any goods or services sold in the Club and that it was mandatory to use scrip to pay the entertainers. His determination that sales of the Club's scrip were taxable was based in part on this understanding.

30. The entertainers who perform at the Club are considered independent contractors and not employees. The terms of the entertainers' relationship to the Club are set forth in a "dancer performance lease" that each entertainer must execute. The entertainers are compensated through charges for private dances, lap dances and tips. Customers pay entertainers directly for private and lap dances, as well as tips. The entertainers pay a nightly "set fee" to perform at the Club. In addition, the Club charges the entertainers a 10% fee on the face value of their scrip upon redemption.

31. Customers of the Club are not required to purchase any beverages and are not required to purchase any scrip.

32. During the period at issue, sales of beverages and merchandise accounted for approximately 17.8% of the Club's total gross revenue and 28.7% of the Club's total gross revenue, net of scrip sales (i.e., scrip sales less scrip redeemed).

33. The Club did not serve any food during the period at issue.

34. The main floor of the Club has a main stage with tables and chairs arrayed throughout. The Club also has two stages located on balconies on opposite sides of the Club that overlook the main floor. The balcony stages are visible from the main floor and are also surrounded, in part, by tables and chairs. The stages are illuminated with theatrical lighting and all three have dance poles. The Club also has a sound system.

35. The Club's 16 private rooms are located along a corridor away from the main floor. They are furnished with couches and are usually dimly lit. There is no stage and no theatrical lighting in the private rooms. There is a television in each private room that shows the performances on the main stage. Four of the private rooms have dance poles.

36. Customers are not charged for watching the entertainers perform on the stages. Customers may choose to tip the entertainers performing on the main stages using either cash or scrip.

37. Table or lap dances cost $20.00 per dance and are performed table-side in the main areas of the Club. Customers pay the entertainers directly for such dances.

38. The Club set the prices for both lap dances and private dances.

39. The entertainers plan and practice their stage routines before the Club opens and sometimes teach each other new moves.

40. The Club provides a hair and makeup artist to assist the entertainers. Entertainers choose their own costumes within parameters set by the Club.

41. Entertainers perform a minimum of four or five sets (consisting of three songs per set) per night on the Club's main stages.

42. Entertainers make most of their money from private dances.

43. Gina described a lap or table dance as an exotic, sensual dance where she performs dance moves that are "kind of what" she does on stage, except without the dance pole. She indicated that other dancers have "their own style of dance." She stated that entertainers may sit on customers' laps, but may not dance on their laps.

44. Gina stated that sexual activity between entertainers and customers was not allowed by the Club.

45. Gina testified that her private dances are similar to her table dances on the floor. She further stated that she preferred the private rooms with dance poles because she can dance like she does on the stage.

46. Gina noted that a private dance experience may involve a conversation between the entertainer and the customer. She considers such conversations part of her job of entertaining customers in the private rooms. She says that she will try to find out their interests and what they like. She noted that, on occasion, customers have cried in the private rooms and that, also on occasion, she has gotten customers to attempt to perform on the dance pole. She considers herself to be acting when she is speaking and interacting with customers in this manner. Gina summed up her approach to the private dances as "whatever makes the time go by as fast as possible and make sure that you are still entertaining them in a safe manner."

47. Ms. Beller received a table dance and a private dance at the Club. She also observed such dances at the Club. She stated that the table dance and private dance were similar. The entertainer who gave her the private dance was aware that she had been hired by the Club to interview entertainers and to observe dances.

48. Ms. Grimes also received a private dance at the Club. In addition, she observed table dances. She had previously interviewed the entertainer who performed a private dance for her.

49. Mr. White, the Club manager, who occasionally viewed activity in the private rooms through security cameras, described private dances as more similar to the table dances performed at the Club than to the stage dances. Mr. White also stated that private dances in rooms with dance poles are more similar to stage performances.

50. The Club hires individuals to work as floor hosts. The function of a floor host is to greet customers when they enter the Club; assist customers in finding a seat; and facilitate transactions between customers and entertainers for private dances. Floor hosts are classified as independent contractors and not employees of the Club. They are compensated by tips from

customers and entertainers. The Club imposed a 30% charge to redeem scrip from its floor hosts. As noted previously, such charges are recorded by the Club as service fee income.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, pursuant to Tax Law § 1105 (f) (1), sales tax is properly imposed on admission charges to places of amusement except (as relevant here) for admission charges to dramatic or musical arts performances. The Administrative Law Judge determined that the Club was a place of amusement within the meaning of the statute, but that, contrary to petitioners' claims, the performances by the entertainers were neither dramatic nor musical arts performances. Rather, the Administrative Law Judge determined that the entertainers offered entertainment in the form of sexual fantasy to customers and that the dance moves and choreography comprising the entertainers' routines were ancillary to that service. Accordingly, the Administrative Law Judge concluded that the admission charges paid for entry into the private rooms and for lap dances were properly taxable pursuant to Tax Law § 1105 (f) (1).

Alternatively, the Administrative Law Judge determined that, even if the performances purchased with scrip were exempt from tax, the assessment on scrip sales must be sustained because petitioners failed to show any allocation of scrip sales to specific services. Under such circumstances, the Administrative Law Judge determined that all scrip sales are properly deemed taxable.

The Administrative Law Judge also sustained the Division's assessment of sales tax on the amounts that the floor hosts paid to the Club because petitioners failed to show that such fees were not taxable.

The Administrative Law Judge further determined that petitioners' constitutional arguments were mooted. Therefore, such arguments were not addressed.

Additionally, the Administrative Law Judge dismissed the Division's request for frivolous petition penalties against each of the individual petitioners based upon each such petitioner's contention that he was not a responsible person liable for the collection and payment of sales tax. The Administrative Law Judge concluded that such penalty was unwarranted.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioners assert that the Division failed to establish a rational basis for the assessment and that, therefore, the subject notices of determination must be dismissed. In support, petitioners argue that the record establishes that the Club's scrip could be used for tips and payments to entertainers only and hence the assessment of tax on the sale of scrip is premised on a misunderstanding of how the scrip could be used. To emphasize the Division's failure to properly understand the Club's operation, petitioners note, correctly, that the Division's auditor did not visit the Club during the audit.

Petitioners also contend that the receipts from the sale of scrip are not admission charges as that term is properly interpreted pursuant to Tax Law § 1101 (d) (2) and thus are not taxable under Tax Law § 1105 (f) (1). They contend that sales of the scrip at issue fall outside of the statutory definition because the scrip could not be used to gain admission to the Club or to any of the private areas of the Club. They further contend that the scrip may not be construed as a service charge or a charge for entertainment by the Club because the scrip could not be used for any sales made by the Club (e.g., the purchase of beverages or merchandise). Pursuant to this

same rationale, petitioners argue that, even if the scrip purchases could be construed as taxable, their entertainers bore full responsibility to collect such taxes.

For similar reasons, petitioners also assert that the sale of scrip did not constitute charges for admission, refreshment, service or merchandise at a roof garden, cabaret or other similar place and are therefore not taxable under Tax Law § 1105 (f) (3).

Alternatively, petitioners contend that the scrip revenue constitutes charges for dramatic or musical arts performances and thus qualifies for the exception to the admissions charge tax in Tax Law § 1105 (f) (1). More specifically, petitioners assert that the record establishes that the Club constitutes a theater, opera house, concert hall or other hall or place of assembly within the meaning of Tax Law § 1101 (d) (5) and that the entertainers provided live dramatic and choreographic performances pursuant to the same provision.

Relatedly, petitioners assert that, although this Tribunal has stated in a decision that similar scrip constituted admission fees under Tax Law § 1105 (f) (1), such statement is dicta because that matter was primarily a responsible officer case and the underlying liability was not challenged. Petitioners also assert that the instant matter is factually distinguishable from other prior decisions of this Tribunal involving admission fees and exotic dancing.

Also alternatively, petitioners contend that the scrip revenue is not taxable under the so-called cabaret tax (Tax Law § 1105 [f] [3]) because the entertainers' performances were live dramatic or musical arts performances and the Club's sale of refreshments and merchandise was merely incidental to such performances. Thus, according to petitioners, the Club did not fall within the definition of roof garden, cabaret or other similar place as set forth in Tax Law § 1101 (d) (12) and is not, therefore, subject to the tax under Tax Law § 1105 (f) (3).

Petitioners also raise several "as applied" constitutional challenges to the proposed imposition of tax pursuant to Tax Law § 1105 (f) (1) and (3) as well as the relevant definitions in Tax Law § 1101 (d) (5) and (12). Specifically, petitioners assert that such statutes as applied herein violate petitioners' rights of free speech and expression under the First Amendment and the corollary protections provided by Article I, § 8 of the New York State Constitution. Petitioners further assert that the subject taxing statutes as applied violate their rights to equal protection under the Fourteenth Amendment and Article I, § 11 of the New York State Constitution. Petitioners also contend that these statutes are unconstitutionally vague as applied.

Additionally, for purposes of preserving their rights on appeal, petitioners raise facial constitutional challenges to Tax Law §§ 1101 (d) (5), (12) and 1105 (f) (1), (3) as violative of their rights to free speech and expression under the First Amendment and Article I, § 8 of the New York State Constitution and of their rights to equal protection under the Fourteenth Amendment and Article I, § 11 of the New York State Constitution. Petitioners also assert that these statutes are uncostititutionally vague on their face. Additionally, in the event that their as applied free speech and expression claim is rejected herein, petitioners make an alternative facial constitutional argument that such statutes are overbroad and therefore unconstitutional.

In their exceptions, petitioners also claim that their due process rights were infringed by the Administrative Law Judge's requirement that all entertainers testifying at the hearing be identified in the record by their real names, even though such names would not be used in the determination. Petitioners assert that this requirement prevented the introduction of relevant testimony and improperly limited petitioners' ability to present evidence in support of their case.

With respect to the service fee income component of the deficiency, petitioners assert that, as such amounts represent payments by the floor hosts to work at the Club, they are not subject to sales tax under any part of Tax Law § 1105.

The Division contends that petitioners' arguments herein hinge on their factual claim that the scrip could not be used for admission into the private rooms at the Club. The Division asserts that the Administrative Law Judge correctly determined that this was not the case and that the record shows a lack of evidence indicating that a patron could enter a private room without first purchasing scrip.

The Division further contends that the Administrative Law Judge correctly determined that the entertainers' performances at the Club were not dramatic, choreographed or musical performances within the meaning of the statute and that, accordingly, the subject charges were properly taxable pursuant to Tax Law § 1105 (f) (1). The Division argues that this determination is supported by prior decisions of this Tribunal and the New York Court of Appeals.

Alternatively, the Division asserts that the scrip revenue is properly subject to tax under Tax Law § 1105 (f) (3) because, as the Administrative Law judge determined, the entertainers' performances were not choreographed or dramatic arts performances and, additionally, the Club's sale of refreshments was not incidental to such performances.

The Division rejects petitioners' claim that, even if the scrip purchases are taxable, the entertainers were responsible for the collection of such taxes. It contends that, as the Club was a sales tax vendor that controlled all aspects of the transactions, the entertainers' status as independent contractors is inconsequential.

As an additional alternative basis for the imposition of sales tax on the scrip sales, the Division asserts that such sales are taxable pursuant to Tax Law § 1105 (d).

With respect to the service fee income, the Division argues that the Administrative Law Judge properly determined that petitioners failed to show that such fees were nontaxable.

Finally, the Division asserts that petitioners' constitutional arguments are baseless because New York courts have determined that the tax statutes at issue are constitutional.

OPINION

Tax Law § 1105 (f) imposes sales tax on receipts from certain amusement charges. As relevant here, such charges are defined in Tax Law § 1101 (d) (3) to include admission charges, taxable pursuant to Tax Law § 1105 (f) (1), and charges of a roof garden, cabaret or other similar place, taxable pursuant to Tax Law § 1105 (f) (3). In accordance with Tax Law § 1132 (c) (1), all such receipts are presumptively subject to sales tax until the contrary is established and the burden to prove that any receipts are nontaxable is on the person required to collect the tax or the customer. Consistent with this statutory provision, a presumption of correctness attaches to a notice of determination upon its issuance and a petitioner bears the burden of proof to overcome a sales tax assessment (***see e.g. Matter of Kieran***, Tax Appeals Tribunal, November 13, 2014). Accordingly, while a notice of determination must have a rational basis to be sustained upon review (***see Matter of Grecian Sq. v New York State Tax Commn.***, 119 AD2d 948 [1986]), contrary to petitioners' contention, the Division does not bear the burden to affirmatively establish such a rational basis (***see Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992).

As noted, it is the Division's position that the Club's receipts from its sale of scrip were taxable as admission charges to a place of amusement pursuant to Tax Law § 1105 (f) (1). As relevant here, that provision imposes sales tax on any admission charge for the use of any place of amusement in New York. For purposes of the tax, admission charge means "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor" (Tax Law § 1101 [d] [2]) and place of amusement means "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101 [d] [10]).

Charges for exotic dances in a private area of an adult entertainment establishment have been determined to be admission charges to a place of amusement within the meaning of Tax Law § 1105 (f) (1) (***Matter of 677 New Loudon Corp. d/b/a Nite Moves***, Tax Appeals Tribunal, April 14, 2010, ***confirmed sub nom Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 85 AD3d 1341 [2011], ***affd*** 19 NY3d 1058 [2012], ***reargument denied*** 20 NY3d 1024 [2013], ***cert denied*** 134 S Ct 422 [2013] ("***677 New Loudon***"); ***Matter of Greystoke Industries LLC d/b/a Paradise Found***, Tax Appeals Tribunal, May 19, 201). Accordingly, the purchase of private dances at the Club are properly subject to sales tax under Tax Law § 1105 (f) (1).

Petitioners seek to distinguish the precedent of ***677 New Loudon*** and ***Greystoke*** on the basis that, in contrast to the facts in those cases, the purchase of a private dance at the Club is a separate transaction from the purchase of access to a private room (***see*** finding of fact 15). In the cases cited by petitioners, customers incurred a single charge for the performance of a private dance in a private area of an adult entertainment establishment. Here, the Club structured the

private dance transaction such that a customer incurred separate charges for the room and for the dance. Petitioners thus assert that the charges for the room, but not the charges for the private dance, were charges for admission to the private rooms. We disagree.

Petitioners' argument does not take into account the full scope of the statutory definition of an admission charge. As noted above, such definition includes not only "the amount paid for admission," but also "any charge for entertainment or amusement" (Tax Law § 1101 [d] [2]). Accordingly, an admission charge necessarily includes any additional cost for entertainment or amusement required to be paid to gain access to a place of amusement. As the record shows, a private dance at the Club required both access to a private room and a performance by an entertainer. Neither element could be purchased separately.[1] A customer thus necessarily incurred both such charges to obtain a private dance pursuant to the bifurcated structure of the transaction as established by the Club. Under these circumstances, the customer's payment to the entertainer for the purchase of a private dance at the Club falls well within the definition of admission charge under Tax Law § 1105 (f) (1) (***see also*** 20 NYCRR 527.10 [b] [1] [i] [example 2]). Accordingly, such payment is properly deemed an admission charge to a place of amusement within the meaning of Tax Law § 1105 (f) (1) and the precedent of ***677 New Loudon*** and ***Greystoke***.[2]

---

[1] We reach this factual conclusion because there is no evidence that the Club ever sold access to a private room without an accompanying purchase of a performance by an entertainer. Moreover, the record suggests that access to the Club's private rooms would be worth little without such an accompanying purchase.

[2] Petitioners do not contest that the private rooms were places of amusement as defined in Tax Law § 1101 (d) (10) and, indeed, they clearly were (***see 677 New Loudon***; ***Greystoke***; ***see also Matter of 1605 Book Ctr., Inc. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240 [1994], ***cert denied*** 513 US 811 [1994] [private booth in an adult bookstore is a place of amusement]).

In making their argument that the private room charges, but not the private dance charges, were admission charges, petitioners note that the Division did not assess sales tax on the room charges following its audit of the Club. While it would appear that such charges were, in fact, taxable admissions charges pursuant to our analysis herein, that issue is not before us. As to the instant matter, we find that the absence of an assessment with respect to the room charges to be of little probative value with respect to the issue of whether the private dance charges are taxable.

Petitioners also seek to distinguish the instant matter from ***677 New Loudon*** and ***Greystoke*** because neither of those matters involved purchases made with scrip. This factual difference has no bearing, however, on the question of whether the purchase of a private dance under the facts herein constitutes an admission charge to a place of amusement.

As to the assertion of tax on sales of scrip herein, we have previously held that scrip sales were taxable under Tax Law § 1105 (f) (1) where such scrip was used to purchase private room exotic dances in an adult entertainment establishment (***see Matter of Marchello***, Tax Appeals Tribunal, April 14, 2011). We reject petitioners' assertion that our discussion of the taxability of scrip sales in ***Marchello*** is dicta. Our finding in that case that the sale of scrip was taxable was a necessary part of our conclusion that the audit method and amount of tax assessed were reasonable, an issue directly addressed in the decision (***id.*** ["We further hold that the sale of dance dollars [scrip] by Club VIP are properly taxable as amusement charges."]).

Additionally, we find that the Division's assertion of tax on scrip sales was reasonable under the present circumstances because, as in ***Marchello***, the scrip was principally used to purchase private dances, which as discussed, are properly subject to tax as admission charges under Tax Law § 1105 (f) (1) under the facts herein. We note that entertainers at the Club made

most of their money from charges for private dances and that the room rental charges were the Club's greatest revenue source during the audit period. We note further that private dance charges were paid only with scrip.[3] Moreover, while it appears that some of the scrip may have been used to purchase table dances or to tip workers at the Club, there is insufficient evidence to establish the amount of scrip attributable to such transactions. We conclude, therefore, that all scrip sales are presumptively taxable pursuant to Tax Law § 1132 (c) (1).

We also reject petitioners' assertion that, even if the charges for private dances are considered to be taxable pursuant to Tax Law § 1105 (f) (1), such charges are imposed by the entertainers, who are independent contractors, and not by the Club. Implicit in this assertion is that the Club was not required to collect sales tax on the private dance charges. As relevant here, "[p]ersons required to collect [sales] tax" include "every recipient of amusement charges" (Tax Law § 1131 [1]). Such a recipient "collects or receives or is under a duty to collect an amusement charge" (Tax Law § 1101 [d] [11]). For purposes of the tax imposed under Tax Law § 1105 (f) (1), the term "amusement charge," as used in Tax Law §§ 1101 (d) (11) and 1131 (1) means admission charge as defined in Tax Law § 1101 (d) (2).

Here, the Club controlled all aspects of the private dance transactions. It provided the space for the private dances. Its floor hosts helped to facilitate the private dance transactions (***see*** finding of fact 50). It set the rates for the private dances, including both the room charge and the amount paid to entertainers. The Club was also responsible for the bifurcated structure of these transactions and, as discussed, both the room charge and the amounts paid to the entertainers

---

[3] This factual conclusion is based on Gina's testimony. When the Division's representative asked her "When you work at the Club you don't collect money from customers, do you?," she responded "I collect Beaver Bucks that they collect from the Club."

constitute payment by the customer for a private dance. Additionally, the Club had a significant financial interest in these transactions. The room charges were its greatest source of revenue during the period at issue. Moreover, the value of this revenue source was contingent on the accompanying charges that were paid to the entertainer. That is, there would have been no room rental revenue without the purchase of private dance performances. The Club also derived revenue from the private dance fees paid to entertainers, through its 20% surcharge on the sale of scrip and its 10% charge to the entertainers upon scrip redemption. Accordingly, we find that petitioners were under a duty to collect the entire amount paid by customers in the private dance transactions and are therefore properly deemed recipients of the taxable amusement charges at issue pursuant to Tax Law § 1101 (d) (11). Petitioners were thus persons required to collect tax on the such charges under Tax Law § 1131 (1).

Our decision in ***Matter of Yager*** (Tax Appeals Tribunal, March 23, 1989) is on point and supports our conclusion on this issue. In that case, we determined that a tavern was responsible for the collection of sales tax on cover charges taxable under Tax Law § 1105 (d), even though such charges were usually collected by, and payable to, non-employee band members hired to play at the tavern. In reaching our conclusion, we noted that, similar to the instant matter, the tavern had a financial interest in the cover charges and that its employees played a role in collecting the fees.

Our conclusion on this issue is also consistent with our decision in ***Matter of Greystoke Indus. LLC d/b/a Paradise Found*** where, as in the instant matter, customers of an adult entertainment establishment paid non-employee entertainers directly for private dances. After the private dance, the entertainers turned the payments over to the house. At the end of their

shift, the entertainers received their share of the private dance fees. In our decision in ***Greystoke***, we determined that the private dance fees were taxable as admission charges under Tax Law § 1105 (f) (1) and that the adult entertainment establishment was responsible for the collection of tax on such fees.

As noted, petitioners alternatively argue that, even if the private dance fees are admission charges, the entertainers' performances are choreographic and dramatic within the meaning of Tax Law § 1101 (d) (5). Accordingly, petitioners contend, such fees are not subject to the tax on admissions imposed under Tax Law § 1105 (f) (1).

Tax Law § 1105 (f) (1) excepts from tax admissions charges to "dramatic or musical arts performances." Contrary to petitioners' contention, the dramatic or musical arts performance exception to the admissions tax is properly treated as an exemption from sales tax (***see 677 New Loudon*** 19 NY3d at 1060). Petitioners bear the burden of establishing entitlement thereto (***see Matter of Grace v New York State Tax Commn***., 37 NY2d 193, 195 [1975], ***lv denied*** 338 NY2d 330 [1975]). Furthermore, in construing the claimed exemption, "[i]f ambiguity or uncertainty occurs, all doubt must be resolved against the exemption" (***Matter of Charter Dev. Co., L.L.C. v City Of Buffalo***, 6 NY3d 578, 582 [2006]). Accordingly, petitioners' interpretation of the statute must not simply be plausible, it must be the only reasonable construction (***see Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.***, 83 NY2d 44, 49 [1993]).

For purposes of the claimed exemption, the term "dramatic or musical arts admission charge" means "[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance"

(Tax Law § 1101 [d] [5]). This definition thus creates two conditions for the claimed exemption, one related to the setting of the claimed exempt performance and one related to its content. Furthermore, the language of Tax Law § 1101 (d) (5) indicates that both such conditions must be met in order to qualify for exemption. Upon review of the record, we conclude that petitioners have not satisfied either such condition and hence their claim for exemption from tax must fail.

As to the setting requirement, Tax Law § 1101 (d) (5) provides that, in order to qualify for the exemption, a performance must be given in "a theatre, opera house, concert hall or other hall or place of assembly." This definition is plainly narrower than the "place of amusement" definition in Tax Law § 1101 (d) (10) to which the admissions charge tax under Tax Law § 1105 (f) (1) generally applies. As noted previously, that definition includes "*[a]ny place* where *any facilities* for entertainment [or] amusement . . . are provided" (Tax Law § 1101 [d] [10] [emphasis added]; ***see also Matter of 1605 Book Ctr. v Tax Appeals Trib.*** [place of amusement includes a booth in an adult bookstore]). What is most noteworthy about the examples that define the setting of an exempt performance is that each is a communal venue in which many people may be expected to gather to watch a performance. In other words, the statute contemplates an exemption for public performances. The examples are thus consistent with the legislature's "evident purpose of promoting cultural and artistic performances in local communities" in creating the subject exemption (***677 New Loudon*** 19 NY3d at 1060).

In contrast, the setting of a private dance performance is a private room in which a single individual watches a performance.[4] Such a setting is the antithesis of the various public venues

[4] Although the record indicates that private dances were sold to individual customers, we note that Ms. Beller testified that her husband was present in the private room when she received her private dance. Considering that she was working for the Club at that time, we conclude that her experience was not typical. In any event, even if

(continued...)

listed in Tax Law § 1101 (d) (5). Moreover, the private aspect of these dances would appear to be a significant part of their appeal. The private rooms also lack stages and theatrical lighting, two other common characteristics of the settings described in Tax Law § 1101 (d) (5). We conclude, therefore, that the Club's private rooms were not "a theatre, opera house, concert hall or other hall or place of assembly" within the meaning of Tax Law § 1101 (d) (5). Accordingly, admissions charges to such rooms, including the private dance charges paid to entertainers, were not exempt from sales tax imposed pursuant to Tax Law § 1101 (f) (1).

Although not necessary to our ultimate holding herein, we also find that petitioners have failed to meet their burden to show that private dances were dramatic or choreographic as claimed (***see 677 New Loudon*** 19 NY3d at 1060, 1061). We find that petitioners have failed to credibly depict the private dance experience in sufficient detail to establish that experience as dramatic or choreographic as required for exemption. We base this conclusion on several factors. First, private dances were described by petitioners' witnesses as similar to table or lap dances, yet the price of a private dance was significantly greater than a table dance (***see*** findings of fact 15 and 37). Such a pricing difference suggests that a private dance would differ considerably from a table dance, yet petitioners offered no evidence addressing the Club's pricing structure. We therefore question the credibility of testimony describing the two kinds of dances as similar. We also note that Gina's description of the table dance as exotic, sensual and "kind of what" she does on stage lacks the specificity necessary to determine whether her private dances should be considered choreographed. Additionally, we discount the descriptions of private

---

[4](...continued)
the Club occasionally sold private dances to couples, it would not change our conclusion that the private rooms were not places of assembly within the meaning of Tax Law § 1101 (d) (5).

dances provided by Ms. Beller and Ms. Grimes since they were working for the Club at the time and the dancer giving the private dance was aware of that fact. We note further that Gina indicated that conversing with the customer was a regular part of the private dance experience. It is unclear from the record the extent to which such conversations were a part of the private dance experience, but, in our view, such conversing is neither choreographic nor dramatic. Related to this point, we reject the notion put forth by petitioners' witnesses that the entertainers were constantly acting while working (***see*** findings of fact 17 and 46) and that such acting is indicative of a dramatic performance within the meaning of Tax Law § 1101 (d) (5). In our reading of the evidence, the entertainers' acting consisted of dressing in a certain way and pretending to be interested in customers. This describes virtually any service worker who depends on tips. Clearly, a more formal or structured performance is necessary to qualify as dramatic for purposes of the exemption at issue.

As noted, the Division asserts, alternatively, that the scrip sales are subject to tax under Tax Law § 1105 (f) (3) as "charges of a roof garden, cabaret or other similar place." Such a charge means "[a]ny charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place" (Tax Law § 1101 [d] [4]). The phrase "roof garden, cabaret or other similar place" is defined as any such place that "furnishes a public performance for profit, *but not including* a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances" (Tax Law § 1101 [d] [12] [emphasis added]). "[L]ive dramatic or musical arts performance" as used in Tax Law § 1101 (d) (12) includes choreography (***see Greystoke Indus.***

LLC; ***see also Amendment to the Definition of Roof Garden, Cabaret or Similar Place - Chapter 609, Laws of 1986*** [New York State Dept of Taxation & Fin. Technical Memo, TSB-M-86(28)S, December 29, 1986]).

Petitioners assert that the Club offered live dramatic or musical arts performances and that its sale of refreshments was incidental to such performances. Petitioners thus contend that the scrip sales are not taxable under Tax Law § 1105 (f) (3). We disagree.

As indicated above, the statutory scheme creates an exclusion (i.e., "but not including . . .") from the so-called cabaret tax through the definition of cabaret in Tax Law § 1101 (d) (12). We are mindful that an exclusion from tax must be construed most strongly in favor of the taxpayer (***see Matter of Grace v State Tax Commn.***). Nevertheless, all statutes should be construed as a whole and, where the language is unambiguous, statutes must be construed so as to give effect to the plain meaning of the words used (McKinney's Cons Law of NY, Book 2, Statutes § 97; ***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [1995], ***lv dismissed*** 87 NY2d 918 [1996]).

In our view, Tax Law § 1101 (d) (12) unambiguously defines cabarets generally as establishments that furnish public performances for profit, but excludes from that definition cabarets that "merely" offer a particular type of public performance.[5]

Here, the Club offered public performances for profit during the audit period through stage performances and table dances. The private dances, however, were the Club's greatest source of revenue during that time. As the record shows, each private dance was performed in the view of

---

[5] We observe that, under both the admissions tax exemption and the cabaret tax exclusion, charges related to similar kinds of public performances avoid sales tax.

the purchasing customer only and was not "open to the view of all" at the Club (***see*** Random House Webster's College Dictionary, 1053 [1997]).[6] The private dances were not, therefore, public performances within the meaning of Tax Law § 1101 (d) (12). Accordingly, even assuming that the stage and table dances were choreographed public performances for profit as claimed, the Club did not "merely" offer such performances, as the private dances were unquestionably a significant part of its entertainment offerings.[7]

In light of the foregoing, it is not necessary to consider the remaining condition for petitioners to qualify for the exclusion; that is, whether the Club's sale of refreshments and merchandise was "merely incidental."

Similarly, having concluded that the sale of scrip is taxable under Tax Law § 1105 (f) (1) and (3) herein, it is not necessary to address whether the sale of scrip is taxable pursuant to Tax Law § 1105 (d).

Turning to petitioners' constitutional arguments, we note first that our jurisdiction does not encompass challenges to the constitutionality of a statute on its face (***see Matter of A&A Serv. Sta., Inc.***, Tax Appeals Tribunal, October 15, 2009). Accordingly, we do not consider petitioners' facial constitutional challenges.

We are, however, empowered to consider whether the application of a statute to a particular set of facts violates the constitution (***see Matter of Eisenstein***, Tax Appeals Tribunal, March 27,

---

[6] As the statute does not define "public," it is appropriate to interpret this word in its ordinary, everyday sense (***see Matter of Automatique, Inc. v Bouchard***, 97 AD2d 183, 186 [1983]).

[7] We note that the dictionary definition of "merely" in this context is "being nothing more . . . than what is specified" (***see*** Random House Webster's College Dictionary, 821 [1997]).

2003). Petitioners bear the burden of proving that a statute, as applied, is unconstitutional (***Matter of Brussel***, Tax Appeals Tribunal, June 25, 1992).

Petitioners' claim that the statutes at issue as applied violate their right to free speech and expression rests upon their contention that a determination of taxability depends upon the content of the entertainers' expression. That is, whether the performances by the entertainers qualify as dramatic or choreographic. This decision's conclusion that the Club's scrip sales were taxable under Tax Law § 1105 (f) (1) and (3), however, is based not upon the content of the expression but rather its setting. Accordingly, the application of these statutes under the instant facts and circumstances does not regulate the content of the performances in any way. Hence, petitioners' first amendment as applied claim fails.

Petitioners' as applied equal protection argument is that the statutes at issue tax certain forms of live entertainment, but allow tax-free entertainment for certain other forms of live entertainment. We reject this claim because petitioners have offered no evidence that they were treated any differently than other taxpayers, similarly situated, in the application of Tax Law § 1105 (f) (1) and (3).

Petitioners' claim that Tax Law §§ 1105 (f) (1) and (3) are unconstitutionally vague as applied is premised on an asserted inability to objectively define dramatic, choreographic or musical performance. As discussed, this decision's conclusion that the Club's scrip sales were taxable is not premised on a determination regarding the content of the entertainers' performances, but was premised on the setting of such performances. Accordingly, this claim, too, is rejected.

We also reject petitioners' claim that their due process rights were infringed by the Administrative Law Judge's requirement that all witnesses testifying at the hearing be identified in the record by their real names, even though such names would not be used in the determination.[8] Petitioners assert that this requirement prevented the introduction of relevant testimony and improperly limited petitioners' ability to present evidence in support of their case. We disagree. In our view, the Administrative Law Judge's requirement was reasonable. We note that petitioners offered no argument in support of this contention in their briefs on exception.

Finally, as to the question of whether sales tax is due on service fee income, it is true that, as the Division and Administrative Law Judge have noted, there is limited evidence in the record regarding the relationship between the floor hosts and the Club. There is sufficient evidence, however, to establish that the floor hosts paid the Club a charge to redeem scrip received as tips and that the Club recorded the payment of such charges as service fee income (***see*** finding of fact 12). Such facts are sufficient to establish that the floor hosts' payments to the Club are not subject to sales tax under Tax Law § 1105. This portion of the subject deficiencies is thus canceled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners, HDV Manhattan, LLC, Anthony F. Grant, Michael A. Grant, Joseph A. Sullo and Jason Mohney, are granted to the extent provided below, but are otherwise denied:

---

[8] We note that the entertainer who testified at the hearing has been identified both in the Administrative Law Judge's determination and in this decision by her stage name, in accordance with petitioners' request.

(a) The Division of Taxation is directed further modify the notices of determination, dated August 10, 2009, and modified by the conciliation orders dated December 17, 2010, to reflect the conclusion herein that amounts attributable to service fee income (***see*** finding of fact 12) are not subject to tax;

2. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph 1 above, but is otherwise affirmed;

3. The petitions of HDV Manhattan, LLC, Anthony F. Grant, Michael A. Grant, Joseph A. Sullo and Jason Mohney, are granted as indicated in paragraph 1 above, but are otherwise denied; and

4. The notices of determination, dated August 10, 2009, as modified by the conciliation orders dated December 17, 2010, and as further modified as indicated in paragraph 1 above, are sustained.

DATED: Albany, New York
February 12, 2016

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

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