STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	DETERMINATION DTA NOS. 824229, 824231, 824232, 824233 AND 824234
HDV MANHATTAN, LLC, ANTHONY F. GRANT, MICHAEL A. GRANT, JOSEPH A. SULLO AND JASON MOHNEY	:	
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, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2006 through November 30, 2008.

A hearing was held on January 30, 2013, and continued to completion on January 31, 2013, at the offices of the Division of Tax Appeals, 1384 Broadway, New York, New York. 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 Jack, Esq., of counsel). Petitioners' reply brief was due on July 31, 2013, which date commenced the six-month period for issuance of this determination. After review of the evidence and arguments presented, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether sales tax is due on the sale of scrip at the Hustler Club.

II. Whether sales tax is due on amounts paid by floor hosts to work at the Hustler Club.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the facts set forth below. In addition, petitioners submitted 112 proposed findings of fact. These facts have been substantially incorporated except for facts 19 and 23 which are unsupported by the record and 42, 43, 46, 49, 50, 52, 53, 55 - 64, 67 - 93 and 108 - 112 which are irrelevant.

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.[1]

3. Petitioner 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. Patrons 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. Petitioner remitted tax on receipts from such cover charges during the period in issue.

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

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[1]The Division seeks a penalty for the filing of a frivolous petition for each of the owners based upon an assertion made that each was not a responsible person liable for the collection and payment of sales tax. Clearly, the petitions filed are more substantive than that and, as such, a penalty for filing a frivolous petition in this case is unwarranted.

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

7. CMSG sold scrip to patrons. This scrip is referred to as Beaver Bucks. Scrip was used for certain purchases within the Club such as admission to private rooms, lap dances, and to tip the entertainers, the floor hosts and bartenders.

8. A 20% surcharge is imposed on each purchase of scrip. For example, if a patron wishes to purchase $100.00 in scrip, the patron'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.

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 petitioner. 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. The redemption rate was not uniform and there was no evidence that explained how the redemption rates were applied to the different workers at the Club.

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 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. No floor host testified 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 performance. 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 entertainment in 16 private rooms located throughout the Club. To gain access to the private rooms, patrons were charged a separate admission fee. The Club generated most of its revenue from admissions to the private rooms.

16. Entertainers also offered lap dances to patrons.

17. Petitioners presented two witnesses that 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. Dawn Beasley, who is a performer 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 actual movements performed by the entertainers on the pole. Moreover, petitioners presented two witnesses, Alexandra Beller and Madonna Grimes, who were dance experts.

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.

CONCLUSIONS OF LAW

A. Tax Law § 1105 provides for the imposition of sales taxes. Specifically, Tax Law § 1105(f)(1), (2) and (d)(i)(1) tax admission charges based upon the type of venue and type of service or activity offered by a taxpayer. Initially, it is noted that the Tax Law presumes all taxpayers' receipts to be taxable unless proven otherwise (Tax Law § 1132[c]). Moreover, a presumption of correctness attaches to statutory notices (Tax Law § 689; ***see also Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [1980]), and petitioners bear the burden of proving otherwise.

B. The first issue to address is whether the admission charges to view performances in the private rooms were properly subject to tax. Tax Law § 1105(f)(1) imposes a sales tax upon

"[a]ny admission charge . . . in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to . . . dramatic or musical arts performances. . . ." For purposes of the statute, an "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 a "[d]ramatic or musical arts admission charge" is defined 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" (Tax Law § 1101[d][5]). The Hustler Club does qualify as a place of amusement (***see Matter of 677 New Loudon Corp. v. State of New York Tax Appeals Trib.***, 85 AD3d 1341 [2011], ***affd*** 19 NY3d 1058 [2012], ***cert denied*** ___ US ___, 134 S Ct 422 [2013] [wherein the Appellate Division determined that the adult entertainment establishment therein was a "place of amusement"]).

C. Thus, it must be determined whether the service provided by the entertainers constitutes a live dramatic, choreographic or musical performance within the meaning and intent of the Tax Law such that the admission charges are exempt under the statute. I find that these performances do not meet the standards set forth for exemption.

This case involves charges for admission into a place of amusement, plain and simple. This adult entertainment establishment provides a service to its patrons that essentially boils down to performers who remove their clothing and create an aura of sexual fantasy. I find that this service is delivered by means of a striptease act that incorporates some elements of dance and certainly choreography. The plain facts of this case have been obfuscated in an attempt to characterize these performances in such a way as to take advantage of an exemption available to

live dramatic, choreographic performances. However, the service provided by the entertainers at the Hustler Club is sexual fantasy, not dance.

The focus of the imposition of sales tax here is on the admission charges paid for entry into the private rooms and for lap dances. The movements, whether dance moves or other choreography, that comprise an entertainer's routine and that appeal to the patron, are ancillary to the ultimate service sold, which is sexual fantasy.

The Tax Appeals Tribunal has employed similar reasoning in the ***Matter of Stat Equip. Corp.*** (Tax Appeals Tribunal, January 25, 1996). In ***Stat Equipment***, the issue was whether an ambulance service was taxable as a transportation service or a medical service. The Tribunal noted that while transportation was certainly an aspect of the service provided, it was the medical services that was the most important part. The Tribunal concluded that petitioners therein "furnished much more than transportation to their customers" (***Matter of Stat Equip. Corp.***). Similarly, the dancing portion of the service is merely ancillary to the performer removing her clothes or creating the sexual fantasy.

D. Since the admission charges paid for this service are not specifically exempted, the admission charges are taxable pursuant to Tax Law § 1105. Even if it were determined that the performances were exempt from tax, petitioners have failed to show what portion of the scrip was attributable to what services.

In reviewing the two sheets representing "Sales Breakdown by Month June 2006 through November 2008," it is unclear what the amounts represent. The Beaver Bucks are tracked in a column titled "Admissions, Beaver Bucks Sales, Entertainment, Service Sales." Exhibit 6 reflected total amounts whereas exhibit 7 reflected net sales after redemption. As set forth in the

facts, petitioners did not adequately explain the redemption rates, which renders the numbers useless in determining any nontaxable versus taxable sales. It is noted that the record reflects that the performers redeemed their scrip at the end of the night at one redemption rate, while other workers redeemed scrip at another rate. The Club, on its books, lumped all the scrip within the same category, resulting in virtually no definite means of assessing which scrip was for what service. Due to the lack of specificity, all sales of scrip are held to be taxable.

E. The Division assessed tax on amounts that the floor hosts paid to the Club as service income fees. Petitioners argue that the fees are paid in order for them to work at the club and are not taxable. No floor host was present to testify.

Petitioners have not demonstrated that the fees are not taxable. There was no documentation submitted to set forth any arrangement between the Club and the floor hosts. As such, it cannot be found that these fees are not taxable without any evidence.

F. Petitioners raised certain constitutional arguments which have been mooted and, thus, will not be addressed.

G. The petitions of HDV Manhattan, LLC, Anthony F. Grant, Michael A. Grant, Joseph A. Sullo and Jason Mohney are denied and the notices of determination dated August 10, 2009 are sustained as modified by the conciliation orders.

DATED: Albany, New York
January 30, 2014

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE