STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

677 NEW LOUDON CORPORATION D/B/A NITE MOVES :

:

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 September 1, 2005 through February 28, 2010. :

In the Matter of the Petition :

of :

STEPHEN DICK, JR. :

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, 2007 through February 28, 2010. :

In the Matter of the Petition :

of :

STUART CADWELL :

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, 2007 through February 28, 2010. :

DECISION
DTA NOS. 824333, 824334 AND 824335

Petitioners, 677 New Loudon Corporation d/b/a Nite Moves, Stephen Dick, Jr. and Stuart Cadwell, and the Division of Taxation, each filed an exception to the determination of the Administrative Law Judge issued on May 21, 2015. Petitioners appeared by W. Andrew

McCullough, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners and the Division of Taxation both filed briefs in support of their exceptions, in opposition to the other party's exception and in reply. Oral argument was heard on February 25, 2016, in Albany, New York, 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.

ISSUE

Whether sales tax is due on admission charges and fees for private performances received by 677 New Loudon Corporation d/b/a Nite Moves.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 5, 9, 11 and 37, which have been modified to more fully and accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner[1] 677 New Loudon Corporation d/b/a Nite Moves operates an establishment in Latham, New York, which features semi-nude and nude dancing by females, lap or table dances and private dances (Nite Moves). Nite Moves serves non-alcoholic beverages but not food.

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[1] "Petitioner" refers to 677 New Loudon Corporation throughout. The liability of Mr. Dick and Mr. Cadwell is derived from that of 677 New Loudon Corporation and neither individual has disputed his liability therefor.

2. Petitioner was selected for a follow-up audit by the Division of Taxation (Division) after a previous audit for the period December 1, 2002 through August 31, 2005. The results of that audit were challenged by petitioner, but the audit results were sustained by the Tax Appeals Tribunal (Tribunal) and also upon judicial review.

3. By letter, dated April 20, 2010, the Division confirmed an audit appointment with petitioner and requested that all records pertinent to sales and use taxes for the period September 1, 2005 through February 28, 2010 (audit period) be made available for inspection. Petitioner produced records for its sales, expense purchases and capital expenditures, which the Division deemed adequate to perform a detailed audit. The detailed audit that ensued produced additional tax in two areas.

4. The Division's audit found additional tax due on expense purchases of landscaping and interior cleaning services in the sum of $9,023.35, which amount was accepted by petitioner and billed separately. No additional tax was determined to be due on capital purchases.

5. The majority of the sales tax determined to be due was sourced to admission charges, charges for private dances, beverage sales and miscellaneous other sales, the last of which were deemed miscategorized private dances. Beverage sales accounted for about 16.29% of gross sales. These additional sales, the only ones remaining in issue, totaled $4,929,260.96, yielding additional tax due of $394,340.88. In its audit, the Division never indicated that the charge for admissions included the beverage sales or contended that any of petitioner's records, which were deemed adequate for a detailed audit, supported such an inclusion.

Petitioner's profit and loss statement for the period September 2005 through February 2009[2] reflected the following sales: couch dances,[3] $3,025,151.96; cover charges,[4] $955,989.00; register (beverage) sales, $923,825.00; and other sales (mischaracterized couch dances), $24,295.00. Total sales for the period were stated to be $4,923,454.22.

Petitioner's profit and loss statement for the period March 2009 through February 2010 reflected the following sales: couch dances, $865,780.00; cover charges, $203,165.00; and register (beverage) sales, $185,412.00. Total sales for the period were stated to be $1,253,029.85.

The auditor accepted the amounts stated on the profit and loss statements for admission charges, drink receipts and private dances without any inquiry into internal controls on petitioner's accounting for the number of admissions. He reconciled the drink sales to the tax returns for the period ending February 28, 2010.

6. With regard to admissions and private dance charges, the Division relied on the Tribunal's decision arising out of the prior audit, which held that these charges were taxable under Tax Law § 1105 (d) (i); (f) (1) and (3), for admission to a place of amusement, admission to a roof garden or cabaret and admission charges that include beverages, respectively.

7. The Division issued to petitioner a notice of determination, dated August 30, 2010, which asserted additional sales tax due of $394,340.88 plus interest for the audit period. Prior to the Bureau of Conciliation and Mediation Services (BCMS) conference, the Division discovered

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[2] While the profit and loss statements entered into evidence bear dates of September 2005 through February 2010 and March 2009 through February 2010, it is apparent from the record that the profit and loss statement bearing the dates September 2005 through February 2010 actually reflected the period September 2005 through February 2009.

[3] Refers to private dance charges.

[4] Refers to admission charges.

that it had erroneously failed to account for taxes paid by petitioner with its returns and brought this to petitioner's and the conferee's attention. As a result, the BCMS order, dated February 11, 2011, recomputed the tax to reflect the tax paid, resulting in additional tax due of $323,155.57, but sustaining the notice in all other respects.[5]

8. The two individuals determined by the Division to be responsible for the collection and payment of sales taxes on behalf of petitioner, Stephen Dick, Jr. and Stuart Cadwell, were also issued notices of determination, dated August 12, 2010, each for the shorter period June 1, 2007 through February 28, 2010, asserting additional sales tax due of $249,635.53 plus interest. Following the adjustment made for taxes paid by petitioner, the BCMS orders sustained the notices issued to Mr. Dick and Mr. Cadwell and recalculated the tax due, yielding additional tax due of $206,942.64 plus interest.

9. Generally, Nite Moves was open seven days a week during the audit period. Prior to 5:00 P.M., the admission charge was $4.00 and thereafter, $11.00. This charge did not include beverages, which were sold separately. The drinks were almost all $3.00 each and usually sold two-at-a-time for $6.00. A caffeine drink was sold for $5.00 due to its higher cost.

Stephen Dick has been involved with petitioner since 1997 when he started as a bartender at Nite Moves. He then went on to become a DJ, a manager, a general manager and a minority partner. At the time of the hearing, Mr. Dick was a minority shareholder and the chief financial officer of petitioner.

Mr. Dick explained that the drinks served were for the comfort and convenience of patrons, who preferred to have beverages on hand. He recounted how Nite Moves has not

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[5] After the BCMS conference, the Division discovered overpayments due to petitioner's reporting of gross sales figures before backing out tax. A credit of $2,531.08 was determined and petitioner was informed by letter, dated January 5, 2011, that it was eligible to claim the credits on a subsequent return.

changed its drink prices since 1997. However, the expense of providing this comfort for patrons comes at a price. He must have bartenders, compressors, coolers, ice makers and incurs the cost of the products themselves. The drinks yielded very little net revenue for petitioner. In contrast, door admissions have no associated costs and the net revenue is far more profitable. Since each profit center shares an equal percentage of the general overhead, the revenue from admissions is far greater than that for beverages.

10. The auditor's supervisor, Donald Haher, stated in a letter to Steven Dick, dated January 6, 2010, that he visited Nite Moves on January 5, 2010 at 1:00 P.M. and paid $10.00 to the bartender. There was no one at the door and he was approached by a bartender for his admission fee and also paid for two drinks. He took one drink immediately and got a coupon for a second. It is not clear from his testimony whether he knew that admission prior to 5:00 P.M. was $4.00 or that the two drinks cost $6.00. Mr. Haher also did not comment on the availability of additional drinks (beyond the two he paid for) or their cost. Mr. Haher stated that he had patronized Nite Moves 10 to 15 times over the course of 15 or 20 years. He was not sure if his recollections pertained to the audit period herein or one of his earlier visits. Mr. Dick stated that during his involvement with Nite Moves, it has never included drinks with admission.

11. Nite Moves has one stage in a lounge area, six rooms designated for couch dances, each about 5 feet by 6 feet with oversized chairs, a dressing room for employees and lavatories. The lounge area occupied the largest area of Nite Moves, approximately 28 feet by 34 feet, with the stage having dimensions of approximately 9 feet by 11 feet. The stage was surrounded by chairs and tables. Photographs of the lounge area showed dinner-theater style table lamps, ceiling mounted spot lighting and a service bar. It was the custom of Nite Moves to always have music playing and a performer on stage regardless of the number of customers.

The stage is illuminated by spotlights and, as stated, there is a dressing room for the dancers, who, at times, wear an array of different costumes. There is a professional sound system. There are tables and chairs oriented towards the stage to focus audience attention on the performances. There is also a small service bar that has no seating. The restrooms and private rooms are removed from the lounge area. The doorways to the private rooms, instead of having doors, had sheer curtains. The sheer curtains allowed for some privacy while at the same time allowing management to make sure that there was no inappropriate behavior taking place in the private rooms.

12. As of February 2009, the performers became employees of petitioner. During the portion of the audit period following that, the performers' compensation was based on a commissioned sales agreement, which provided that all entertainers would earn commissions from private dances, with the safety net of a minimum wage if their commissions did not outperform the current minimum wage. In addition, performers earned tips from lap dances, which were performed for customers in the public lounge area. Depending on the customer traffic, performers go through the lounge area soliciting lap dances for tips.[6] The commissioned sales agreement revealed generally the split of private dance charges with management. The total charge for each dance fee was claimed by petitioner in its calculation of total sales.

13. The charges for private dances varied depending on the duration, chosen by the customer, whether the performer was topless or fully nude and any discounts offered by the club. The duration was driven by three minute songs. A customer could choose three, six or twelve minutes (one, two or four songs) for which he would prepay and receive coins. The coins were

[6] During the audit period, the tips received by the performers for lap dances were not shared with the club and are not in issue herein.

then redeemed for the private dances. Upon entry into the private dance rooms, which were approximately 5 feet by 6 feet, the performer would push a button that would time her performance for the customer.

14. The record reflects various prices for the private dances, which yielded various commissions for the performers after a minimum of the equivalent of $25.00 during the day or $30.00 at night was reached. Generally, the price of a topless private dance lasting one song was $20.00, and $30.00 for a nude dance. For four songs, the topless charge was $55.00 and $75.00 for nude.

15. Mr. Dick stated that the ultimate goal at Nite Moves was and is to entice customers to purchase private dances, saying, "[i]deally, . . . I would like every customer to spend as much money as possible." This goal was repeated by one of the dancers, Taylor, who stated that her goal was to create a fantasy for customers during her stage dance so that they would buy a lap dance or private dance, because her best opportunity to make the most money resided in the latter.

16. Petitioner offered several expert reports in support of its petition. One was authored by Judith Lynne Hanna, PhD, a cultural anthropologist retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance critic. Dr. Hanna offered her expert testimony in ***Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.***, 19 NY2d 1058 (2012), ***rearg denied*** 20 NY3d 1024 (2013), ***cert denied*** 134 SCt 422 (2013), ***affg*** 85 AD3d 1341 (2011), ***confirming Matter of 677 New Loudon Corp. d/b/a Nite Moves*** (Tax Appeals Tribunal, April 14, 2010) (***677 New Loudon Corporation***).

Dr. Hanna has a doctoral degree in anthropology from Columbia University, specializing in nonverbal communication and the arts and society. She has training in many forms of dance,

has taught dance and has danced herself for over 50 years. Her training included ballet, modern, jazz, hip-hop, flamenco, belly, swing, folk and ethnic. She has been a dance critic for dance magazines, a judge in dance competitions, received many awards for her research on dance and written seven books and more than 150 articles on dance.

Dr. Hanna opined that dance is the purposeful, intentionally rhythmical and culturally influenced choreographed sequences of nonverbal body movements. She said that choreographers can engage in a broad range of practices that draw upon the aesthetic principles of, among others, unity, variety, repetition, contrast, transition between movements and balance.

17. Dr. Hanna prepared her report in this matter by reviewing her research findings used in ***677 New Loudon Corporation*** and her research findings in ***Matter of Greystoke Indus. LLC d/b/a Paradise Found*** (Tax Appeals Tribunal, May 19, 2011). For this proceeding, she also viewed the videos of three dancers on the stage at Nite Moves and two private dances, all of which were submitted into evidence. She did not observe any of the 2014 dancers in person at petitioner's premises and did not interview any of the Nite Moves dancers about their backgrounds and training in preparing her 2014 report.

18. Dr. Hanna stated that exotic dance meets the criteria of dance, which she believes to be purposeful, intentionally rhythmical and culturally influenced choreographed sequences of nonverbal body movements; motion with aesthetic value and symbolic potential; uses the human body as the instrument of dance; symbolically represents content or form; and requires an underlying faculty for conceptualization, creativity and memory.

19. Dr. Hanna stated that the purpose of exotic dance is to express eroticism, beauty of the body, health and fantasy. She said the dance uses the aesthetic to elicit fantasy and emotion, where movement through time and space is used to communicate fantasy, often incorporating

jazz-like, improvisatory movements in its choreography, i.e., the composition and arrangement of dances.

20. Based on her education, professional expertise, the prior matters referenced above and the videos she was provided herein, Dr. Hanna concluded that the shows at Nite Moves during the audit period were live, dramatic, musical choreographed performances in a theater, presenting shows composed entirely of dance routines.

21. Petitioner presented a second expert report of Katherine Liepe-Levinson, PhD, a highly skilled dancer who trained in ballet. Dr. Liepe-Levenson has choreographed for modern dance companies and a dance studio she founded. Her doctorate was earned in theater, and she has done research on exotic dance that focused on how clubs function as cultural and theatrical environments. Aside from her background in theater (MA and PhD in theater), Dr. Liepe-Levinson has experience in staging (Colgate University, assistant professor of theater), acting and dance, in addition to her observations of hundreds of exotic dance routines, including those at Nite Moves. She has also taught dance and choreography in a multitude of venues.

Dr. Liepe-Levinson based her opinion on the videos of performances at Nite Moves and written statements of a Nite Moves dancer, Mickey, and Stephen Dick, Jr. These sources were supplemented by her experience in viewing exotic dances at 70 venues in North America and hundreds of videos on exotic dance performances.

22. Dr. Liepe-Levinson concluded that Nite Moves was a theater because it had a marquee with the name of the establishment; charged admission to the performance space; had a designated stage with lighting and props; few distractions for patrons; and a house protocol that encouraged the audience to focus on the performers. She believed that the exotic dances performed at Nite Moves were choreographed arrangements of steps or moves that included

repetition and a clear beginning and end point, set to music. Routines utilized costumes and moves associated with the exotic dance genre as well as other genres; improvisation within set structures; and props like chairs and poles, used to focus and limit movement. Dr. Liepe-Levinson noted how the larger dance community commonly incorporates elements of exotic dance into its productions, highlighting the artistic merit of the genre. She does not believe that the sexual "turn on" aspect of the dance renders its choreography moot.

23. Petitioner also offered a video of, and report prepared by, Sabrina Madsen, an accomplished gymnast, who has also coached the sport on recreational and competitive levels. Ms. Madsen is a certified personal trainer, a body builder and holds a master of science degree in sports medicine. She practices and teaches pole dancing, and has a successful record in competitions including 2014 Pole Dance America's National Pole Championships and 2012 Miss Georgia Pole professional champion.

24. Ms. Madsen opined that her experience with pole dancing competitions taught her that the sport has components of pole tricks and dance, both of which are part of the judging criteria. Ms. Madsen was shown the various stage videos from Nite Moves and the music video of Alize, a Nite Moves dancer. She described the pole moves and dance steps in great detail for each and concluded that both gymnastics and pole dancing have components of acrobatics, skills and dance choreography.

25. Petitioner presented the testimony of Lorraine McTague, owner of Lorraine Michaels Dance Center in Albany, New York. Ms. McTague has studied dance at the University at Albany in elective programs in ballet, modern dance, jazz and choreography. She has studied latin, ballroom and swing in New York City and has traveled worldwide to study various international styles.

Ms. McTague has owned the dance center at the same location for 31 years and has taught dance for over 33 years. She teaches ballroom, latin, swing, tango, hip hop, ballet, tap, country and freestyle. In addition, belly, exotic and pole dancing instruction have been included in the dance center's course offerings for over 15 years. The first teacher she hired to teach exotic dance was a dancer at Nite Moves. She said that the demand for pole and exotic dance instruction has risen dramatically, to the point where she now has multiple classes and teaching rooms with poles.

26. At petitioner's request, Ms. McTague visited Nite Moves, observed several performances, spoke with dancers and determined that the performances she witnessed were choreographed dances. Her definition of choreography was stated as the arrangement of the movements of dance. Although she observed different levels of proficiency, based on her background, knowledge and skills, she concluded that all the dancers used choreographed dance pieces. Ms. McTague noted that choreography was fluid in the sense that the dancers at Nite Moves were trying to establish a relationship with the audience. She noted that, although many pieces are created months in advance of a performance, it would be feasible for a piece to be choreographed in far less time. What she witnessed had an entrance, a middle and an exit, with a distinct arrangement to music that was not "very, very basic."

27. Although the logistics of her observation were not disclosed, Ms. McTague watched one private dance and conversed with the dancer afterwards. She recounted that the dancer conceded that the smaller space, music from the main stage DJ and the rules of conduct applicable in the private rooms hindered her movement, but that the dancer maintained that she choreographed the private dances. She noted that the dance she witnessed was very different from the private dance recalled by the auditor's supervisor. She did not mention any touching,

grinding or the use of a cloth to cover the patron. Her description of the private dance focused on the small space and the dancer only being able to "kind of move around the couch and move around the customer," and "it was kind of the same thing [as the stage dance]."

28. Steve Barnes, an award winning entertainment critic from the Albany Times Union newspaper with 25 years of specialization in arts and cultural reporting, prepared an account of a visit he made to Nite Moves on November 9, 2012 in conjunction with a televised story on "The Colbert Report" on Comedy Central Cable Television Network, which was produced to highlight the dispute between petitioner and the Division during the judicial proceedings pertaining to the prior audit period.

29. Mr. Barnes observed the stage show and then paid for a lap dance. After his observations, Mr. Barnes concluded that "there's no question that the dancing at Nite Moves is art, which is most broadly defined as anything created with aesthetic intent." He noted that the performances entailed rehearsals, costumes, music, an audience and a plot. He believed that the Nite Moves' performers, like actors and actresses, are paid, in part, for their faces and physiques, exploit and merchandise their looks and emotions while playing out private acts in public. Mr. Barnes believes that it is equally valid and desirable for art to evoke grief, happiness and laughter as it is for art to arouse lust. While he believes that the art performed at Nite Moves is "terrible art," he notes that one does not take away the status of art just because it is of low quality, concluding that "bad art is still art, . . . no matter how uncomfortable it makes us or how the majority views it."

30. Two dancers from Nite Moves, representative of the approximately 30 dancers employed by the club, confirmed that they choreographed their dance routines for the main stage, lap dances and private dances. Depending on the number of performers on duty, each performer

could be called upon to perform on the main stage 5 to 15 times a shift. All of the dancers had a degree of performance related backgrounds, which they supplemented with YouTube videos and peer to peer instruction.

31. One of the dancers, whose stage name was Alize, taught pole dancing at Nite Moves on Sundays. Her students consisted of exotic dancers and women from all walks of life interested in learning the art form for jobs, a workout or other personal reasons. Alize had no formal training for her job but taught herself exotic dance and pole dancing through YouTube videos and watching and learning from other dancers. Over the course of several years, she became a top dancer at Nite Moves. Her mastery of the craft was highlighted in a professionally produced music video, which she choreographed to the featured song, that was entered into evidence. Alize was also featured in video performances at Nite Moves that were entered into evidence. One of the videos was a staged private dance where the patron was played by a club employee and the filming was done by the manager, Mr. Dick.

32. Alize had three choreographed stage sets, which she varied depending on whether the music was slow, fast or rock music. She averred that she had choreographed routines for her table dances and private dances as well, which she never varied. Although the music for the lap and private dances might not have been of her choosing, she believed that she was able to accommodate for that because she thought she "[could] dance to any music."

33. A second dancer, whose stage name was Taylor, had a more significant background in jazz and tap dance and athletics throughout her childhood and adolescent years. She also acted in shows that involved choreographed dance such as "The Rocky Horror Picture Show." She taught herself to pole dance by watching and conversing with other dancers, relying on her

athleticism and dance experience. As she became a better dancer, Taylor returned the courtesy by teaching other dancers how to master various aspects of pole and exotic dancing.

34. Taylor's stage dance routines, which she choreographed, are performed to her own music that she chooses to appeal to different audiences. For instance, she has a routine for younger audiences and another for older audiences. At times, she asks for requests and will improvise on her set routines to accommodate the requests. Her repertoire consists of approximately 40 songs, with a basic choreographed routine for all of them.

35. Taylor also prepared taped performances of her stage and private dance routines, which were filmed by Mr. Dick and entered into evidence. She uses basic moves in the private dances, the choice of which is driven by customer preferences. She noted the limits placed on her dance movements in private dances by the room dimensions, but maintained that the movements were choreographed since she had a basic set of moves she always did and then tailored them to the customer.

36. The supervising auditor assigned to this audit, Mr. Haher, had significant prior personal experience with Nite Moves and its various offerings. He stated that he had purchased private dances at Nite Moves and that they entailed entering one of the small, back rooms with the dancer, having her press a timer button, covering him with a protective cloth to prevent makeup or perspiration from soiling his clothes and then grinding and rubbing herself over his body. He recalled that if a performer had a particularly outstanding physical attribute she would highlight it in her "massage" or body rub routine. This account confirmed what the primary auditor had been told by a dancer when he asked what went on during a private dance. Although not related in the same graphic style, Mr. Dick recounted that the body cloth was a common protective cover to prevent soiling of a customer's clothing and injury to the dancer from zippers

and belt buckles, intimating that there was a need for the cloth because of the intimate physical contact between the patron and performer.

Both auditors assigned to this matter admitted having almost no knowledge or background in performing arts or, more specifically, choreographed dance performance, instead relying on the outcome of the prior audit and the Tribunal's decision in ***677 New Loudon Corporation***.

37. Mr. Dick explained that Nite Moves hired performers regardless of whether they had dance backgrounds, talent or skills. He and the other dancers worked with new performers, who also watched YouTube videos and other performers on stage to learn to dance. Mr. Dick stated that Nite Moves also used a buddy system, where an experienced dancer would be paired with a new dancer for training purposes. One of the dancers, Alize, began teaching pole dancing at Nite Moves for the general public on Sundays. At the last class Alize held before her testimony at the hearing, there were 10 students in attendance, two of whom were dancers at Nite Moves.

38. The Division sent an undercover criminal investigator to apply for a job at Nite Moves, who explicitly told Mr. Dick that she had no prior experience or dance background, just athleticism. She was told to return for an audition and led to believe that she would be hired, but Mr. Dick denied this, saying it was his protocol to allow a tryout prior to hiring, which he follows with all new dancers. Mr. Dick has an extensive background in the exotic dancing business visiting establishments throughout the world to master the skills necessary to manage a top quality showplace. He was involved with dancer training and closely monitored the stage routines.

39. Petitioner has approximately 40 to 42 employees and over 30 dancers. At busy times, there are sometimes 15 dancers on the premises at Nite Moves.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge initially determined that the doctrine of stare decisis did not mandate a decision in the Division's favor based upon the Court of Appeals decision in ***677 New Loudon Corporation***. The Administrative Law Judge explained that the doctrine of stare decisis precluded re-litigating settled principles of law or legal issues, not factual determinations. Thus, where evidence different from that of the past case is presented, a de novo review is appropriate. Furthermore, the Administrative Law Judge noted that Tax Law § 1123, providing for an exemption from tax imposed on admission charges for cabarets and similar places, was enacted in 2006, after the periods involved in ***677 New Loudon Corporation***.

Accordingly, the Administrative Law Judge proceeded by distinguishing the evidence presented in the current matter from that presented in the Administrative Law Judge hearing held in ***677 New Loudon Corporation***. The initial difference that the Administrative Law Judge noted was that in the present case, unlike in ***677 New Loudon Corporation***, the evidence indicated a clear difference between the front-door admission charges and the charges for the private performances. The Administrative Law Judge proceeded by first discussing the front-door admission charges.

The Administrative Law Judge noted that the Tribunal in ***677 New Loudon Corporation***, held that the exemption contained in Tax Law § 1105 (f) (1) for dramatic or musical arts performances did not apply because Nite Moves was different than the "theater-in-the-round contemplated by the statute and regulations." The Administrative Law Judge, after discussing the additional evidence presented in the current matter, held that based upon the evidence before him, Nite Moves is a place where performances are given. The Administrative Law Judge also

concluded that the front-door admission charges allowed customers access to the lounge area and the ability to view the main-stage performances only, and that all other charges were optional.

The Administrative Law Judge explained that charges for admission to places of entertainment were taxable, although not if such charges were for admissions to a "live dramatic, choreographic or musical performance" (Tax Law § 1101 [d] [5]). The Administrative Law Judge noted that the Tribunal decision in ***677 New Loudon Corporation*** was largely based upon a finding that petitioner's lone expert witness, Dr. Hanna, was not credible, in particular because she professed to know that the private performances at Nite Moves were choreographed even though she had not seen a private performance in person or even on a video. However, the Administrative Law Judge found the additional evidence provided by petitioner in the present matter sufficient to prove that the main-stage performances in the lounge area at Nite Moves were choreographed dance performances.

The Administrative Law Judge found the expert opinion of Ms. McTague, a highly experienced dance teacher, that the main-stage performances in the lounge area at Nite Moves were choreographed, to be particularly compelling. Furthermore, the Administrative Law Judge noted that Ms. McTague's opinion was buttressed by not only Dr. Hanna's expert opinion,[7] but also by three additional expert opinions from: (1) Dr. Liepe-Levinson, a professional choreographer, Broadway dancer and theater expert; (2) Ms. Madsen, an expert in pole dance; and (3) Mr. Barnes, an entertainment critic for the Albany Times Union.

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[7] The Administrative Law Judge found that Dr. Hanna's opinion in the present matter was not tainted by the credibility holding of the Tribunal in ***677 New Loudon Corporation*** because of differing circumstances. We note that, in any event, the Administrative Law Judge's determination does not rely heavily upon Dr. Hanna's opinion.

The Administrative Law Judge found that the most persuasive evidence that the main-stage performances in the lounge area at Nite Moves were choreographed, "came from the very credible and candid testimony of Alize and Taylor, two of the dancers at Nite Moves during the audit period." Their testimony indicated that the dances on the main stage at Nite Moves were lengthy routines requiring much preparation and a "careful paring of movements" with the dancers' chosen music. Their testimony also indicated that, while dancers were hired regardless of their experience, applicants were required to audition and new hires in need of further training were provided with training. Both witnesses stated that they choreographed their own routines. Thus, the Administrative Law Judge concluded that petitioner was entitled to the exception from sales tax provided for in Tax Law § 1105 (f) (1).

The Administrative Law Judge concluded that the front-door admission charges were also not taxable pursuant to Tax Law § 1105 (f) (3) as the charge of a roof garden, cabaret or similar place. First, the Administrative Law Judge found that petitioner was entitled to the exclusion set forth in Tax Law § 1101 (d) (12) for places where the selling of refreshments is merely incidental to the providing of "live dramatic or musical arts performances." This finding was based upon the testimony of Mr. Dick, that was not in the record in ***677 New Loudon Corporation***, which proved that the beverages sold were not a "substantiative profit center" nor did they constitute a significant portion of net revenue, and thus were merely incidental to the musical arts performances. Furthermore, the Administrative Law Judge found that since 2006, petitioner was entitled to the exemption from sales tax provided for in Tax Law § 1123, because it charged separately for admission and beverages, and made available to the Division menus and statements of its charges.

Finally, with regard to the main-stage performances, the Administrative Law Judge concluded that the admission charges were not taxable under Tax Law § 1105 (d) (i) providing for the taxation of receipts from the sale of drinks, including receipts from cover charges, minimum drink charges and entertainment that contained charges for drinks. The Administrative Law Judge, after throughly discussing his finding that the testimony of Mr. Dick was credible, determined that the admission charge at Nite Moves did not include any charge for drinks.

The Administrative Law Judge did not reach the same conclusion regarding the charges for the private performances. The Administrative Law Judge found that the expert opinions, dancer narratives and management descriptions failed to prove that the private performances could be classified as dramatic or musical arts performances and therefore entitled to the exclusion from tax provided for in Tax Law § 1101 (d) (5). In particular, the Administrative Law Judge noted that only one expert actually viewed a private performance and her description of it was rather curt. Furthermore, the Administrative Law Judge questioned the value of the videos on which the other experts based their opinions, as the performances in the videos appeared stilted and carefully directed by Mr. Dick to demonstrate choreography. Additionally, the Administrative Law Judge explained that the private performances on the videos were inconsistent with witness testimony. For example, witnesses for both parties testified that a protective cloth was placed on the customers during a private performance to prevent make-up, perspiration and perfume from getting on their clothes and to protect the performers from zippers and belt buckles. However, no such protective cloth appeared in the videos of the private performances. The Administrative Law Judge also noted that the music was not chosen by the dancers, eliminating the chance to choreograph the private performances, and the private

performance space was small and had no stage, minimizing the ability for choreographed dance performances. Thus, the Administrative Law Judge concluded that the private performances were not dramatic, choreographed or musical performances and, therefore, the charges for the private performances were taxable under Tax Law § 1105 (f) (1).

With regard to petitioner's constitutional arguments, the Administrative Law Judge: (1) explained that the Division of Tax Appeals was without jurisdiction to find a statute unconstitutional on its face; and (2) found that petitioner offered no proof that it was treated any differently than other taxpayers similarly situated and therefore failed to prove that Tax Law §§ 1105 (f) (1); (3) and (d) (i) were unconstitutionally applied in this case.

SUMMARY OF ARGUMENTS ON EXCEPTION

Both parties on exception, argue that the Administrative Law Judge's separation of the consideration of the main-stage performances in the lounge area of Nite Moves from the private performances was incorrect. Petitioner argues that the private performances are part of the same performance as those performed in the lounge area. Furthermore, petitioner argues that once the Administrative Law Judge concluded that Nite Moves was a "place of assembly for a live dramatic, choreographic or musical performance" pursuant to Tax Law § 1101 (d) (5), it must be concluded that all the entertainment provided in the same facility must be "dramatic or musical arts performances" pursuant to Tax Law § 1105 (f) (1).

The Division argues that the Administrative Law Judge cannot regard the video evidence presented by petitioner of the main-stage performances as a basis to support his conclusion that the front-door admission charges are not taxable, i.e., finding such evidence credible, while at the same time regarding the video evidence submitted by petitioner of the private performances as a

basis to support his conclusion that the charges for the private performances are taxable, i.e., finding such evidence not credible.

On the question of the effect of ***677 New Loudon Corporation*** on this case, the Division continues to argue on exception that petitioner presents the same legal issues and essentially the same facts as those presented in ***677 New Loudon Corporation***, and that, therefore, the doctrine of stare decisis requires the same conclusions be reached in this case, i.e., that the receipts at issue are taxable under Tax Law §§ 1105 (f) (1), 1105 (f) (3) and 1105 (d). Petitioner continues to counter that the basis of ***677 New Loudon Corporation*** was that petitioner failed to meet its burden of proof to show that such receipts are not taxable, and that, therefore, petitioner must be allowed to meet its burden of proof on these issues in different tax periods. Furthermore, petitioner asserts that both the courts and this Tribunal in the previous case urged petitioner to present more evidence in order to prove that the performances at Nite Moves were choreographed dance performances. Thus, petitioner argues that there is no legal principle that an adult juice bar that provides performances for the amusement of its customers is not entitled to the relief requested, if it can prove that those performances are dramatic or musical arts performances. According to petitioner, this case presents a question a fact, thus making the doctrine of stare decisis inapplicable.

The Division argues that there is no support in the record for a conclusion that the front-door admission charges were excluded from taxation as admissions to dramatic or musical arts performances, and that the performances at issue in the current audit period are no different than the performances that were the subject of ***677 New Loudon Corporation***. The Division points to the fact that petitioner has again presented the opinion of Dr. Hanna in support of its position that

the routines on the main stage were choreographed performances and that Dr. Hanna's opinion has been rejected by this Tribunal on two separate occasions, in both ***677 New Loudon Corporation*** and in ***Matter of Greystoke Indus. LLC d/b/a Paradise Found***. The Division further notes that on those occasions, Dr. Hana had personally visited the clubs and observed performances, whereas in this case, she based her opinion strictly on videos of performances submitted by petitioner.

Furthermore, the Division argues that the videos submitted by the petitioner lacked credibility as they were not of actual performances at Nite Moves, but rather videos created by petitioner solely for use as evidence in this matter. The Division notes that the Administrative Law Judge found the videos produced regarding the performances on the main stage to be reliable evidence, while at the same time, finding the videos simulating the private performances not to be reliable. The Division posits that there was no basis for the Administrative Law Judge to make this distinction merely based upon the overheard direction of Mr. Dick in the videos simulating the private performances, which is not heard in the videos simulating the main-stage performances. The Division also notes that none of the videos depict any interaction between actual patrons and the performers.

The Division likewise questions the weight that should be assigned to Ms. McTague's testimony as this testimony is no different than that of Dr. Hanna. The Division questions how, after spending only 90 minutes at Nite Moves, and speaking about choreography with only two of the performers, Ms. McTague could conclude that the performances consisted of choreographed dance routines. The Division claims that Ms. McTague never had any meaningful discussion with the performers regarding choreography of the routines because she testified only that she

believed and that it was her understanding that most of the girls choreographed their own routines with the assistance of other more experience dancers.

The Division disagrees with the finding of the Administrative Law Judge that the testimony of the performers from Nite Moves was credible and candid. The Division asserts that their credibility was compromised by their claim that the videos of the private performances depicted actual private performances, even when the Administrative Law Judge found that was not the case.

The Division also disagrees with the weight given to the affidavits of Dr. Liepe-Levinson and Ms. Madsen. The Division states that, as these witnesses never visited the club, their opinions were based completely on the videos provided by petitioner that, again, did not depict actual performances at Night Moves.

Petitioner argues that its presentation again of the testimony of Dr. Hanna is no longer subject to the same credibility issues as it was in ***677 New Loudon Corporation***, because when viewed with the additional expert presentations, Dr. Hanna's opinion overcomes the previous objections voiced by this Tribunal. Furthermore, petitioner asserts that it addressed in the present case other concerns of this Tribunal expressed in ***677 New Loudon Corporation***. For example, in response to the concerns regarding how much planning is involved in attempting to incorporate a dance move seen on YouTube, Ms. McTague explained that there is much in the way of dance instruction available on YouTube. She opined that the same amount of effort and planning is required to duplicate a dance move seen on YouTube as there is in duplicating a dance move taught by any other method.

Petitioner argues that the videos of the main-stage performances, while admittedly not videos of actual performances at Nite Moves, were supported by the testimony of the performers themselves who testified as to their training, experience and efforts. Therefore, the Administrative Law Judge could certainly find that the videos of the main-stage performances were entitled to be seen as indicative of the performances given at Nite Moves during the audit period.[8]

Petitioner notes that both of the performers who testified at the hearing testified as to their long experience in dance and entertainment. The Administrative Law Judge found the testimony of these witnesses to be candid and credible, and thus the utilization of the videos as representative of the performances that actually occurred is supported by the record.

Petitioner also urges that the weight afforded the expert witnesses by the Administrative Law Judge should stand, as again, the Division has done nothing to discredit the videos upon which those opinions were based, other than making allegations.

The Division argues that the admission charges at issue are also taxable as amounts paid as charges of a roof garden, cabaret or other similar place of entertainment pursuant to Tax Law § 1105 (f) (3). The Division asserts that under the statute and regulations, such a place furnishes a public performance for profit, but does not include any place where only live dramatic or musical arts performances are offered, and any serving of refreshments is merely incidental to the performances. The Division argues, based upon the Administrative Law Judge's finding, that the

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[8] When questioned at oral argument as to why petitioner did not submit into evidence videos of actual performances at Nite Moves, petitioner responded that it was thought inappropriate and unnecessary to introduce videos of actual performances, in that the performances at Nite Moves involve nudity, whereas the videos submitted into evidence allowed petitioner to represent the performances that actually occurred without the nudity.

private performances, while entertainment, were not live dramatic or musical arts performances. Nite Moves did not provide only dramatic or musical performances, but other types of entertainment, as well. Furthermore, the Division asserts that even if petitioner provided only dramatic or musical arts performances, the admission charges would still be subject to tax under this provision because the selling of refreshments at Nite Moves was more than merely incidental to the performances.

Petitioner argues that once the Administrative Law Judge found the front-door admission charges not subject to tax pursuant to Tax Law § 1105 (f) (1), there should be no further inquiry as to whether such charges are subject to tax under this second provision. Indeed, petitioner argues that with regard to other types of entertainment facilities, there is no further inquiry once it is determined that the charges for admission to such facilities are not subject to tax pursuant to Tax Law § 1105 (f) (1).

Petitioner also asserts that the testimony of Mr. Dick in the present matter establishes that the sale of beverages at Nite Moves was incidental to the performances, and that such testimony was not part of the record in ***677 New Loudon Corporation***.

The Division addresses Tax Law § 1123, which first became effective December 1, 2006, by initially noting that such provision is not applicable to that portion of the audit period from September 1, 2005 through November 30, 2006. As described by the Division, this provision exempts from taxation charges for admission to a roof garden, cabaret or similar place to attend a dramatic or musical arts performance under certain circumstances. As the Division maintains that the performances on the main stage at Nite Moves are not dramatic or musical arts performances, the Division asserts that this exception is not available to petitioner.

Petitioner asserts that as it has proven that the performances on the main stage are choreographed dance performances, it is entitled to the exemption provided by Tax Law § 1123 from the December 1, 2006 effective date until the end of the audit period.

The Division explains that just as in ***677 New Loudon Corporation***, petitioner's books and records reflect separate amounts for front-door admission fees for general admission charges, couch sales for the service of private performances for customers, and register sales for the sales of beverages. The Division argues that this Tribunal is bound by its previous conclusion set forth in ***677 New Loudon Corporation*** regarding this issue. The Division explains that Tax Law § 1105 (d) subjects to tax the receipts from all beverages sold by all establishments, including receipts from any minimum, entertainment or other charge. The Division notes that in ***677 New Loudon Corporation*** this Tribunal stated that the receipts from the front-door admission charges and the charges for the private performances could be subject to tax under this provision.

Petitioner argues that Tax Law § 1105 (d) is meant to encompass restaurant-type establishments, which Nite Moves is not.

Finally, petitioner argues that taxing its receipts from front-door admissions and charges for the private performances, based upon the content of the performance, violates both the First Amendment to the United States Constitution and Article I, § 8 of the New York State Constitution. Petitioner states that while this is not the proper forum before whom to bring the constitutional arguments, it sets forth its arguments to preserve them for appeal.

OPINION

Applicability of the doctrine of stare decisis

Initially, we note our agreement with the conclusion of the Administrative Law Judge that a decision in favor of the Division was not mandated in this matter pursuant to the doctrine of stare decisis based upon ***677 New Loudon Corporation***. Indeed, we find the Division's argument on this issue somewhat confusing, as this Tribunal is always governed by the doctrine of stare decisis. The doctrine of stare decisis is simply that adjudicators are bound by prior controlling precedent and, as such, applies only to principles of law or settled legal issues "'rather than to prior factual or legal determinations' (***Killeen v Crosson***, 218 AD2d 217, 220 [1996], ***appeal after remand*** 284 AD2d 926 [2001])" (***Samuels v High Braes Refuge, Inc.***, 8 AD3d 1110, 1111 [2004]; ***see also*** David D. Siegel, New York Practice § 449 at 782-83 [5th Ed rev 2005]). It appears that the Division is attempting to conflate the doctrine of stare decisis with the doctrine of res judicata, which may apply to both questions of law and questions of fact (***see Killeen v Crosson***, 218 AD2d at 220; ***see also*** Siegel § 449 at 782-83). However, the doctrine of res judicata does not apply where, as is the case here, at issue in the adjudication is a determination of tax for a different tax period than that involved in a prior adjudication. Each taxable period contested in a separate and distinct adjudication receives separate consideration from the adjudicator (i.e., a determination as to the amount of tax due based upon the proof offered for one tax period is not determinative in establishing the same with respect to another tax period) (***see Killeen v Crosson***, 218 AD2d at 220 ["(S)ignificantly, the State does not attempt to invoke the doctrines of either collateral estoppel or res judicata. Those doctrines would be inapplicable in any event . . . ."]; ***see also People ex rel. Watchtower Bible & Tract Socy. v***

Haring, 286 AD 676, 680 [1955], ***lv granted*** 11 AD2d 605 [1960] ["(T)he assessment for one year is a separate and different cause of action from the assessment for another year"], ***People ex rel. Hilton v Fahrenkopf***, 279 NY 49, 52-53 [1938] ["(E)ach annual proceeding is separate and distinct from every other"]).

Admission Charges to a Place of Amusement

We begin this discussion by noting that this Tribunal has consistently deferred findings of witness credibility to the Administrative Law Judge. We have long held that:

> "the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (***see Matter of Berenhaus v. Ward,*** 70 NY2d 436, 522 NYS2d 478). While this Tribunal is not absolutely bound by an Administrative Law Judge's assessment of credibility and is free to differ with the Administrative Law Judge to make its own assessment, we find nothing in the record here to justify such action on our part (***see Matter of Stevens v. Axelrod***, 162 AD2d 1025, 557 NYS2d 809)" (***Matter of Spallina***, Tax Appeals Tribunal, February 27, 1992).

In the instant matter, we disagree with the Division's assessment of the Administrative Law Judge's specific findings of credibility, and find that there is nothing in the present record to disturb the Administrative Law Judge's findings with respect to the credibility of any of the witnesses.

With some exceptions, one of which is at issue here, Tax Law § 1105 (f) imposes sales tax on receipts from certain admission charges to, or for the use of, a place of amusement. 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]).

Clearly, petitioner's place of business, including the lounge area and the rooms for the private performances, constitutes a place of amusement under the statute. Indeed, petitioner does not appear to argue that its place of business does not constitute a place of amusement. Rather, petitioner argues that its receipts from the front-door admissions and private performances are excepted from tax under Tax Law § 1105 (f) (1), as they constitute admission charges to, or for, "dramatic or musical performances."

Initially, as the receipts at issue were for entrance to, or for use of, a place of amusement, in accordance with Tax Law § 1132 (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 petitioner as the person required to collect the tax. "Furthermore, in construing a tax exemption statute, the well-settled rule is that '[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, petitioner's interpretation of the statute must not be simply 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]).[9]

Dramatic or musical arts admission charges are defined in Tax Law § 1101 (d) (5) as "[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." As the Tribunal

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[9] We are not unsympathetic to petitioner's request that we reconsider our previous holding in ***677 New Loudon Corporation*** and find that Tax Law § 1105 (f) (1) excepts admissions to "dramatic or musical arts performances" from the imposition of the taxation on admission charges to places of amusement, and therefore is an exclusion from tax and not an exemption from tax subject to these strict burdens. This is particularly true where, as here, the Tribunal decision in ***677 New Loudon Corporation*** set forth its holding that this provision is an exemption in a cursory manner, indicating that it was not an issue in that case. However, any request to reconsider such a holding must now be addressed to the Court of Appeals, as they specifically adopted this holding in their decision in the same case (***677 New Loudon Corporation***, 19 NY3d at 1060).

recently held in ***Matter of HDV Manhattan, LLC*** (Tax Appeals Tribunal, February 12, 2016), "[t]his 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" and "the language of Tax Law § 1101 (d) (5) indicates that both such conditions must be met in order to qualify for exemption."

Turning first to the setting requirement, the setting for the performances at Nite Moves consisted of the lounge area, the six rooms designated for the private performances, a dressing room for employees and rest rooms. The lounge area included a stage of approximately 9 feet by 11 feet, that was illuminated by spotlights and surrounded by chairs and tables. The chairs and tables were orientated towards the stage to focus audience attention on the performances. The lounge area also included a small service bar with no seating.

There was a dressing room for the dancers, rest rooms and the rooms for the private performances, all of which were removed from the lounge area. The rooms for the private performances are approximately 5 feet by 6 feet. The doorways to the rooms for the private performances were covered by sheer curtains so that the management could maintain control over the activities in the room, while at the same time allowing some measure of privacy to the customer.

From these descriptions, it is clear that the rooms for the private performances do not constitute a theater, hall or place of assembly, as such venues, by definition, require a public performance and the primary reason that Nite Moves customers pay extra for a private performance is privacy, i.e., the lack of additional people in the audience. Furthermore, the rooms for the private performances are physically too small for an audience, nor do the rooms have a stage or theatrical lighting, only a couch. Thus, the charges for the private performances,

considered alone, do not qualify for the exception from taxation provided for in Tax Law § 1105 (f) (1) in that they are not dramatic or musical arts admission charges because the performances do not take place in a theater, hall or other place of assembly as required by Tax Law § 1101 (d) (5). Thus, while the lounge area and the rooms for private performances at Nite Moves are places of amusement, only the lounge area could be considered "a theatre, opera house, concert hall or other hall or place of assembly" pursuant to Tax Law § 1101 (d) (5) (***Matter of HDV Manhattan, LLC***). Accordingly, the charges for the private performances are subject to tax pursuant to Tax Law § 1105 (f) (1) as charges for the use of a place of amusement.

While this holding makes it unnecessary to address the additional requirement that the performances at issue must be live dramatic, choreographic or musical performances, we find that petitioner has failed to meet its burden to show that private performances were dramatic or choreographic performances, as claimed (Tax Law §§ 1101 (d) (5), 1105 (f) (1); ***see also Matter of HDV Manhattan, LLC***). Furthermore, we find that the Administrative Law Judge completely and adequately addressed this issue and we affirm for the reasons stated therein. The issue of the appropriateness of dividing the front-door admission charges from the charges for the private performances, or the main-stage performances from the private performances, raised by both parties on exception, is discussed below.

We turn now to the issue of the front-door admission charges and whether such charges were for admission "to a theatre, opera house, concert hall or other hall or place of assembly," the setting requirement of Tax Law § 1101 (d) (5). The lounge area appears to constitute such a place. Performances are viewed by an audience arranged around a stage in a manner consistent with the intent of focusing their attention on the performances. The stage has theatrical lighting and sound systems.

The only question is whether the front-door admission charges, as found by the Administrative Law Judge, allowed customers access only to the lounge area including the ability to view the main-stage performances, and that all other charges were optional. While we agree with the Administrative Law Judge that all other charges were optional, we reverse the conclusion of the Administrative Law Judge that the front-door admission charges only allowed customers access to the lounge area and the ability to view the main-stage performances. The front-door admission charge also allowed customers the option of paying for the private performances. In other words, while the private performances were paid for separately, there is no evidence in the record before us indicating that there was any means by which a customer could purchase a private performance, without paying the front-door admission charge first. Under these circumstances, it is not possible to consider the front-door admission charge as a separate admission charge applicable to the lounge area only. Accordingly, we reverse the Administrative Law Judge's conclusion on this point and hold that as the front-door admission charges are for access to both the lounge area and the separate rooms for the private performances, such charges are not for admission "to a theatre, opera house, concert hall or other hall or place of assembly," as required by Tax Law § 1101 (d) (5) and are thus taxable pursuant to Tax Law § 1105 (f) (1).

While this holding makes it unnecessary to address the additional requirement that the performances at issue must be live dramatic, choreographic or musical performances, we find that petitioner has met its burden to show that the main-stage performances were dramatic or choreographic performances as claimed (Tax Law §§ 1101 [d] [5], 1105 [f] [1]). Furthermore, we find that the Administrative Law Judge completely and adequately addressed this issue and we affirm for the reasons stated therein. The Division's objection regarding how the videos

submitted by petitioner could be found reliable by the Administrative Law Judge in determining that the main-stage performances were choreographed performances, but not reliable in determining that the private performances were not choreographed performances, was specifically addressed by the Administrative Law Judge in his thorough discussion regarding his findings of credibility and we find no need to comment further.

Admission Charges of a Roof Garden, Cabaret or Similar Place

Tax Law § 1105 (f) (1) imposes sales tax on receipts from certain amusement charges. Having found that the front-door admission charges and the charges for the private performances are taxable pursuant to such statutory provision, it is not necessary that we address the Division's assertion that these charges are also taxable pursuant to Tax Law § 1105 (f) (3), but we will do so in the interest of providing a complete record.

Tax Law § 1105 (f) (3) imposes tax on the receipts from "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 performances" as used in Tax Law § 1101 (d) (12) includes choreography (***see 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]).

Petitioner asserts that Nite Moves offered live dramatic, choreographic, or musical arts performances and that its sale of refreshments was incidental to such performances. The Division counters that in order to be excluded from tax, petitioner must first show that it merely, or only, provided live dramatic, choreographic or musical arts performances and that petitioner has failed to do that here, but that in any event, the sales of refreshments were not incidental to the performances.

The Tribunal also dealt with this issue in its recent decision in ***Matter of HDV Manhattan, LLC*** wherein it found that "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." The Tribunal went on to find that "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" (***Matter of HDV Manhattan, LLC***). As we previously concluded in this case that the main-stage performances were dramatic, choreographic or musical arts performances, but that petitioner had not proven the same was true for the private performances, it cannot be said that Nite Moves only, or merely, offered dramatic, choreographic or musical performances. Accordingly, petitioner is not covered by the exclusion from the definition of roof garden, cabaret or similar place set forth in Tax Law § 1101 (d) (12), and its receipts would also be subject to tax pursuant to Tax Law § 1105 (f) (3).

While it is not necessary to address whether petitioner has proven that Nite Moves' sale of refreshments was "merely incidental" to the performances, on this issue, and the issue of petitioner's entitlement to the exemption provided for in Tax Law § 1123 from its effective date

in 2006, we find that the Administrative Law Judge completely and adequately addressed these issues and we affirm for the reasons stated therein.

Admission Charges That Include Beverages

Having concluded that the receipts from petitioner's front-door admission charges and charges for private performances are taxable under Tax Law § 1105 (f) (1) and (3) herein, it is not necessary to address whether such receipts are also taxable pursuant to Tax Law § 1105 (d). In this instance, we decline to exercise our discretion to render an opinion on this issue.

Constitutional Arguments

Petitioner asserts that its constitutional arguments are not properly made before this forum and are set forth only for the sake of preserving such arguments for appeal. We would note only that petitioner's arguments are based upon an alleged disparate treatment between exotic dance and other kinds of dance, which constitute arguments that the relevant statutes are being applied unconstitutionally, not that such statutes are unconstitutional on their face. Otherwise, on these constitutional issues raised by petitioner, we find that the Administrative Law Judge completely and adequately addressed the same and we affirm for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 677 New Loudon Corporation d/b/a Nite Moves, Stephen Dick, Jr. and Stuart Cadwell is denied;

2. The exception of the Division of Taxation is granted;

3. The determination of the Administrative Law Judge is affirmed in part and reversed in part;

4. The petitions of 677 New Loudon Corporation d/b/a Nite Moves, Stephen Dick, Jr. and Stuart Cadwell are denied;

5. The notice of determination issued to 677 New Loudon Corporation d/b/a Nite Moves, dated August 30, 2010, as modified by the order of the Bureau of Conciliation and Mediation Services, dated February 11, 2011, is sustained;

6. The notice of determination issued to Stephen Dick, Jr., dated August 12, 2010, as modified by the order of the Bureau of Conciliation and Mediation Services, dated February 11, 2011, is sustained; and

7. The notice of determination issued to Stuart Cadwell, dated August 12, 2010, as modified by the order of the Bureau of Conciliation and Mediation Services, dated February 11, 2011, is sustained.

DATED: Albany, New York
August 25, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner