No. 13-____

IN THE

Supreme Court of the United States

677 NEW LOUDON CORP., d/b/a NITE MOVES,

Petitioner,

v.

STATE OF NEW YORK TAX APPEALS TRIBUNAL AND JAMIE WOODWARD, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government may deny an entertainment tax exemption for live dramatic, choreographed, or musical performances through the exercise of New York State's content-based aesthetic preferences.

PARTIES TO THE PROCEEDINGS

The petitioner, petitioner and appellant below, is 677 New Loudon Corporation, d/b/a Nite Moves.

The respondents, also respondents below, are the State of New York Tax Appeals Tribunal and Jamie Woodward, Commissioner of the New York State Department of Taxation and Finance.

RULE 29.6 STATEMENT

677 New Loudon Corporation is a privately held corporation, none of whose shares is held by a publicly traded company.

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The Order of the Court of Appeals of New York for which review is sought, appearing at 979 N.E.2d 1121 (N.Y. 2012), is included at A-1. The dissenting opinion of Judge Smith, in which Chief Judge Lippman and Judge Read concurred, appears at A-5.

The Court of Appeals of New York's denial of the motion for reargument, appearing at 20 N.Y.3d 1024 (2013), is included at A-80. The Opinion of the New York Supreme Court Appellate Division, appearing at 925 N.Y.S.2d 686 (N.Y. App. Div. 2011), is included at A-10.

The decision of the State of New York Tax Appeals Tribunal (DTA No. 821458) in included at A-22. The State of New York Division of Tax Appeals Administrative Law Judge determination (DTA No. 821458) is included at A-59.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Court of Appeals of New York. An extension of time to file this petition for a writ of certiorari, allowing until July 8, 2013, was received by Petitioners on April 24, 2013. Application No. 12A1023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

N.Y. Tax Law § 1105(f)(1):

> [T]here is hereby imposed and there shall be paid a tax of four percent upon:
>
> * * *
>
> (f)(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, except charges for admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or

use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools.

N.Y. Tax Law § 1101(d):

When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

* * *

(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theater, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.

* * *

(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided.

N.Y. York Comp. Codes R. & Regs. tit. 20, § 527.10:

(a) Imposition.

(1) A tax is imposed upon any admission charge, in excess of 10 cents, to or for the use of any place of amusement in this State.

* * *

(d) Admissions *excluded from the tax*.

* * *

> (2) Charges for admission to dramatic or musical arts performances are excluded from tax. Dramatic and musical performances do not include variety shows, magic shows, circuses, animal acts, ice shows, aquatic shows and similar performances.

INTRODUCTION

This petition asks the Court to determine whether the First Amendment to the United States Constitution permits a state tax collector to selectively administer a tax exemption for dramatic or musical arts performances in a way that imposes a higher tax on content that a government functionary disfavors.

STATEMENT OF THE CASE

1. N.Y. Tax Law § 1105(f)(1) imposes a four percent sales tax on "places of amusement," but exempts from taxation admission charges for "dramatic or musical arts performances." A-2–A-3. Rules codifying the exemption provide examples of exempt performances, including "[a] theater in the round [which] has a show which consists entirely of dance routines. The admission is exempt since choreography is included within the term musical arts." N.Y. York Comp. Codes R. & Regs. tit. 20, § 527.10.

Petitioner New Loudon Corp. operates Nite Moves, in Latham, New York, a club that provides choreographed entertainment consisting of dance performances that include nudity. The New York State Division of Taxation assessed sales taxes in the amount of $128,960.61 on Petitioner following a

tax audit for the period from December 2002 through August 2005.

2. New Loudon Corp. filed a petition with the Division of Tax Appeals, claiming its performances were excluded from the tax as an admission charge for "dramatic or musical arts performances." Petitioner also challenged the tax assessment on constitutional grounds.

Following a hearing at which the Petitioner provided expert testimony, an Administrative Law Judge ("ALJ") issued extensive findings of fact and held that the exemption for dramatic or musical arts performances applied to the admission charges to Nite Moves, and that no tax was due. Specifically, the ALJ found:

> The fact that someone may believe that this entertainment is not appropriate for any audience is not the issue. The fact that the dancers remove all or part of their costume during the performances, that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of Tax Law § 1105(f)(1).

A-74.

Petitioner argued that a content-based tax would violate the First and Fourteenth Amendments to the United States Constitution, but the ALJ found it unnecessary to rule on the constitutional question. A-78.

3. The State appealed to the Tax Appeals Tribunal, which reversed the ALJ decision. The Tribunal held that the dance routines in question could not be considered choreography because they did not rise to the aesthetic level of a ballet performance. It explained that "[a]s we use the term here, 'choreography' is 'the art of composing ballets and other dances and planning and arranging the movement, steps, and patterns of dancers' (Random House Webster's College Dictionary 232 [2d ed. 1977]). We question how much planning goes into attempting a dance seen on YouTube." A-49. The Tribunal summarily denied Petitioner's constitutional arguments.

4. Petitioner thereafter paid the contested tax and filed a Petition with the New York Supreme Court, Appellate Division, contesting the Tribunal's conclusions regarding the applicability of the tax to Petitioner's admission charges. The Appellate Division issued a Memorandum and Judgment affirming the Tribunal's assessment of taxes and cursorily rejecting Petitioner's First and Fourth Amendment claims. A-22–58, A-57.

5. Petitioner's Motion for Leave to Appeal to the New York Court of Appeals was granted, and the Court of Appeals affirmed the Appellate Division 4-3. The majority reasoned that the "evident purpose" of the tax exemption was to promote "cultural and artistic performances," and concluded "it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was also not a qualifying performance entitled to exempt status." A-3, A-5. The Petitioner fully briefed the constitutional claims,

but the Court of Appeals dismissively rejected them. The court's full explanation was contained in a single sentence: "Petitioner's remaining constitutional argument is unavailing." A-5.

Judge Smith dissented, joined by Chief Judge Lippman and Judge Read. A-5–A-9. He reasoned that the majority made "a distinction between highbrow dance and lowbrow dance that is not to be found in the governing statute" and that the distinction "raises significant constitutional problems." A-5–A-6. Judge Smith's opinion suggested that the majority and the Tribunal implicitly defined the statutory words "'choreographic performance' to mean 'highbrow dance' or 'dance worthy of a five-syllable adjective.'" A-7. The dissent explained the admission charges for the Petitioner's performances were deemed to be taxable because "the performances are, in the majority's view, not cultural and artistic." Judge Smith concluded that "the only question – an extremely easy question – [is] whether these women are dancing or not." A-8.

The dissent further explained that it was wholly inappropriate for the state to assess tax liability based on its estimation of the relative "value" of the content at issue. As Judge Smith noted:

> I do not read *Hustler* magazine. I would rather read the *New Yorker.* I would be appalled, however, if the State were to exact from *Hustler* a tax that the *New Yorker* did not have to pay, on the ground that what appears in *Hustler* is insufficiently 'cultural and artistic.' That sort of discrimination on

> the basis of content would surely be unconstitutional.

A-9.

REASONS FOR GRANTING THE WRIT

The Court should grant review because the Court of Appeals of New York decided an important federal question in a way that conflicts with longstanding First Amendment jurisprudence prohibiting content-based taxation. Rule 10(c). Review is essential to address a serious and recurring problem of constitutional law.

The Court of Appeals upheld a denial of a tax exemption based on the tax collector's untrammeled discretion to determine whether a "musical arts performance" or "choreography" is sufficiently "artistic" to qualify. While Petitioner does not question that this ruling is now the definitive interpretation of New York law, *e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999), it conflicts directly with federal constitutional limits. In this case, the Court of Appeals inappropriately brushed off Petitioner's First and Fourteenth Amendment arguments with nothing more than the pronouncement that the "Petitioner's remaining constitutional argument is unavailing." A-5. *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 576 (2009); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2981 (2010). But as the three dissenting judges stressed, the case "raises significant constitutional problems." A-6.

I. THIS COURT MUST CLARIFY THE LAW GOVERNING THE IMPOSITION OF CONTENT-BASED TAXES

A. Discriminatory Taxes on Expression Are Unconstitutional

Just as this Court has always understood that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 431 (1819), it has long held the power to tax also includes the power to censor. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) ("[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment"). To be sure, generally applicable taxes may be levied on the press and entertainment industry, much as they are on any other business. However, this Court has characterized "special" taxes on expression as "a form of prior restraint on speech" and has regarded such taxes as inherently suspect.

This Court has explained that such "obnoxious" taxes led to adoption of the First Amendment. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583-84 & n.6 (1983). Accordingly, it is settled law that the First Amendment does not permit the government to impose taxes that discriminate based on the content of speech. *E.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Content-based taxes are "particularly repugnant to First Amendment principles," *Arkansas Writers' Project*, 481 U.S. at 229, which provide that the community "may not suppress, or the state tax, the dissemination of views because they are unpopular,

annoying, or distasteful." *Murdock*, 319 U.S. at 116. Allowing the state to use such a subtle tool for suppression "would be a complete repudiation of the philosophy of the Bill of Rights." *Id.*

Like other forms of prior restraint, content-based taxes are presumptively unconstitutional. *See, e.g.*, *Arkansas Writers' Project*, 481 U.S. at 229-30; *Minneapolis Star*, 460 U.S. at 585; *Grosjean*, 297 U.S. at 250-51. Such selective taxes are invalid even where there is no apparent "impermissible or censorial motive." *Id.* at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

These principles apply equally to discriminatory tax exemptions or exclusions as to direct taxes. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."). In *Minneapolis Star*, the Court invalidated an exemption for the first $100,000 in paper and ink that treated some newspapers more favorably than others. 460 U.S. at 591-92. This principle was extended in *Arkansas Writers' Project* to invalidate a state sales tax exemption that benefited religious, professional, trade and sports magazines, among other publications. *Arkansas Writers' Project*, 481 U.S. at 229.

The Court described the Arkansas scheme as "a more disturbing use of selective taxation than *Minneapolis Star*, because . . . a magazine's tax status depends entirely on its *content*." *Arkansas Writers' Project*, 481 U.S. at 229 (emphasis in original). This Court has since reaffirmed the principle that discriminatory tax exemptions violate

the First Amendment. *Cf. Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating a sales tax exemption on Establishment Clause grounds because it applied only to religious publications).

B. New York Applies the Entertainment Tax Exemption to Discriminate Against Disfavored Content

The New York amusement tax applies generally to admission charges at "places of amusement," defined broadly to include "[a]ny admission charge paid for admission to a theatre, opera house, concert hall or other hall of place of assembly for a live dramatic, choreographic or musical performance." N.Y. Tax Law § 1101(d)(5).

The law's seemingly expansive application is moderated by a number of exclusions. For example, the amusement tax is exempted for admission charges for motion picture theaters, live circus performances, sporting facilities where the patron will be a participant (such as bowling alleys and swimming pools), and for "dramatic or musical arts performances." *Id.* § 1105(f)(1).

Historically, the New York Court of Appeals has interpreted these statutory exemptions as applying categorically. Thus, for example, it rejected as too narrow an application of the exemption for movie theaters limited to "exhibitions of conventional moving pictures alone," finding that "the determinative factor was not . . . the event to which patrons gained admission, but the place where it was held." *United Artists Theatre Circuit, Inc. v. State Tax Comm'n*, 52 N.Y.2d 1013, 1014 (1981). Thus, it extended the tax exemption to closed circuit telecasts

of boxing matches that were shown in movie theaters.

In this case, the exemption for "dramatic or musical arts performances" is similarly categorical. Implementing rules indicate that such performances do not include such things as variety shows, magic shows, animal acts, ice shows, aquatic shows, and similar performances, N.Y. Comp. Codes R. & Regs. tit. 20, § 527.10(d)(2), but no distinction is made between types of dance performances or venues. Nevertheless, the state argued, and the Court of Appeals approved, an application of the exemption that excluded Petitioner's dance presentations as insufficiently sophisticated based on the assertion that the "evident purpose" of the legislature was to promote "cultural and artistic performances." A-3. The court concluded it was "not irrational" for the state to decide that "women gyrating on a pole to music" does not qualify as sufficiently artistic. A-5.

Apart from the evident irony of establishing an "artistic merit" test for a tax code that also exempts bowling and live circus performances from the amusement tax, Judge Smith's dissent pointed out that the State's gloss on the law "raises significant constitutional problems." A-6. Indeed, the State's asserted rationale of promoting more culturally acceptable entertainment to the exclusion of Petitioner's dance performances is the very reason the First Amendment prohibits content-based taxation. *See*, *e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445, 450-51 (2002) (Kennedy, J., concurring).

This Court has stressed in various contexts that "a requirement that literature or art conform to

some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946). It has emphasized that "esthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). As Judge Smith wrote in dissent below, making such artistic judgments, or the "'ranking,' either of gymnasts or dancers, is not the function of a tax collector." A-8.

Indeed, such content-based discrimination presents a particular risk where the administration of taxes and fees may appear to be neutral but can be applied in ways that restrict unpopular speakers. *E.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Murdock*, 319 U.S. at 112. Measures that purport to be neutral but that make distinctions based on content categories must be scrutinized carefully in order to "keep alert to a risk of content-based regulation." *Alameda Books,* 535 U.S. at 456-57 (Souter, J., joined by Stevens, J., and Ginsburg, J., dissenting).

It is no answer for the court below to assert that Petitioner failed to prove his entitlement to the tax exemption. A-2. The law is clear that taxes that discriminate based on content, or that vest unlimited discretion in government officials to make such artistic distinctions, are presumed to be unconstitutional. *Arkansas Writers' Project,* 481 U.S. at 229-30.

II. THE COURT BELOW INCORRECTLY DECIDED A VITAL AND RECURRING QUESTION OF FEDERAL CONSTITUTIONAL LAW

It is difficult to overstate the threat to free expression posed by the government's misuse of power to levy taxes based on the content of speech or the identity of the speaker. *E.g.*, Juliet Eilperin and Zachary A. Goldfarb, *IG Report: 'Inappropriate Criteria' Stalled IRS Approvals of Conservative Groups*, Wash. Post, May 14, 2013; Josh Hicks and Kimberly Kindy, *For Groups, an IRS 'Horror Story*,' Wash. Post, May 16, 2013 at A1. The decision below disregards such concerns and embraces the notion that the government should be allowed to impose higher taxes, or selectively give tax breaks, based on its estimation of the relative "value" of the speech.

This is not an uncommon reaction in cases that involve the regulation of adult entertainment. Some lower courts – and in particular, the court below in this case – have been particularly dismissive if they believe the speech at issue lacks sufficient cultural merit. *See* A-5 ("surely it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was also not a qualifying performance entitled to exempt status").

But this Court has cautioned that "[w]e cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important." *Playboy Entm't Group*, 529 U.S. at 818, 826. Indeed, some of the Court's most significant First Amendment decisions in recent

years soundly rejected arguments that the government has greater power to restrict speech because of claims the expression at issue lacked value. *E.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2544-47 (2012); *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733-34 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-17 (2011); *United States v. Stevens*, 130 S. Ct. 1577, 1585-86 (2010).

The decision below is in obvious conflict with this Court's well-established jurisprudence holding that content-based taxation is anathema to the First Amendment guarantee of free expression. In this respect, it is similar to a small but growing number of state supreme court decisions that have upheld similar tax schemes against constitutional challenges.[1] Those cases improperly conflate content-based taxation with the zoning doctrine of "secondary effects," but have thus far escaped this Court's review. *But see Alameda Books,* 535 U.S. at 445 (Kennedy, J., concurring) ("[A] city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax."). This case, however, does not rely on a "secondary effects" theory, and instead squarely presents the question whether the tax collector may function as an art critic and withhold exemptions based on his aesthetic preferences.

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[1] *Combs v. Texas Entm't Ass'n*, 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012); *Bushco v. Utah State Tax Comm'n*, 225 P.3d 153 (Utah 2009), *cert. denied*, 131 S. Ct. 455 (2010); *Pooh Bah Enters., Inc. v. County of Cook*, 232 Ill. 2d 463, *cert. denied*, 130 S. Ct. 258 (2009).

Not only is the question important, it is guaranteed to recur as more jurisdictions adopt special taxes that target adult entertainment.[2] Moreover, this problem is not limited to sexually-oriented expression. While these content- and speaker-based taxes have taken root in this area and have not yet been trimmed back, they unquestionably will be extended to other subjects if this Court does not clarify the law.

Indeed, the taxing power is increasingly being viewed as a convenient end run around this Court's recent First Amendment rulings. A number of states currently are considering legislation to impose special taxes on "violent" video games notwithstanding what should have been the definitive word on such content-based regulation in *Brown v. EMA*.[3] Such proposals may gain added

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[2] *See*, *e.g.*, A.B. 2912 (N.Y. Jan. 22, 2013) (a bill to establish a surcharge on "sexually oriented media"); H.B. 2119 (W. Va. Feb. 13, 2013) (a bill to impose an excise tax on "the sale or rental of obscene materials"); S.B. 380 (Nev. Mar. 18, 2013) (a bill to provide a fee on "certain live adult entertainment businesses"). A number of states already impose such taxes. *E.g.*, Illinois Live Adult Entertainment Facility Surcharge Act, 35 Ill. Comp. Stat. 175 (2012); Tex. Bus. & Com. Code Ann. § 102.052 ($5 admission tax on sexually-oriented businesses); Utah Code Ann. §§ 59-27-101 to -108 (2008) (ten percent gross receipts tax on nude entertainment).

[3] *See*, *e.g.*, H.D. 3579 (Mass. Apr. 3, 2013) ($1 tax on M-rated video games and music with "explicit lyrics"); H.B. 5735 (Conn. Jan. 23, 2013) (a bill to establish a 10 percent sales tax on M-rated video games); H.B. 157 (Mo. Jan. 14, 2013) (a bill to place a 1 percent excise tax on "violent" video games); H.B. 893 (Mo. Mar. 26, 2013) (a bill to impose a $1 excise tax on "violent" video games rated T, M, or AO). *See also* A.B. 2982 (N.Y. Jan. 22, 2013) (a bill to impose a special tax on the sale and

momentum after being endorsed by government officials at the highest levels. *See*, *e.g.*, Paul Tassi, *Joe Biden Sees "No Legal Reason" Why We Can't Tax Violent Video Games*, Forbes.com, May 14, 2013 (http://www.forbes.com/sites/insertcoin/2013/05/14/joe-biden-sees-no-legal-reason-why-we-cant-tax-violent-video-games/).

It is important for this Court to articulate governing principles in this area now, before additional content-based tax laws are adopted. Addressing the issue is essential not just to limit the increasing level of constitutional damage, but also to reduce disruption to the states if such unconstitutional taxing schemes become more ingrained in state fiscal policies and are litigated at a later date.

CONCLUSION

The dissenters below warned that it would be appalling if the state were allowed to selectively award tax exemptions based on the tax collector's judgment regarding whether speech is sufficiently "cultural and artistic." A-7, A-9. To prevent such practices from gaining ground, Petitioner respectfully requests that this Court grant review of this case.

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rental of video games and on movie theater admissions to combat childhood obesity).

Respectfully submitted,

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July 5, 2013

APPENDIX A

Court of Appeals of New York.

In the Matter of 677 NEW LOUDON CORPORATION, Doing Business as Nite Moves, Appellant,

v.

STATE OF NEW YORK TAX APPEALS TRIBUNAL, et al., Respondents.

Oct. 23, 2012.

***796** W. Andrew McCullough, L.L.C., Midvale, Utah (W. Andrew McCullough of counsel), for appellant.

Eric T. Schneiderman, Attorney General, Albany (Robert M. Goldfarb, Andrew D. Bing and Barbara D. Underwood of counsel), for respondents.

Shafer & Associates, P.C. (Bradley J. Shafer, of the Michigan bar, admitted pro hac vice, of counsel), and Morrison & Foerster LLP, New York City (Hollis L. Hyans and R. Gregory Roberts of counsel), for CMSG Restaurant Group LLC, amicus curiae.

MEMORANDUM.

**1122 The judgment of the Appellate Division should be affirmed, with costs.

Petitioner, the operator of an adult "juice bar" in Latham, New York, contends that the admission charges and private dance performance fees it collects from patrons are exempt from state sales and use taxes. We agree with the Appellate Division that petitioner failed to meet its burden of proof that a tax exemption applies to those charges.

To begin, New York State collects taxes from a wide variety of entertainment and amusement venues. In particular, the Tax Law imposes a sales tax on "[a]ny admission charge" in excess of 10% for the use of "any place of amusement in the state" (Tax Law § 1105[f][1]). The legislature expansively defined places of amusement that are subject to this tax to include "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10]). The tax, therefore, applies to a vast array of entertainment including attendances at sporting events, such as baseball, basketball or football games, collegiate athletic events, stock car races, carnivals and fairs, amusement parks, rodeos, zoos, horse shows, arcades, variety shows, magic performances, ice shows, aquatic events, and animal acts (*see* 20 NYCRR 527.10). Plainly, no specific type of recreation is singled out for taxation.

***1060** However, with the evident purpose of promoting cultural and artistic performances in local communities, the legislature created an exemption that excluded from taxation admission charges for a discrete form of entertainment—"dramatic or musical arts performances" (Tax Law § 1105[f][1]). In this case, petitioner claims, and the dissent agrees, that the legislature intended to give the adult entertainment business a tax break because the exotic stage and couch dances that are featured at the premises qualify as musical arts performances, rather than as more generalized amusement or entertainment activities that fall within the broad sweep of the tax. We disagree.

[1][2][3][4] It is well established that a taxpayer bears the burden of proving any exemption from taxation (*see Matter of Grace v. New York State Tax Commn.,* 37 N.Y.2d 193, 195, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975]). "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 N.Y.3d 578, 582, 815 N.Y.S.2d 13, 848 N.E.2d 460 [2006]). This is so because "an exemption is not a matter of right, but is allowed only as a matter of legislative grace" (*Matter of Grace v. New York State Tax Commn.,* 37 N.Y.2d at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886). Thus, a determination by the Tax Appeals Tribunal that a taxpayer does not qualify for a tax exemption should not be disturbed ****1123** "unless shown to be erroneous, arbitrary or capricious" (*id.* at 195–196, 371

N.Y.S.2d 715, 332 N.E.2d 886).

***797 [5] In order for petitioner to be entitled to the exclusion for "dramatic or musical arts performances," it was required to prove that the fees constituted admission charges for performances that were dance routines qualifying as choreographed performances. Petitioner failed to meet this burden as it related to the fees collected for the performances in so-called "private rooms"; none of the evidence presented depicted such performances and petitioner's expert's opinion was not based on any personal knowledge or observation of "private" dances that happened at petitioner's club. Thus, the Appellate Division properly concluded that the activities conducted in the private rooms failed to qualify for the exemption.

[6] Further, it was not arbitrary, capricious or an error of law for the Tax Appeals Tribunal to find that petitioner failed to meet the same burden as it pertained to the admission charges for the stage performances. The Tribunal discredited the expert's opinion that the routines qualified as choreographed performances, a *1061 determination well within its province (*see generally Matter of Di Maria v. Ross,* 52 N.Y.2d 771, 436 N.Y.S.2d 616, 417 N.E.2d 1004 [1980]). The Tribunal articulated a rational basis for discrediting her; it found her testimony was compromised by her opinion that the private performances were the same as the main stage performances despite the fact that she neither observed nor had personal knowledge of what occurred

in the private areas.

Clearly, it is not irrational for the Tax Tribunal to decline to extend a tax exemption to every act that declares itself a "dance performance." If ice shows presenting pairs ice dancing performances, with intricately choreographed dance moves precisely arranged to musical compositions, were not viewed by the legislature as "dance" entitled a tax exemption, surely it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was also not a qualifying performance entitled to exempt status. To do so would allow the exemption to swallow the general tax since many other forms of entertainment not specifically listed in the regulation will claim their performances contain tax-exempt rehearsed, planned or choreographed activity.

Because we conclude that the charges and fees were taxable under Tax Law § 1105(f)(1), we need not consider whether petitioner met its burden that the admission charges were not subject to tax pursuant to section 1105(f)(3) of the Tax Law.

Petitioner's remaining constitutional argument is unavailing.

SMITH, J., (dissenting).

The ruling of the Tax Appeals Tribunal, which the majority upholds, makes a distinction between

highbrow dance and lowbrow dance that is not to be found in the governing statute and raises significant constitutional problems. I therefore dissent.

The dispositive question is whether the charges the State seeks to tax are paid for admission to a "choreographic ... performance" (Tax Law § 1101[d][5]). I find it clear that the legislature used "choreographic" in its statutory definition of "[d]ramatic or musical arts admission charge" merely as a synonym for "dance." Strictly speaking, it is true, not all dance is choreographed—some may be improvised—but it is absurd to suggest (and I do not read the majority opinion to suggest) **1124 that the legislature meant to tax improvised dance while leaving choreographed dance untaxed. In any event the record shows, without contradiction, that ***798 the performances here were largely planned, not improvised.

*1062 That the statutory word "choreographic" simply means "dance" is confirmed by a regulation of the Department of Taxation and Finance. The regulation gives this example of "[a]dmissions excluded from tax":

> A theatre in the round has a show which consists exclusively of dance routines. The admission is exempt since choreography is included within the term musical arts

(20 NYCRR 527.10[d][2] [*example* 4]).

The regulation assumes that "choreography" includes all "dance routines"—it does not matter what kind of dancing is being done.

Thus, the only question in the case is whether the admission charges that the State seeks to tax were paid for dance performances. There is not the slightest doubt that they were. That is proved by the video introduced into evidence before the Tribunal, and the testimony of two witnesses, an executive of petitioner and a dancer, with personal knowledge. The people who paid these admission charges paid to see women dancing. It does not matter if the dance was artistic or crude, boring or erotic. Under New York's Tax Law, a dance is a dance.

The majority, and the Tribunal, have implicitly defined the statutory words "choreographic ... performance" to mean "highbrow dance" or "dance worthy of a five-syllable adjective." The admission charges for these performances are taxable because the performances are, in the majority's view, not "cultural and artistic" (majority mem. at 1060). The Tribunal took a similar view, finding that the dancers did not put the care into their efforts that high art requires: "We question how much planning goes into attempting a dance seen on YouTube," the Tribunal remarked. It is undisputed that the dancers worked hard to prepare their acts, and that pole dancing is actually quite difficult, but the Tribunal decided that they were not artists, but mere athletes: "[T]he degree of difficulty is as relevant to a ranking in gymnastics as it is [in] dance." The Tribunal seems to have missed the point

that "ranking," either of gymnasts or dancers, is not the function of a tax collector.

The majority implies that since the legislature did not exclude from the entertainment tax other lowbrow forms of entertainment, such as baseball games and animal acts (see majority mem. at 1059), it would not have wanted to exclude pole dancing; but the issue is not what the legislature would have wanted to do, but what it did. If the legislature wanted to tax all *1063 "choreographic ... performances" except pole dancing, it could (assuming there are no constitutional problems) have said so, but the Tribunal has no authority to write that exception into the statute. And if, as the majority claims, a Department regulation purports to extend the tax to ice shows with "intricately choreographed dance moves" (majority mem. at 1061), that is a problem with the regulation. It does not change the statute.

Since I view the only question—an extremely easy question—to be whether these women were dancing or not, I find the expert testimony in this case entirely irrelevant. It was perhaps a mistake for petitioner to call an expert, in an attempt to impress the Tribunal with the cultural value of the entertainment that its juice bar provides. I find the majority's and the Tribunal's discussions of the expert's testimony unfair—indeed, the Tribunal's discussion (which says the testimony came in **1125 through a "continuous stream of leading questions") is simply inaccurate. But it does not matter, because the expert's testimony was superfluous.

***799 Like the majority and the Tribunal, I find this particular form of dance unedifying—indeed, I am stuffy enough to find it distasteful. Perhaps for similar reasons, I do not read Hustler magazine; I would rather read the New Yorker. I would be appalled, however, if the State were to exact from Hustler a tax that the New Yorker did not have to pay, on the ground that what appears in Hustler is insufficiently "cultural and artistic." That sort of discrimination on the basis of content would surely be unconstitutional (*see Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229–230, 107 S.Ct. 1722, 95 L.Ed.2d 209 [1987]). It is not clear to me why the discrimination that the majority approves in this case stands on any firmer constitutional footing.

Judges CIPARICK, GRAFFEO, PIGOTT and JONES concur; Judge SMITH dissents in an opinion in which Chief Judge LIPPMAN and Judge READ concur.

Judgment affirmed, with costs, in a memorandum.

APPENDIX B

Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of 677 NEW LOUDON CORPORATION, Doing Business as Nite Moves,
Petitioner,

v.

STATE OF NEW YORK TAX APPEALS TRIBUNAL et al.,
Respondents.

June 9, 2011.

**687 W. Andrew McCullough, Midvale, Utah, for petitioner.

**688 Eric T. Schneiderman, Attorney General, Albany (Robert M. Goldfarb of counsel), for Commissioner of Taxation and Finance, respondent.

Before: PETERS, J.P., SPAIN, McCARTHY, GARRY and EGAN JR., JJ.

EGAN JR., J.

*1341 Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to

review a determination of respondent Tax Appeals Tribunal which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29.

Petitioner operates Nite Moves, an adult juice bar located in the Town of Colonie, Albany County, where patrons may view exotic dances performed by women in various stages of undress. The club generates revenue from four primary sources: general admission charges, which entitle patrons to enter the club, mingle with the dancers and view on-stage performances, as well as any table or lap dances performed on the open floor; "couch sales," representing the fee charged when a dancer performs for a customer in one of the club's private rooms; register sales from the nonalcoholic beverages sold to patrons; and house fees paid by the dancers to the club. Following a test period audit conducted in 2005, the Division of Taxation concluded that the door admission charges and private dance sales were subject to sales tax, which petitioner had neglected to pay,[1] and issued a notice of determination assessing, insofar as is relevant to this proceeding, $124,921.94 in sales tax due plus interest.

Petitioner thereafter sought a redetermination, contending that the dances performed at the club—both on stage and in the private rooms—qualified as "dramatic or musical arts

[1]Petitioner paid the applicable tax on the register sales, and the Division determined that the house fees were not taxable.

performances" and, therefore, the corresponding fees charged for those services were exempt from taxation under Tax Law § 1105(f)(1). At the conclusion of the hearing that followed, the *1342 Administrative Law Judge (hereinafter ALJ) agreed, finding that the subject fees were not taxable under that provision. The ALJ also rejected the Division's assertion that liability alternatively could be imposed under Tax Law § 1105(d)(i) and (f)(3). The Division filed an exception and, following oral argument, respondent Tax Appeals Tribunal reversed the ALJ's decision, concluding that sales tax liability could be imposed under each of the cited subdivisions. Petitioner then commenced this CPLR article 78 proceeding to challenge the Tribunal's determination.

[1][2][3] It is well settled that "[s]tatutes creating tax exemptions must be construed against the taxpayer" (*Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.,* 83 N.Y.2d 44, 49, 607 N.Y.S.2d 620, 628 N.E.2d 1330 [1993] [internal quotation marks and citation omitted]; *see Matter of Charter Dev. Co., L.L.C. v. City of Buffalo,* 6 N.Y.3d 578, 582, 815 N.Y.S.2d 13, 848 N.E.2d 460 [2006]; *Matter of 21 Club, Inc. v. Tax Appeals Trib. of State of N.Y.,* 69 A.D.3d 996, 997, 892 N.Y.S.2d 659 [2010]; *Matter of XO N.Y., Inc. v. Commissioner of Taxation & Fin.,* 51 A.D.3d 1154, 1154–1155, 856 N.Y.S.2d 310 [2008]), and the taxpayer, in turn, bears the burden of establishing that the requested exemption applies (*see id.; see also Matter of Lake Grove Entertainment, LLC v. Megna,* 81 A.D.3d 1191, 1192, 917 N.Y.S.2d 725 [2011]; **689*Matter of CBS Corp. v. Tax Appeals Trib.*

of State of N.Y., 56 A.D.3d 908, 909, 867 N.Y.S.2d 270 [2008], *lv. denied* 12 N.Y.3d 703, 876 N.Y.S.2d 704, 904 N.E.2d 841 [2009]). To that end, it is not sufficient for the taxpayer to establish that its construction of the underlying statute is plausible; rather, the taxpayer must demonstrate that "its interpretation of the statute is ... the only reasonable construction" (*Matter of CBS Corp. v. Tax Appeals Trib. of State of N.Y.,* 56 A.D.3d at 910, 867 N.Y.S.2d 270 [internal quotation marks and citations omitted]; *see Matter of Charter Dev. Co. L.L.C. v. City of Buffalo,* 6 N.Y.3d at 582, 815 N.Y.S.2d 13, 848 N.E.2d 460; *Matter of Yellow Book of N.Y., Inc. v. Commissioner of Taxation & Fin.,* 75 A.D.3d 931, 932, 906 N.Y.S.2d 386 [2010], *lv. denied* 16 N.Y.3d 704, 919 N.Y.S.2d 119, 944 N.E.2d 657 [2011]; *Matter of Astoria Fin. Corp. v. Tax Appeals Trib. of State of N.Y.,* 63 A.D.3d 1316, 1318, 880 N.Y.S.2d 389 [2009]). Our standard of review in this regard is limited, and "[t]he Tribunal's determination will not be disturbed if it is rationally based and is supported by substantial evidence in the record, even if a different result could have been reached" (*Matter of 21 Club, Inc. v. Tax Appeals Trib. of State of N.Y.,* 69 A.D.3d at 997, 892 N.Y.S.2d 659; *see Matter of Lake Grove Entertainment, LLC v. Megna,* 81 A.D.3d at 1192, 917 N.Y.S.2d 725). Applying these principles to the matter before us, we cannot say that the Tribunal erred in concluding that petitioner's proof as to the claimed exemptions fell short.

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 ****1343*** *... dramatic or musical arts performances* " (emphasis added). 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 "dramatic 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]). Additionally, a "place of amusement" is defined as "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10]), which includes, without limitation, "a theatre of any kind ... or other place where a performance is given" (20 NYCRR 527.10[b][3] [i]).

Although the parties debate whether petitioner's club may be deemed to be the functional equivalent of a theater-in-the-round—a notion expressly rejected by the Tribunal—there is no question that the club qualifies as a place of amusement under the expansive definition set forth in Tax Law § 1101(d)(10) and the accompanying regulation.[2] Hence, the issue distills

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[2]Contrary to the parties' respective assertions, we do not find the Court of Appeals' decision in *Matter of 1605 Book Ctr. v. Tax Appeals Trib. of State of N.Y.,* 83 N.Y.2d 240, 609 N.Y.S.2d 144, 631 N.E.2d 86 [1994], *cert. denied* 513 U.S. 811, 115 S.Ct. 61, 130 L.Ed.2d 19 [1994], which addressed the applicability of Tax Law § 1105(f)(1) to receipts derived from coin-operated peep show

**690 to whether the club's admission and private dance fees constitute charges for admission to a "live dramatic, choreographic or musical performance" (Tax Law § 1101[d][5]; *see* Tax Law § 1105[f][1]).[3]

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booths, to be dispositive of the matter now before us. The central issue in that case was whether the booths constituted places of amusement or, as the petitioner contended, "devices such as jukeboxes and video games" (*id.* at 244, 609 N.Y.S.2d 144, 631 N.E.2d 86). Thus, the Court's finding that "[t]he booths are factually not taxably distinguishable from a usual theater except for the element of privacy" (*id.* at 245, 609 N.Y.S.2d 144, 631 N.E.2d 86) does not speak to the underlying dispute here-namely, whether the dances offered at petitioner's club may be deemed to be choreographed performances.

[3]In this regard, respondent Commissioner of Taxation and Finance argues on review that petitioner is not entitled to the cited exemption because it failed to establish that the fees collected by the club were "exclusively" attributable to, insofar as is relevant to this proceeding, a choreographed performance. Specifically, the Commissioner notes that the club's admission charge allows patrons to, among other things, mingle and converse with the dancers—activities that hardly may be construed as choreographed under any definition—and, therefore, such charge is not paid "solely" to view a choreographed performance. As evidence of this asserted exclusivity requirement, the Commissioner points to one of the examples (No. 4) set forth in 20 NYCRR 527.10(d)(2)—the regulation governing admission charges excluded under Tax Law § 1105(f).

Although the validity of this particular argument ultimately need not detain us (*see infra*), we note in passing that neither the text of the statute itself nor the language of the relevant implementing regulation limits the definition of "dramatic or musical arts admission charge" in this fashion (*see generally Matter of Cecos Intl. v. State Tax Commn.,* 71 N.Y.2d 934, 937,

[4] ***1344** Petitioner's expert witness, a cultural anthropologist who has conducted extensive research in the field of exotic dance, defined " choreography" as "the composition and arrangement of dances." Based upon her personal observations gleaned from a visit to petitioner's club, as well as her review of the dances depicted on the Nite Moves DVD entered into evidence at the administrative hearing and her interviews with certain of the club's dancers, the expert opined that "the presentations at Nite Moves are unequivocally live dramatic choreographic performances." In support of that opinion, the expert testified at length regarding the sequential components, aesthetics and principles of exotic dance and, in her report, set forth the choreographic sequence and characteristics of the on-stage dances she viewed on the foregoing DVD. The expert further concluded that the private dances performed at petitioner's club involved "similar kinds of movements" as those portrayed by the dancers she observed on stage and, therefore, also qualified as choreographed performances.

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528 N.Y.S.2d 811, 524 N.E.2d 132 [1988]). Further, as "an example merely serves as a speculative and hypothetical illustration of a regulation, it is not entitled to the same degree of judicial deference as [the actual] regulation" (*Matter of St. Joe Resources Co. v. New York State Tax Commn.,* 132 A.D.2d 98, 102, 522 N.Y.S.2d 252 [1987], *revd. on other grounds* 72 N.Y.2d 943, 533 N.Y.S.2d 51, 529 N.E.2d 419 [1988]; *see Matter of ADP Automotive Claims Servs. v. Tax Appeals Trib.,* 188 A.D.2d 245, 249, 594 N.Y.S.2d 96 [1993], *lv. denied* 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305 [1993]) or, for that matter, the relevant statute.

In our view, there can be no serious question that—at a bare minimum—petitioner failed to meet its burden of establishing that the private dances offered at its club were choreographed performances. Petitioner's expert, by her own admission, did not view any of the private dances performed at petitioner's club and, instead, based her entire opinion in this regard upon her observations of private dances performed in *other* adult entertainment venues. None of the DVDs entered into evidence at the administrative hearing depicted the private dances in question, and neither the generalized testimony—as offered by one of the club's dancers—that the private performances "still use[d] dance moves" nor that dancer's description of a particular move she often would employ while performing such a dance was sufficient to establish that these private performances were in fact choreographed. Given the dearth of evidence on this point, **691 the Tribunal's conclusion that petitioner was not entitled to the requested exemption insofar as it related to the club's *1345 couch/private dance sales was entirely rational and, as such, will not be disturbed.

[5][6] We must reach a similar conclusion as to the taxability of petitioner's door admission charges. Although petitioner argues that the detailed testimony of its expert was more than sufficient to discharge its burden on this point, the Tribunal essentially discounted this testimony in its entirety, leaving petitioner with little more than the Nite Moves DVD to demonstrate its entitlement to the requested exemption. In this regard, while the Tribunal's

definition of the term choreography did not differ significantly from the one employed by petitioner's expert, the Tribunal characterized the expert's interpretation of a choreographed performance as "stunningly sweeping"—deeming it to be "so broad as to include almost any planned movements [performed to] canned music." The Tribunal also noted what it construed as the expert's attempt to tailor her testimony and corresponding report to "neatly fit into the statutory exemption language" and viewed her testimony regarding the private dances offered at petitioner's club as particularly suspect, finding that "the certainty with which [the expert] holds to [her] conclusion[s], even in the absence of direct knowledge or observation of what occurs in the private areas at Nite Moves, undermine[s] her overall testimony." Credibility determinations, including the weight to be accorded to an expert's testimony, are matters that lie "solely within the province of the administrative factfinder" (*Matter of Kosich v. New York State Dept. of Health,* 49 A.D.3d 980, 984, 854 N.Y.S.2d 551 [2008], *lv. dismissed* 10 N.Y.3d 950, 862 N.Y.S.2d 463, 892 N.E.2d 856 [2008]; *see Matter of Suburban Restoration Co. v. Tax Appeals Trib. of State of N.Y.,* 299 A.D.2d 751, 752, 750 N.Y.S.2d 359 [2002]; *Matter of Brahms v. Tax Appeals Trib.,* 256 A.D.2d 822, 825, 681 N.Y.S.2d 699 [1998]) and, "absent any indication of the arbitrary exercise of the power thus conferred" (*Matter of Pearson [Catherwood],* 27 A.D.2d 598, 598, 275 N.Y.S.2d 717 [1966]), we lack the authority to disturb them (*see Matter of Gordon v. Tax Appeals Trib.,* 243 A.D.2d 828, 830, 663 N.Y.S.2d 897 [1997]). We perceive no such arbitrariness here.

[7] Nor can we say that the Tribunal erred in concluding that the balance of petitioner's proof was insufficient to establish its entitlement to the exemption set forth in Tax Law § 1105(f)(1). The record reflects that the club's dancers are not required to have any formal dance training and, in lieu thereof, often rely upon videos or suggestions from other dancers to learn their craft. The one dancer who testified at the hearing did not extensively discuss the nature of the performances encompassed by the club's door admission charge, and the Nite Moves DVD does not—standing alone—demonstrate that the on-stage *1346 dances qualified as choreographed performances, thereby falling within the ambit of the cited exemption. Accordingly, inasmuch as the Tribunal's determination has a rational basis and petitioner failed to demonstrate its entitlement to the claimed exemption, the determination must be confirmed.

[8] Petitioner next contends that, even if the sales at issue are taxable under Tax Law § 1105(f)(1), those very same sales are "exempt" from taxation under Tax Law § 1105(f)(3), the latter of which imposes sales tax upon "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state." To that end, Tax Law § 1101(d)(12) defines a "roof garden, cabaret or other similar place" as "[a]ny roof garden, cabaret or other similar**692 place which 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 ... refreshment[s] ..., so long as

such serving or selling ... is merely incidental to such performances." Even assuming, among other things, that the cited provisions actually create a true exemption,[4] as opposed to simply limiting the definition of roof garden, cabaret or other similar place, we nonetheless find the Tribunal's denial of the claimed exemption to be rational.

The Tribunal expressly found that petitioner's club constituted a cabaret or similar place where a public performance is staged for profit, and the record as a whole certainly supports this finding. Indeed, petitioner acknowledges that it "might" be a cabaret but argues that, because it provides "live dramatic or musical arts performances" and its beverage sales are "merely incidental to such performances," it is outside the taxable reach of Tax Law § 1105(f)(3). In this regard, although the Tribunal's decision focuses primarily upon whether the club's register sales from the nonalcoholic beverages sold qualify as incidental, implicit in its analysis of Tax Law § 1105(f)(3)—and its corresponding rejection of petitioner's claimed exemption thereunder—is a finding that the dances offered at petitioner's club did not constitute "live dramatic or musical arts performances" within the meaning of the statute. Having already found that the Tribunal's resolution of that factual issue was rational, we need not proceed to consider whether petitioner's

[4]Tax Law § 1123 was enacted in December 2006 to accomplish this feat (L. 2006, ch. 279, § 1).

beverage sales would qualify as incidental.[5]

[9] Finally, we find no merit to petitioner's various constitutional *1347 claims. Simply put, each of the statutory provisions at issue is facially neutral and in no way seeks to levy a tax upon exotic dance as a form of expression. Further, and contrary to petitioner's conclusory assertions, there is nothing in the record to suggest that the subject taxing scheme is being applied in a discriminatory manner. Notably, neither the Tribunal's decision nor the underlying statutes preclude an adult juice bar from qualifying for the claimed exemptions under a different set of circumstances, and the record as a whole fails to support petitioner's claim that the relevant fees were taxed for some reason other than the legitimate collection of sales tax revenues. In short, petitioner was denied the requested relief due not to the nature of its business but, rather, because of the inadequacy of its proof. Petitioner's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

PETERS, J.P., SPAIN, McCARTHY and GARRY, JJ., concur.

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[5]In light of the foregoing, we also need not address the Tribunal's conclusions regarding the applicability of Tax Law § 1105(d).

APPENDIX C

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 December 1, 2002 through August 31, 2005.

DECISION
DTA NO. 821458

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued March 12, 2009 with respect to the petition of 677 New Loudon Corporation d/b/a Nite Moves. Petitioner appeared by Andrew McCullough, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a letter brief in reply. Oral

argument, at the request of the Division of Taxation, was held on October 14, 2009 in Troy, New York.

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

ISSUES

I. Whether petitioner has established that the door admissions and fees for private dances it collects from its patrons are not subject to sales tax as an admission charge to a place of amusement pursuant to Tax Law § 1105(f)(1).

II. Whether petitioner has established that the door admissions and charges for private dances it collected from its patrons are not subject to sales tax as amounts paid as charges of a roof garden, cabaret or other similar place pursuant to Tax Law § 1105(f)(3).

III. Whether petitioner has established that the door admissions and charges for private dances it collected from its patrons are not subject to sales tax pursuant to Tax Law § 1105(d)(i), as a cover, minimum, entertainment or other charge made to patrons in an establishment that provides taxable food or beverages.

FINDINGS OF FACT

We find the facts as determined by the

Administrative Law Judge except for findings of fact "1," "5," "6," "8," "9," "10," "12," "13," "14" and "15," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

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

> 677 New Loudon Corporation, doing business as Nite Moves (petitioner) operated an adult entertainment establishment, referred to as an adult juice club, located in Latham, New York, offering semi nude and nude female performances during the audit period at issue, December 1, 2002 through August 31, 2005. Petitioner served only non-alcoholic beverages, including bottled water, soda and juice. Up until 2004, petitioner sold light lunch items, but this was discontinued due to low demand. From that point on, petitioner only sells beverages of a non-alcoholic nature to its customers.[1]

After a request for books and records, the Division of Taxation (Division) determined that petitioner's books and records were adequate for the performance

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

of a detailed audit. The Division audited petitioner's fixed asset purchases and recurring expense purchases in detail and determined that there was additional tax due of $4,038.67 on additional expense purchases of $50,483.00 for the period in issue. Petitioner does not dispute this amount.

Pursuant to an executed test period audit method election agreement entered into by the parties, the Division performed a test of petitioner's sales for the quarter ending August 31, 2005. Petitioner's sales were comprised of four categories: 1) door admission fees, for general admission charges; 2) "couch sales" for the service of private dances performed for customers; 3) register sales for non-alcoholic beverages sold; and 4) house fees, for the fees paid by the dancers to the club. The Division determined that petitioner had not paid tax on its door admissions ($64,612.00 for the test period) or its fee for private dances ($321,535.00 for the test period), and the Division maintains that these items are subject to sales tax. Petitioner had collected tax on its register sales of beverages ($68,937.00 for the test period) and was given credit for taxes paid. The Division determined that the house fees ($18,650.00 for the test period) were not subject to tax.

According to the Division, petitioner should have paid tax on test period items totaling $281,665.00[2] at

[2]In a footnote, the Administrative Law Judge observed that the Division omitted August taxable sales in this calculation, wherein the end result would have been $455,084.00 for the test period total, and significantly higher tax for the audit period.

a tax rate of 8% for additional tax for the test period of $22,533.20. Giving the taxpayer credit for taxes paid in accordance with its filed sales tax returns for the same period of $5,077.71, the additional tax due was $17,455.49. The Division divided the additional tax due for the test period by the total gross sales reported by petitioner on its sales tax returns for that quarter, $455,165.00, to determine an error rate of 3.8350%. The Division next multiplied the error rate by the total gross sales reported on petitioner's sales tax returns for the audit period ($3,257,417.00) to determine $124,921.94 in additional tax due on sales for the entire period in issue. Then the Division added the additional tax due on expenses purchases of $4,038.67, to arrive at a total additional tax due of $128,960.61.

The Division's audit resulted in its issuance of a Notice of Determination dated February 13, 2006 (notice number L-026619882-9) for additional sales and use taxes due for the period December 1, 2002 through August 31, 2005 in the amount of $128,960.61 plus interest. No penalties were assessed.

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

> The Division's auditor, based on his knowledge of prior similar audits, proceeded on the premise that the

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There was no explanation provided for this omission. Accordingly, the omission of tax appears to be mathematical errors and has no effect on the notice of determination as issued.

> admission fees at the door, the private couch dances, and the beverages sold were all taxable (although no additional tax was ultimately found due on beverages). The auditor spoke briefly with petitioner's management and observed the layout of the business prior to its opening. As noted earlier, no additional tax was found due on beverages, public dances or on house fees. However, the auditor found that the only area on which petitioner was collecting tax was for register sales for drinks. The auditor determined that tax should have been charged for the fees on private dances and admission charges at the door and proceeded to calculate the amount of tax due on those areas as well. The auditor did not make observations of either the public (stage) dances or the private couch dances as part of the audit. There is no evidence that petitioner inquired about possible exemptions from sales tax.[3]

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

> We note that the audit was

[3]We have modified this fact to more accurately reflect the record.

commenced in September, 2005.[4] Before beginning the actual audit, the auditor spoke with the taxpayer about the club's operations (*see*, Tr., pp. 30-31). He was informed that patrons paid a $5.00 door fee, and patrons were required to buy a minimum of two non-alcoholic beverages, paid also at the time of admission. Stephen Dick, CFO and manager of petitioner, testified that in 2004, when the business was remodeled, a sign advising customers of the two-drink minimum was removed. Although the sign was removed in 2004, the record, including testimony of the auditor and Mr. Dick, shows that the policy requiring the two drink minimum continued. It is a standard practice in the industry, states Mr. Dick, to ask customers to buy their drinks when entering the premises. Mr. Dick testified, however, that he has never had a patron enter the premises only to have a drink (*see*, Tr., pp. 42; 43). Once the customer pays for the two drinks, he can still decline to drink them. The bartenders still ask customers if they would like a beverage, but do not require the purchase of additional drinks to remain in the club (*see*, Tr., p. 70). The

[4]The test period used for the audit was from June through August, 2005.

> cost of beverages was estimated at $3.00 to $5.00 each. The sales of beverages consisted of approximately 15% of petitioner's total sales income, or approximately $460,000.00 during the audit period. Beverage sales were second only to private dances as a profit center for petitioner (*see*, Tr., pp. 18-29).
>
> The admission charge at the door was $5.00 at the beginning of the audit period, and was raised to $8.00 in 2003, and later to the current admission fee of $10.00 ($3.00 before 5:00 P.M.). The admission fee is a general admission to the club to watch the public performances on the main stage.[5]

Petitioner provides entertainment consisting of exotic dancers performing routines in costume, for a portion of the time, and in the nude for the balance of the time that they are on stage. The main stage where the performances take place is 12 feet by 10 feet, with a brass pole from floor to ceiling and a brass rail around the edge of the stage. Petitioner has standards it sets for the costumes worn by the dancers and the dancers generally have several theme costumes to accompany their routines. Dancers choose their own music and are encouraged to enhance the

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

entertainment value by pairing the dance music with the theme chosen.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> Petitioner introduced into evidence three DVDs illustrating various dance techniques. The first was an undated DVD of dance clips taken from YouTube depicting routines that two of petitioner's dancers adapted into their own dance routines. The YouTube DVD was comprised of three pole dance routines, two of which were material from PoleJunkies.com, a Canadian internet site established to teach pole dancing for fitness. Petitioner's dancers often used such sources to incorporate new dance moves and learn new techniques, particularly with pole routines.
>
> The second DVD was of public stage performances (as opposed to the private dance area) at petitioner's place of business. This DVD, entitled "Nite Moves [sic] Routines" was approximately 22 minutes in length and showed dances by two dancers. Each were using pole techniques and dance steps to music.
>
> The last video introduced was taken when the club hosted Miss Nude

> Capital District in 1998, and had a feature performance, one which utilized props, themes and corresponding steps and music to the themes chosen. This video was introduced as an example of dance performance with a theme, though filmed outside the audit period.[6]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> The dancers are hired from a variety of backgrounds, training and levels of dance experience. Some have no prior experience at all. Some have training in gymnastics, ballet, jazz, or exotic dance and develop their routines within the parameters set forth by the club, advancing their own ability and creativity over time. New steps and routines are learned from watching videos and other dancers.[7]

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> The patron is able to select a particular dancer to perform at table side

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[6]We have modified this fact to more fully reflect the record.

[7]We have modified this fact to more clearly reflect the record.

or to perform a private couch dance, while others are dancing on the stage. Patrons can request a table dance on the open floor area off the stage, partially clothed, in close proximity to a particular customer at their table, for which there is no additional fee payable to the club. Customarily, the dance will result in tips to the dancer, and these tips are not shared with the club. For an additional club charge, patrons can request a private dance in a small private room with the same or another dancer. The private dances, which generate the most income for the club, are performed in the nude in an intimate setting of a small private room with a chair or couch. There are six small private rooms each with a curtain. They do not have dance poles as does the stage. Petitioner's expert, Judith Lynne Hanna, a cultural anthropologist, testified that she did not observe the private dances at the club. Nevertheless, Dr. Hanna stated that in her opinion the dance routines were very similar to those performed on stage, with the difference that the dancer's focus would be on a particular patron. During the beginning of the audit period, private dances were $20.00 for a three-minute private dance, which petitioner and the dancer shared equally. In the latter part of the audit period, the cost of private dances was

> raised to $25.00; petitioner received $15.00 and the dancer received $10.00.[8]

House fees, another income category in petitioner's business, represent a fee paid by the dancers as independent contractors to petitioner. This fee is a space rental agreement for the rental of the facility in which to perform. The dancers are afforded the use of the stage, equipment and the dressing area for $25.00 per day, or $30.00 per evening. The Division did not include the house fees in taxable sales.

We modify finding of fact "12" of the Administrative Law Judge's determination to read as follows:

> Stephen Dick, the CFO and general manager of petitioner, is responsible for the day to-day business management and handles the bookkeeping for petitioner. Mr. Dick also acts as a DJ one afternoon a week, and worked with two dancers who wanted to learn how to make dance moves similar to that seen on the YouTube video. According to Mr. Dick, the young ladies watched the video until they learned how to do the moves and now use the moves in their routines (Tr., p. 51). Mr. Dick testified that he made the YouTube DVD

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

> himself, recording routines done by various Canadian dancers. He also made the video entitled "Nite Moves [sic] Routines," in preparation for this litigation. He then sent the videos to Dr. Hanna in Maryland to review for her opinion (*see*, Tr., pp. 55-57). The third DVD entitled "Miss Nude Capital District" was made in 1998. The two latter videos represent dances in the public area of the club (*see*, Tr., pp. 63-67). There were no DVD recordings of private dances.[9]

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> Dr. Judith Lynne Hanna, referred to above, was retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance critic. Dr. Hanna earned her master's and doctoral degree in anthropology from Columbia University, specializing in nonverbal communication and the arts and society.[10] Dr. Hanna has training in

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[9]We have modified this fact to omit extraneous material.

[10]Dr. Hanna's dissertation was on a group's choreography and its meaning and style. She is a senior research scholar in the Department of Dance and an affiliate in the Department of

> several dance genres and has taught dance, as well as college courses on dance theory. Since 1995, Dr. Hanna has been conducting on-site research on exotic dance and adult entertainment. Along with the research approach, she has examined the characteristics and choreography of exotic dance.[11]

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

> Dr. Hanna reviewed and analyzed the three dance videos referred to above, particularly the DVD that contained two dancers performing on petitioner's public stage for about 22 minutes.[12] Dr. Hanna stated as her expert opinion that this video represented choreography, or arrangement, of about 61 different moves with theme and variation patterns with repetition. She identified the use of locomotion, gesture, pole, mirror and floor work at variable levels in response to music.

Anthropology at the University of Maryland, College Park, Maryland.

[11]We have modified this fact to more concisely reflect the record.

[12]The DVD entitled "Nite Moves [sic] Routines."

> I saw a range of movements that were typical of adult entertainment elsewhere, and I saw the individual creativity of the dancers. They used the mirror, they used the pole, they used the floor, they used the tip rail, they used the ledge overhead . . . I saw, also, some interaction with a patron at the tip rail on giving a tip (Tr., pp. 90-91).

Dr. Hanna reviewed two other videos that some of the dancers have used in their routines. On the basis of the above, Dr. Hanna formed and prepared the report of her expert opinion. When she subsequently arrived in the area to testify in this matter, she spent two hours at the club observing six dancers. She also spoke with bartender and former dancer, Michelle Miller. One of the dancers she observed did not perform pole work, but instead used a country dance routine, complete with costumes and her own artistic interpretation.[13]

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[13]We have modified this fact to more accurately reflect the record.

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

> Dr. Hanna's report discussed, at great length, dance in general, and exotic dance in great detail. Her report focused on the sequential parts of the performance, the messages of the performer, the skill it takes to perform dance routines, and the psychology of dance and its effect on the viewers. She set forth a description in detail of the choreographed sequence for each dancer on the DVD videos she reviewed for her testimony:
>
> > The aesthetic principles, they use unity, variety, repetition, contrast, transitions. So you saw the dancers on the pole, on the floor, midway, you saw smaller movements, you saw larger movements, you saw high quality performances, you saw balance . . . . You have some harmony, and sometimes choreography may have some dissonance, again, to attract attention.
> >
> > [Dance] has a

> vocabulary, it has certain movements, it has meaning, it has some ambiguity (Tr., pp. 96-97).
>
> Dr. Hanna concluded the "presentations at Nite Moves unequivocally were live, dramatic choreographic performances" (Tr., p. 94 [lines 14-15]).

Dr. Hanna did not observe the dances in the private area of the club but nevertheless insisted on direct and redirect examinations that the dances in the private areas were choreographed performances.[14]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Petitioner charged a general admission at the door of its premises as an entrance fee, which permitted a patron to view all of the stage dances, and any table dance performed for that patron or another on the open floor. Further, petitioner charged an additional fee for the private couch dances. Since the private dance charge would qualify as a charge for additional entertainment, the Administrative Law Judge found that it would be considered an admission charge under the Tax Law.

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[14]We have modified this fact to more accurately reflect the record.

The Administrative Law Judge observed that it is undisputed that petitioner's place of business is a place of amusement under the statute. Accordingly, petitioner's admission fee and private dance charge would be subject to sales tax under Tax Law § 1105(f)(1), unless it qualified for the exemption as a dramatic or musical arts performance. The Administrative Law Judge found that petitioner satisfied the enumerated exception contained within the taxing statute because the entertainment provided consists of "dramatic or musical arts performances."[15]

The Administrative Law Judge stated that petitioner sought the exemption and introduced evidence of an expert in support of its position. The Administrative Law Judge pointed out that petitioner's evidence included the three DVD videos described above. The videos depicted dance routines that included acrobatic pole maneuvers, which the Administrative Law Judge opined, are no small feat to accomplish.

The Administrative Law Judge found that petitioner met its burden of proof pursuant to Tax Law § 1132 on this issue and that the admission charges it collects from patrons at the door and for the private dances meet the exemption to taxation under Tax Law

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[15]Petitioner premised its arguments on language in a determination by an Administrative Law Judge in an unrelated matter. We note that such determination does not have precedential value in a proceeding before us (*see*, Tax Law § 2010[5]).

§ 1105(f)(1) and, therefore, are not taxable under this section.

The Division next argued that petitioner's admission charges are taxable pursuant to Tax Law § 1105(f)(3), which provides that a sales tax shall be imposed on "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state."

Other than the existence of the public performance for profit, the Administrative Law Judge noted there are two tests that must be met for petitioner's admission charges to be taxed under this section: its business must be a roof garden, cabaret or similar place, and its beverages must be more than incidental to the performances. The term "cabaret," as used by the Administrative Law Judge, is defined as "a restaurant serving liquor and providing entertainment (as by singers and dancers); a nightclub." The Administrative Law Judge explained that a "roof garden" is a restaurant or nightclub at the top of a building often in connection with or decorated to suggest an outdoor garden. Based on these definitions, the Administrative Law Judge observed that the common denominator between a cabaret and roof garden is that they are both restaurants that also have entertainment. Since petitioner does not serve either alcohol or food, the Administrative Law Judge found that petitioner did not meet the definition of either. The Administrative Law Judge pointed out that if one could establish that petitioner's place of business constitutes a "similar place" where a public performance is staged for profit, it would still be

necessary to show that petitioner's sales of refreshments are more than incidental to its provision of entertainment. In the present case, the Administrative Law Judge found that petitioner's beverage sales constitute approximately 14.2% of its total sales, and that this fact was a strong indicator that the sale of refreshments was merely incidental to petitioner's business. Furthermore, the Administrative Law Judge also found the fact that petitioner took down the sign stating a policy of a two-drink minimum, payable upon entrance, is evidence that it no longer required its patrons to make such purchases. Therefore, the Administrative Law Judge determined that the sale of refreshments was incidental to petitioner's business, and that petitioner's admission charges were not subject to tax pursuant to Tax Law § 1105(f)(3).

The Division next argued, in the alternative, that the admission charges were subject to tax pursuant to Tax Law § 1105(d)(i). In the view of the Administrative Law Judge, this section cannot be applied to the taxation of the admission charges herein. First, in her view, the focus of Tax Law § 1105(d)(i)(1) is to tax food and beverages (the Administrative Law Judge noted that there was no dispute that the beverages in this case were taxable). The Administrative Law Judge stated that if patrons visited petitioner's business because the juice beverages were extraordinary, and happened to experience entertainment while there, this section would then apply. The Administrative Law Judge found that patrons do not frequent petitioner's business for the juice drinks, but rather to see the

performers dancing and, thus, the taxation of the admission charges is not provided for here, but rather under section 1105(f)(1) of the Tax Law.

Secondly, the Administrative Law Judge found the proper interpretation of the parenthetical "except those receipts taxed pursuant to subdivision [f] of this section" to Tax Law § 1105(d)(i) is that since it has been determined that the admission charges collected by petitioner from its patrons were subject to tax pursuant to Tax Law § 1105(f)(1), but met the exception contained therein, they cannot be held taxable under Tax Law § 1105(d). Accordingly, the Administrative Law Judge found that the Division erred in taxing the admission charges in this matter under Tax Law § 1105(d)(i).

Having found that petitioner's charges were not subject to tax, the Administrative Law Judge deemed petitioner's constitutional protection arguments moot.

ARGUMENTS ON EXCEPTION

The Division argues on exception, as it did below, that petitioner's admission charges are taxable pursuant to Tax Law § 1105(d)(i)(1); (f)(1) and (3), all of which exist in order to impose sales tax on the receipts for items enumerated by the Tax Law.

Similarly, petitioner continues to maintain that it is exempt from sales tax on its admission charges and private dance performances as admission to a theater featuring choreographed dance performances.

Petitioner further states that nude dancing is protected expression under the Constitution and should be recognized as such. Petitioner additionally argues that it is exempt from sales tax on its admissions and private dance performances as an entertainment venue where the sales of refreshments are merely incidental to the performance.

OPINION

The primary focus of this matter is whether the admission fees collected at the door and the couch fees collected for the private dances are subject to sales tax.[16]

The Tax Law presumes that all of a taxpayer's sales receipts are subject to tax until the contrary is established and the taxpayer has the burden of proof in that regard (*see*, Tax Law § 1132[c]). Exemptions from tax are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the statute entitles him to the exemption (*see, Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]).

The facts demonstrate that petitioner operates as

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[16]It will be recalled that although the sale of beverages exceeded the amount of admission fees at the door, the sales tax on beverage sales was reported and paid and are not an issue here. Whether such beverage sales were incidental to petitioner's business does remain an issue, however.

an adult juice club where dance performances are performed for its patrons by nude or semi nude females. Live entertainment or dancing are forms of amusement (*see, Matter of Antique World,* Tax Appeals Tribunal, February 22, 1996).

We first address whether the admission charges collected by petitioner from its patrons were subject to sales tax. Tax Law § 1105(f)(1) provides, as relevant here, that a sales tax shall be imposed on:

> Any admission charge where such admission charge is in excess of ten cents to or for the use of any place of amusement in the state, *except charges for admission to . . . exhibitions which charges are taxed under any other law of this state, or dramatic or musical arts performances* . . . (emphasis added).

Dramatic or musical arts performances are further defined in Tax Law § 1101(d)(5) as admission charges "for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance." An "admission charge" is defined as "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor" (Tax Law § 1101[d][2]). The term "place of amusement" is defined by Tax Law § 1101(d)(10) as "[a]ny place where any facilities for entertainment, amusement, or sports are provided," which includes without limitation a "theatre of any kind . . . or other

place where a performance is given" (20 NYCRR 527.10[b][3][i]). The Division's regulations include an example of an exempt musical arts performance as follows:

> Example 4: A theatre-in-the-round has a show which consists exclusively of dance routines. The admission is exempt since choreography is included within the term musical arts (20 NYCRR 527.10[d][2]).

We reverse the determination of the Administrative Law Judge.

In *Matter of 1605 Book Center v. Tax Appeals Tribunal* (83 NY2d 240 [1994], *cert denied* 513 US 811 [1994]), the Court of Appeals upheld imposition of sales tax on receipts from peep show booths pursuant to Tax Law § 1105(f)(1) as places of amusement. That case involved two types of live shows. The first included live shows available by coin-operated machines, in private booths that surrounded a stage on which nude or partially nude females performed. The other venue, known as the "fantasy booth," also functioned with a coin deposited in a private booth, allowing a patron to converse with a scantily-dressed woman. In both booths, the patron was separated from the performer by a glass partition that was covered by a curtain or screen. The curtain parted for a set time only after the patron deposited coins in the machine. The peep show booth consisted of separate booths surrounding a stage from which patrons were able to view nude or partially nude females performing.

Patrons would enter the booths and deposit coins in a slot, which resulted in a curtain or screen raising to enable the patron to view a live performance or speak with the scantily-dressed woman performing. Petitioner in *1605 Book Center* argued that its venue was not a place of entertainment or amusement, but rather that the booths were devices like a juke box or video game. The Court of Appeals rejected this argument and held that the coins so deposited were a fee paid as an admission charge to a place where entertainment is provided and was subject to tax under Tax Law § 1105(f)(1). The Court observed that there could be no doubt that if these patrons observed these live performances with other audience members, rather than private booths, the sales tax would also apply.

Similarly, Nite Moves is an adult juice club and a place where entertainment is provided. This case has many of the same elements as *1605 Book Center*. Nite Moves provides female performers, either in the public area or private area, who dance and speak with patrons. In some ways, the setting here is even more intimate than that in *1605 Book Center*, since here, the customers and the performers actually can touch, and the performers are not merely scantily clad, but often nude. Petitioner does not argue that it is not a place of amusement, but rather that it is excepted by the statute because the entertainment provided consists of dramatic or choreographed musical arts performances. In support of this argument, petitioner presented its expert.

Dr. Hanna based her testimony on her review of the three DVDs and a conversation she had with Michelle Miller, the bartender and former performer at Nite Moves. Dr. Hanna referred in her report and testimony in great detail about herself and her experience. When it came to specifics about what she observed at Nite Moves, her testimony was more limited. She had apparently not visited Nite Moves prior to coming to this area to testify in this matter. As was noted earlier, Mr. Dick sent the three DVDs to her in Maryland to review. In addressing the issue of choreography, generally, she stated:

> The aesthetic principles, they use unity, variety, repetition, contrast, transitions. So you saw the dancers on the pole, on the floor, midway, you saw smaller movements, you saw larger movements, you saw high quality performances, you saw balance . . . . You have some harmony, and sometimes choreography may have some dissonance, again, to attract attention.
>
> . . . [D]ance has a vocabulary, it has certain movements, it has meaning, it has some ambiguity (Tr., pp. 96-97).

Dr. Hanna described the exotic dance routines variously as:

> somewhat "risqué" or "naughty" adult play, a fanciful teasing that transgresses

> social decorum and dress codes in an ambience (sic) ranging from sedate to carnival-like. Exotic dance is erotic fantasy and communication with a display of nudity, disclosure of more skin and different movements than are seen in public, the use of high heels (often six inch stiletto platform shoes) and incorporation of jazz-like, improvisatory movements in routines (Exhibit "7," p.7, ¶ 4).

Dr. Hanna stated, based on her review of the three DVDs that these naughty, risque, playful, teasing, erotic, nude performances at Nite Moves were "live, dramatic choreographed performances" (Tr., p. 94 [lines 14-15]). Dr. Hanna concluded that:

> the presentations at Nite Moves unequivocally were live dramatic choreographic performances. They are in a *theater* that shows only dance routines. The theater actually is a little bit like an off Broadway theater. It's small and it's intimate, it's like theater-in-the-round (Tr., p. 94 [lines 13-19]).

Further, while Dr. Hanna admits that she did not observe the performances in the private areas of the club, she nevertheless insisted, both in her direct and redirect testimony, that the dances in the private areas were also choreographed performances (*see*, Tr., pp. 106-108).

We find, notwithstanding Dr. Hanna's testimony, that petitioner is an adult juice club for adult entertainment and not a theater or theater-in-the-round contemplated by the statute and regulations. This is consistent with Steven Dick's testimony that petitioner is an adult juice club. With regard to whether it is a choreographed performance, we note that the record sets forth how the dancers help each other when they are getting started, how they view other dancers on YouTube and practice the dances they see on the internet. As we use the term here, "choreography" is "the art of composing ballets and other dances and planning and arranging the movement, steps, and patterns of dancers" (Random House Webster's College Dictionary 232 [2nd ed 1997]). We question how much planning goes into attempting a dance seen on YouTube. The record also shows that some of the moves on the pole are very difficult, and one had best plan how to approach turning upside down on the pole to avoid injury. However, the degree of difficulty is as relevant to a ranking in gymnastics as it is dance. Dr. Hanna's view of choreographed performance is so broad as to include almost any planned movements done while playing canned music. To accept Dr. Hanna's stunningly sweeping interpretation of what constitutes choreographed performance, all one needs to do is move in an aesthetically pleasing way to music, using unity, variety, repetition, contrast, transition.

The private dances are performed in a private area containing a chair or couch. Dr. Hanna said, *inter alia*, that she saw a range of movements typical of adult

entertainment elsewhere and that she saw the individual creativity of the dancers. It is unclear how, based on a 22 minute DVD[17], Dr. Hanna could divine a particular dancer's "creativity," as opposed to a dancer on YouTube, for instance, from which the performance may have been copied. Nevertheless, Dr. Hanna's opinion is steadfast in her conclusion and stated the dancers on the "Nite Moves [sic] Routines" DVD "used the mirror, they used the pole, they used the floor" (Tr., pp. 90-91 [lines 24;1]). Yes, and so did the dancers on the YouTube DVD.

Further, the terminology that Dr. Hanna employs in her report and testimony at times appears designed to neatly fit into the statutory exemption language, e.g., that the performances at Nite Moves constitute "live, dramatic musical choreographic performances" (Exhibit "7," p. 14). We also find that Dr. Hanna's credibility is compromised by her insistence, even after admitting that she did not observe any of the private dances, that the areas at Nite Moves set aside for private dances have the same performances as the public area of Nite Moves. We note that the only dances appearing on the DVDs were of the public variety, and one of the DVDs did not involve Nite Moves performances at all. In examining her testimony and the amount of weight it should be given, it was not helpful for Dr. Hanna to state that she knows what occurs in the private areas of petitioner's

[17]This is the only DVD made within the audit period that actually contains dancers at petitioner's venue.

venue, which she did not herself observe. We find that the certainty with which Dr. Hanna holds to this conclusion, even in the absence of direct knowledge or observation of what occurs in the private areas at Nite Moves, undermined her overall testimony.[18]

Additionally, we find Dr. Hanna's testimony overreaching when she testified that petitioner's club was like a theater or theater-in-the-round, again tailoring her testimony to the Division's language in its regulations. We note that Dr. Hanna did not qualify as an expert in what constitutes theater. If we were to place a small stage in our living room, with chairs around it, would it still be a living room? We believe that it would, and petitioner remains an adult juice club where adult entertainment is presented. For the above reasons, we do not find Dr. Hanna's testimony compelling.

As the Court of Appeals stated in *Matter of 1605 Book Center*:

> there can be no doubt that the sales tax would apply if patrons viewed the same live performance in the company of other audience members in a theater (*see*, 20 NYCRR 527.10[b][3]). The booths are factually not taxably distinguishable

[18]This was exacerbated by the continuous stream of leading questions by petitioner's counsel and the fact that neither the Division's attorney nor the Administrative Law Judge objected to it.

> from a usual theater except for the element of privacy. Accordingly, the fee paid is an admission charge to a place where entertainment is provided (*Matter of 1605 Book Center v. Tax Appeals Tribunal*, *supra*, 83 NY2d at 245).

Although in the above case, where only private booths were in dispute, Nite Moves involves both live private performances and performances where patrons can view the show along with other audience members. We conclude that admission charges to the private areas of Nite Moves, where petitioner generates the most income, are, from a tax standpoint, indistinguishable from the admission charges to the public areas of the club and both are subject to sales tax pursuant to Tax Law § 1105(f)(1).

We reject the argument that petitioner's place of business constituted "a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance" for purposes of the tax statute (Tax Law § 1101[d][5]). As the Court stated in *Matter of 1605 Book Center*, "what was omitted from the exemptions was not intended to be excluded from the otherwise comprehensive taxable sweep of section 1105(f)(1) (citations omitted)" (*Matter of 1605 Book Ctr. v. Tax Appeals Tribunal, supra).*

Petitioner has, therefore, failed to meet its burden of proof pursuant to Tax Law § 1132. We conclude that the admission charges and fees that petitioner collects from its customers for the public and private dances

are taxable under Tax Law § 1105(f)(1).

Petitioner's admission charges are also taxable pursuant to Tax Law § 1105(f)(3), which provides that a sales tax shall be imposed on "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state." Tax Law § 1101(d)(12) defines roof garden, cabaret or similar place as:

> Any roof garden, cabaret or other *similar place* which 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 (emphasis added).

We find that petitioner's place of business constitutes a cabaret or similar place where a public performance is staged for profit. Nevertheless, it remains to be determined whether petitioner's sales of refreshments are more than incidental to its provision of entertainment. We look for guidance to Federal case law for assistance in determining the meaning of incidental, since this provision is derived from the former Federal excise tax on cabaret charges (*see*, IRC §§ 4231, 4232; *see also*, *Matter of Empire Mgt. and Prods.* [TSB-A-96(9)S]; *Matter of Tralfamadore Café* [TSB-A-85(42)S]). In determining whether sales of

refreshments are only incidental to the furnishing of entertainment, one of the factors to be considered is the ratio of sales for refreshments to gross sales (*see*, *Roberto v. United States*, 357 F Supp 862 [1973], *affd* 518 F2d 1109 [1975]; *Dance Town, U.S.A. v. United States*, 319 F Supp 634 [1970], *affd* 446 F2d 882 [1971]). In the present case, petitioner's beverage sales ($68,937.00) for the three month test period ending August 31, 2005 exceeded the club's door admissions for the test period ($64,612.00). We note further that even after the club was refurbished and the sign setting forth the two drink minimum was removed, the evidence shows the underlying policy remained the same. The club continued to charge for two drinks at the door as late as August, 2005, when the audit commenced. When one considers that the above amounts are for only one tax quarter out of a three year audit period, and that for the audit period, drink sales totaled approximately $460,000.00 or 15% of total sales, it is clear that beverage sales were not merely incidental to this business.

Mr. Dick testified, and we do not doubt, that the club's customers do not frequent the establishment for its drinks. However, while drinks may be incidental from the customer's perspective, that is not the issue. Whether the sale of drinks are incidental relates, in this context, to the extent to which the sale of beverages is a profit center for Nite Moves. In this case, the sale of drinks is second only to private dances as an income source for petitioner. Where, as here, the sales of drinks by petitioner exceed the amounts taken in as cover charges at the door, it would be counter

intuitive to view such sales as incidental.

Furthermore, petitioner's policy of requiring customers to purchase at least two drinks was evidenced by the sign posted on the door, which was only removed in 2004,[19] and the testimony of the auditor and Steven Dick himself, who stated that when a patron enters the club, he will be asked if he is ready to "buy your drinks" (Tr., pp. 42, 43, 46). We also note that contrary to Mr. Dicks's implication that petitioner no longer required its customers to purchase drinks after 2004, the record is, at best, contradictory. The audit commenced in September, 2005. The auditor testified that upon entering petitioner's premises, a patron was charged for two drinks as well as the admission charge (*see*, Tr., pp. 30-31). We view it as significant that the auditor's testimony was not challenged on cross examination. We conclude that the club's selling of beverages was not incidental to petitioner's business, but was an integral part of that business. Accordingly, all of petitioner's admission charges, including charges to private areas of the club, are also taxable pursuant to Tax Law § 1105(f)(3) as charges of a cabaret or other similar place that provides its customers with a place for public performance for profit in conjunction with serving beverages not merely incidental to the business (*see*, Tax Law § 1101[d][12]; 20 NYCRR 527.12[b][2][ii]).

The Division also argues that the admission

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[19]A year before the end of the audit.

charges were subject to tax pursuant to Tax Law § 1105(d), which provides:

> (i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, *including in the amount of such receipts any cover, minimum, entertainment or other charge* made to patrons or customers (*except those receipts taxed pursuant to subdivision (f) of this section*):
>
> (1) in all instances where the sale is for consumption on the premises where sold; (emphasis added).

We agree with the Division that such charges could be subject to tax under Tax Law § 1105(d) in the alternative. We view the limiting language of Tax Law § 1105(d)(i), limiting tax under this section to receipts not taxed under subdivision "f" of this section, as merely to protect taxpayers against double taxation. Further, we find the Administrative Law Judge erred in opining that this provision would apply only in situations where petitioner's drinks were extraordinary and were the primary reason for patrons to frequent Nite Moves. The Administrative Law Judge completely ignored the broadly inclusive

language of subdivision (d), i.e., "*including in the amount of such receipts any cover, minimum, entertainment or other charge* made to patrons . . .(emphasis added)."

Finally, we come to petitioner's constitutional argument, which was not considered by the Administrative Law Judge, inasmuch as it was deemed moot. We address it now summarily. Petitioner appears to argue that if the sales tax here were directed solely at nude dancing in establishments like petitioner's, it would be a denial of its free speech rights and a denial of equal protection. That might be true if those were the facts here, but those are not the facts here. Petitioner has failed to demonstrate that it is being treated any differently than any similarly situated taxpayer. Thus, this argument, too, is rejected.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

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

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

3. The petition of 677 New Loudon Corporation d/b/a Nite Moves is denied; and

4. The Notice of Determination dated February 13, 2006 is sustained.

DATED: Troy, New York
April 14, 2010

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

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

APPENDIX D

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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 December 1, 2002 through August 31, 2005.

DETERMINATION
DTA NO. 821458

Petitioner, 677 New Loudon Corporation d/b/a Nite Moves, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2002 through August 31, 2005.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 5, 2008 at 9:30 A.M. Petitioner appeared by Andrew McCullough, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne

Jack, Esq., of counsel). All briefs were to be submitted by September 15, 2008, which date began the six-month period for the issuance of this determination.

ISSUES

I. Whether the Division of Taxation has established that the door admissions collected by petitioner from its patrons is subject to sales tax pursuant to Tax Law § 1105(f)(1) as an admission charge to a place of amusement, or whether petitioner has established entitlement to the exemption under the same section as an admission to a dramatic or musical arts performance.

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

III. Whether the Division of Taxation has established that the door admissions collected by petitioner from its patrons is subject to sales tax pursuant to Tax Law § 1105(d), as a cover, minimum, entertainment or other charge made to patrons in an establishment which provides taxable food or beverages.

FINDINGS OF FACT

1. 677 New Loudon Corporation, doing business as Nite Moves (petitioner), operated an adult

entertainment establishment, referred to as an adult juice club, located in Latham, New York, offering exotic dancing by females during the audit period at issue, December 1, 2002 through August 31, 2005. Petitioner served only nonalcoholic beverages, including bottled water, soda and juice. At the very beginning of the audit period petitioner sold light lunch items, but this was discontinued due to low demand.

2. After a request for books and records, the Division of Taxation (Division) determined that petitioner's books and records were adequate for the performance of a detailed audit. The Division audited petitioner's fixed asset purchases and recurring expense purchases in detail and determined there was additional tax due of $4,038.67 on additional expense purchases of $50,483.00 for the period in issue. Petitioner does not dispute this amount.

3. Pursuant to an executed test period audit method election agreement entered into by the parties, the Division performed a test of petitioner's sales for the quarter ending August 31, 2005. Petitioner's sales were comprised of four categories: 1) door admission fees, for general admission charges; 2) "couch sales" for the service of private dances performed for customers; 3) register sales for nonalcoholic beverages sold; and 4) house fees, for the fees paid by the dancers to the club. The Division determined that petitioner had not paid tax on its door admissions ($64,612.00 for the test period) or its fee for private dances ($321,535.00 for the test period), and the Division maintains that these

items are subject to sales tax. Petitioner had collected tax on its register sales of beverages ($68,937.00 for the test period) and was given credit for taxes paid. The Division determined that the house fees ($18,650.00 for the test period) were not subject to tax.

According the to the Division, petitioner should have paid tax on test period items totaling $281,665.00[1] at a tax rate of 8% for additional tax for the test period of $22,533.20. Giving the taxpayer credit for taxes paid in accordance with its filed sales tax returns for the same period of $5,077.71, the additional tax due was $17,455.49. The Division divided the additional tax due for the test period by the total gross sales reported by petitioner on its sales tax returns for that quarter, $455,165.00, to determine an error rate of 3.8350%. The Division next multiplied the error rate by the total gross sales reported on

[1]The Division appears to have omitted August taxable sales in this calculation, wherein the end result would have been $455,084.00 for the test period total, and significantly higher tax for the audit period. There was no explanation provided for this discrepancy. Article 28 makes no provision for the assertion of a greater deficiency based upon mathematical errors in audit calculations, unlike the remedy provided in income tax under Tax Law § 689(e)(3). While there is no apparent bar to the Division's issuance of more than one notice of determination assessing tax for a particular period (*see Matter of Adirondack Steel Casting Co. v. New York State Tax Commn, 121 AD2d 834, 504 NYS2d 265; [1986]; Matter of Turner Construction Company v. New York State Tax Commn, 57 AD2d 201, 394 NYS2d 78 [1977])*, there is no evidence or claim that the Division ever attempted to do so within the statute of limitations. Accordingly, the discrepancies which appear to be mathematical errors will have no effect on the notice of determination as issued.

petitioner's sales tax returns for the audit period ($3,257,417.00) to determine $124,921.94 in additional tax due on sales for the entire period in issue. Then the Division added the additional tax due on expenses purchases of $4,038.67 to this amount to arrive at total additional tax due $128,960.61.

4. The Division's audit resulted in its issuance of a Notice of Determination dated February 13, 2006 (notice number L-026619882-9) for additional sales and use taxes due for the period December 1, 2002 through August 31, 2005 in the amount of $128,960.61 plus interest. No penalties were assessed.

5. The Division's auditor had a preconceived opinion that the admissions for the door and the private couch dances were taxable, along with the beverages sold. The auditor spoke briefly with petitioner's management and observed only the layout of the business prior to its opening. No observation was made of either the stage dances or the private couch dances as part of the audit. The auditor did not discuss with petitioner any possible exemptions from sales tax, nor the percentage of beverage sales as it related to total income from the club's operations.

6. The auditor observed that the club had a sign posted at the entrance that stated there was a $5.00 door fee, and that patrons were required to buy a minimum of two nonalcoholic beverages, paid also at the time of admission. In 2004, when the business was remodeled, the sign regarding the two-drink minimum was removed. The bartenders still ask all customers if

they would like a beverage, but do not require the purchase of one or more to remain in the club. The cost of beverages was estimated at $3.00 to $5.00 each. The sales of beverages consisted of approximately 15% of petitioner's total sales income during the audit period.

The admission charge at the door was $5.00 at the beginning of the audit period, and raised to $8.00 in 2003, and later to the current admission fee of $10 ($3.00 before 5:00 P.M.). The admission fee is a general admission to the club to watch the performances on the main stage.

7. Petitioner provides entertainment consisting of exotic dancers performing routines in costume for a portion of the time, and in the nude the balance of the time they are on stage. The main stage where the performances take place is 12 feet by 10 feet, with a brass pole from floor to ceiling and a brass rail around the edge of the stage. Petitioner has standards it sets for the costumes worn by the dancers and the dancers generally have several theme costumes to accompany their routines. Dancers choose their own music and are encouraged to enhance the entertainment value by pairing the dance music with the theme chosen.

8. Petitioner introduced into evidence several DVDs illustrating various dance techniques. The first was a DVD of dance clips depicting routines that some of petitioner's dancers used for training or to adapt new techniques into their choreography, taken from YouTube. It was comprised of three pole dance routines, two of which were material from

PoleJunkies.com, a Canadian internet site established to teach pole dancing for fitness, one video of some pole dance clips, and the last of a stage performance that began as a ballet performance and then incorporated more active use of pole techniques in a manner which was acrobatic in nature. Petitioner's dancers often used sources such as these to choreograph new routines and learn new techniques, particularly with pole routines.

The second DVD was of actual stage performances at petitioner's place of business. It was approximately 20 minutes in length and showed several performances by two or three dancers. Each were using pole techniques and dance steps to music.

9. The last video introduced was taken when the club hosted Miss Nude Capital District in 1998, and had a feature performance, one which utilized props, several themes and corresponding steps and music to the themes chosen. This video was introduced to illustrate a dance performance with a theme, though filmed outside the audit period.

10. The dancers are hired with a variety of backgrounds, training and levels of dance experience. Some have training in gymnastics, ballet, jazz, or exotic dance and refine their routines given the parameters set forth by the club, advancing their own ability and creativity over time. New steps and routines are often learned from videos and other dancers in the industry. The patron is able to select a particular dancer to perform at table side or to perform

a private couch dance, while others are dancing on the stage. Patrons had the option of requesting a table dance on the open floor area off the stage, in close proximity to a particular customer at their table, for which there was no set fee, but customarily would result in tips to the dancer, which were not shared with the club. For an additional charge, patrons could request a private dance in a small private room with the same or another dancer. The private dances were performed in the nude, unlike the table dances, in the intimate setting of a small private room with a chair or couch. There were six small private rooms each with a curtain that allowed for the private room to be monitored. They did not have the same dance poles as the stage; however, the dance routines were very similar to those performed on stage, with the dancer's focus being on the particular patron. During the beginning of the audit period, private dances were $20.00 for a three-minute private dance, which petitioner and the dancer shared equally. The latter part of the audit period, the cost of private dances was raised to $25.00; petitioner received $15.00 and the dancer received $10.00.

11. House fees, another income category in petitioner's business, represent a fee paid by the dancers as independent contractors to petitioner. It is a space rental agreement for the rental of the facility in which to perform. The dancers are afforded the use of the stage, equipment and the dressing area for $25 per day, or $30 per evening. The Division did not include the house fees in taxable sales.

12. Stephen Dick, the CFO and general manager of petitioner, provided many of the details of petitioner's business at the hearing. He is responsible for the day to-day business management and handles the bookkeeping for petitioner. He also acts as a DJ one afternoon a week.

13. Dr. Judith Lynne Hanna, a cultural anthropologist, was retained by petitioner to express an opinion in this matter based upon her expertise as an anthropologist, dance scholar and dance critic. Dr. Hanna earned a master's degree in anthropology from Columbia University in 1975 and a doctoral degree in anthropology from Columbia University in 1976, specializing in nonverbal communication and the arts and society. Her doctoral dissertation was on a group's choreography and its meaning and style. She is a senior research scholar in the Department of Dance and an affiliate in the Department of Anthropology at the University of Maryland, College Park, Maryland. Dr. Hanna has training in a multitude of dance genres, has taught dance as well as courses on dance theory at the college level, and has continually conducted teacher and youth dance workshops. She has served as a dance consultant and critic, and has written 6 books on dance, published more than 150 articles in dance periodicals, and done many reviews and commentaries on dance. Since 1995, Dr. Hanna has been conducting on-site research on exotic dance and adult entertainment. Along with the research approach she has taken with other forms of dance, she has examined the characteristics and choreography of exotic dance. Dr. Hanna has been retained on 43 occasions as an

expert in court matters relating specifically to exotic dance and was accepted as an expert in this field for this matter.

14. Dr. Hanna reviewed and analyzed the dancer videos entered into evidence particularly the one which contained two dancers performing at petitioner's place of business for about 22 minutes of dancing. She described this as a choreography, or arrangement, of about 61 different moves with theme and variation patterns with repetition. She identified the use of locomotion, gesture, pole, mirror and floor work at variable levels in response to music.

Dr. Hanna reviewed other videos that some of the dancers have used in developing new routines, and she spent two hours at the club observing six dancers and speaking with some of them. One of the dancers she observed did not perform pole work, but instead used a country dance routine, complete with costumes and her own artistic interpretation and choreography.

15. Dr. Hanna's report discussed dance in general, and exotic dance in great detail. Her report focused on the sequential parts of the performance, the messages of the performer, the skill it takes to perform dance routines, and the psychology of dance and its effect on the viewers. She set forth a description in detail of the choreographed sequence for each dancer in the videos submitted into evidence and discussed the various characteristics of the dancers' choreography. Dr. Hanna concluded that the presentations at petitioner's business are live dramatic choreographic performances

in a theater which has shows that consist entirely of dance routines.

SUMMARY OF THE PARTIES' POSITIONS

16. The Division argues that petitioner's admission charges are taxable under Tax Law § 1105(d)(i)(1); (f)(1), (3), all of which exist in order to impose sales and use tax on the receipts for items enumerated by the Tax Law.

17. Petitioner maintains that petitioner is exempt from sales tax on its admission charges and private dance performances as admission to a theater featuring choreographed dance performances. Petitioner further states that nude dancing is protected expression and should be recognized as such. Petitioner additionally argues that it is exempt from sales tax on its admissions and private dance as an entertainment venue where the sales of refreshments are merely incidental to the performance.

CONCLUSIONS OF LAW

A. Pertinent to this matter, Tax Law § 1105 imposes sales tax upon the following:

> (d)(i) The receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other

establishments in this state, or by caterers, *including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section)* (emphasis supplied):

(1) in all instances where the sale is for consumption on the premises where sold . . . .

* * *

(f)(1) Any admission charge where such admission charge is in excess of ten cents to or for the use of *any place of amusement* in the state, *except charges for* admission to race tracks, boxing, sparring or wrestling matches or exhibitions which charges are taxed under any other law of this state, or *dramatic or musical arts performances*, or live circus performances, or motion picture theaters, and except charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant, such as bowling alleys and swimming pools (emphasis supplied).

* * *

(3) The amount paid as charges of a roof garden, cabaret or other similar place in

the state.

B. The primary focus of this matter is whether the admission fees collected at the door and the "couch" fees collected for the private dances are subject to sales tax. The Division asserts taxation under three different provisions of Tax Law § 1105. Although there is no constitutional prohibition against double taxation, which more often occurs when different articles of the Tax Law apply to a given transaction, it would seem unusual for each of these three subsections of Tax Law § 1105 to act as the provision intended to capture as taxable the door admission charges and the private dance charges. In fact, a more plausible explanation is that one must look to the primary focus of each of the Tax Law sections, and then determine whether the primary focus of petitioners' transactions, occurring in the context of this business venue, results in a taxable event.

Petitioner charged a general admission at the door of its premises as an entrance fee, which permitted a patron to view all of the stage dances, and any table dance performed for that patron or another on the open floor. Further, petitioner charged a separate fee for the private couch dances. Since the private dance charge would qualify as a charge for additional entertainment, it would also be considered an admission charge under the Tax Law (20 NYCRR 527.10[b][1]).

In *Matter of 1605 Book Center v. Tax Appeals*

Tribunal (83 NY2d 240, 609 NYS2d 144 [1994], *cert denied* 513 US 811, 130 L Ed 2d 19 [1994]) the Court of Appeals upheld imposition of sales tax on receipts from peep show booths pursuant to Tax Law §1105(f)(1) as places of amusement. The peep show booth consisted of separate booths surrounding a stage from which patrons were able to view nude or partially nude females performing. Patrons would enter the booths and deposit coins in a slot, which resulted in a curtain or screen raising to enable the patron to see the performance. In determining that the coins so deposited were taxable, the Court of Appeals stated:

> Notably, there can be no doubt that sales tax would apply if patrons viewed the same live performance in the company of other audience members in a theater (*see*, 20 NYCRR 527.10[b][3]). The booths are factually not taxably distinguishable from a usual theater except for the element of privacy. Accordingly the fee paid is an admission charge to a place where entertainment is provided. (*Matter of 1605 Book Center v. Tax Appeals Tribunal*, 83 NY2d at 245, 609 NYS2d at 147.)

Clearly petitioner's place of business is a place of amusement under the statute, and this is not in dispute. Accordingly, petitioner's admission fee and private dance charge would be subject to sales tax under Tax Law § 1105(f)(1), unless it qualified for the exemption as a dramatic or musical arts performance.

Petitioner asserts that it meets the enumerated exception contained within the taxing statute because the entertainment provided consists of "dramatic or musical arts performances," an argument that was not specifically addressed by the Court of Appeals in *Matter of 1605 Book Center*.

The tax regulations further explain Tax Law § 1105(f)(1) at 20 NYCRR 527.10(d)(2), Example 4:

> A theater in the round has a show which consists exclusively of dance routines. The admission is exempt since choreography is included within the term musical arts.

Thus, the question must focus on whether the dance performances at petitioner's club qualify as a musical arts performance.

C. What distinguishes this case is that petitioner explicitly seeks the exemption and introduced both evidence of the dance routines and the testimony of an expert in dance, along with her report, in support of its position. At the hearing, petitioner introduced dance videos as evidence of the routines of its dancers to illustrate that the routines were choreographed dance routines. The videos depicted dance routines that incorporated acrobatic pole maneuvers, splits, and other patterned repetitions. The pole maneuvers in particular are no small feat to accomplish, and attempting such a performance without the skill and a planned routine of steps could prove dangerous.

Petitioner's expert described the symbolism, fantasy experience and other characteristics of exotic dance as entertainment in a manner that highlighted the artistic expression and the skill and training involved from an academic perspective. She describes the exotic dance routines as follows:

> somewhat 'risque' or 'naughty' adult play, a fanciful teasing that transgresses social decorum and dress codes in an ambiance ranging from sedate to carnival-like. Exotic dance is erotic fantasy and communication with a display of nudity, disclosure of more skin and different movements than are seen in public, the use of high heels. . . and incorporation of jazz-like, improvisatory movements in routines.

The fact that a community may opt not to have a juice bar or a billboard advertising its existence in its neighborhood is not a factor in the determination of whether petitioner's entertainment charges are subject to these sales tax provisions. The fact someone may believe that this entertainment is not appropriate for any audience is not the issue. The fact that the dancers remove all or part of their costume during the performances, that the dance routines are seductive in nature and titillation of a patron is the outcome, simply does not render such dance routines as something less than choreographed performances, or remove them from the exception to the general rule of Tax Law § 1105(f)(1). Accordingly, petitioner has met

its burden of proof pursuant to Tax Law § 1132 on this issue and the admission charges it collects from its patrons at the door and for the private dances meet the exception to taxation under Tax Law § 1105(f)(1), and are therefore not taxable under this section.

D. The Division maintains that petitioner's admission charges are also taxable pursuant to Tax Law § 1105(f)(3) which provides that a sales tax shall be imposed on "[t]he amount paid as charges of a roof garden, cabaret or other similar place in the state." Tax Law § 1101(d)(12) defines roof garden, cabaret or similar place as:

> Any roof garden, cabaret or other similar place which 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.

Other than the existence of the public performance for profit, there are two tests that must be met for petitioner's admission charges to be taxed under this section: its business must be a roof garden, cabaret or similar place, and its beverages must be more than incidental to the performances. The term "cabaret" is defined as "a restaurant serving liquor and providing entertainment (as by singers and dancers); a

nightclub" (Merriam-Webster Online Dictionary. 2009, available at http://www.merriam-webster.com/dictionary/cabaret>). A "roof garden" is a restaurant or nightclub at the top of a building often in connection with or decorated to suggest an outdoor garden (Merriam-Webster Online Dictionary, 2009, available at http://www.merriam-webster.com/dictionary/roof garden>). What a cabaret and roof garden appear to have in common is that they are both restaurants that also have entertainment. Petitioner does not serve either alcohol or food (with the exception of briefly serving lunch) and does not appear to meet the definition of either, but for the entertainment that is provided. If one could argue that petitioner's place of business constitutes a "similar place" where a public performance is staged for profit, it must also be determined that petitioner's sales of refreshments are more than incidental to its provision of entertainment. The Division is correct in looking to Federal case law for assistance in determining the meaning of "incidental" since this provision is derived from the former Federal excise tax on cabaret charges (*see* IRC §§ 4231, 4232; *see also*, *Matter of Empire Management and Productions* [TSB-A-96(9)S]). In determining whether sales of refreshments are only incidental to the furnishing of entertainment, one of the primary factors reviewed in the Federal cases is the ratio of sales of refreshments to gross sales (*see Roberto v. United States*, 357 F Supp 862 [1973], *affd* 518 F2d 1109 [1975]; *Dance Town U.S.A. v. United States*, 319 F Supp 634 [1970]). In *Stevens v. United States* (302 F2d 158 [5th Cir 1962]) the court encouraged an analysis that took into account the

relative percentages of gross receipts as the most important single index, along with other factors. In *Ross v. Hayes* (337 F2d 690 [5th Cir 1964]), the court found that the cabaret tax was not applicable because the taxpayer's establishment was a dance hall and the sale of food and drink was merely incidental, even at 44% of the gross income. The focus was that of the taxpayer's overall operation, as should be applied here. In the present case petitioner's refreshment sales constitute 14.2% of its total sales. This percentage is a strong indicator that the selling of refreshments was merely incidental to petitioner's business, and not an integral part of that business. The testimony provided by Mr. Dick clearly indicated that the primary reason people visit the petitioner business is for the entertainment provided, not the beverages. Furthermore, the fact that petitioner discontinued usage of a sign stating a policy of a two-drink minimum, payable upon entrance is also evidence that it did not require its patrons to make such purchases and the selling of refreshments was incidental to petitioner's business. Petitioner has met its burden of proof that its admission charges were not subject to tax pursuant to Tax Law § 1105(f)(3).

E. The Division also argues that the admission charges were subject to tax pursuant to Tax Law §1105(d)(i), set forth in detail in Conclusion A. For two reasons this section is misapplied to the taxation of the admission charges herein (taxation of the beverages is not disputed). First, the focus of Tax Law § 1105(d)(i)(1) is to tax food and beverages. The receipts from a cover or other entertainment charge is included

as a secondary or tangential focus of the subject of that tax section. In other words, if patrons visited petitioner's business because the juice beverages were extraordinary, and happened to experience entertainment while there, this section would surely apply. Clearly it is not the case that people are drawn to petitioner's business for the juice drinks. The patrons are there to see beautiful, scantily clad performers dancing on stage. Thus, the taxation of the admission charges is not provided for here, but rather under section 1105(f)(1).

Secondly, the proper interpretation of the parenthetical "(except those receipts taxed pursuant to subdivision [f] of this section)" is that since it has been determined that the admission charges collected by petitioner from its patrons were subject to tax pursuant to Tax Law § 1105(f)(1), (but met the exception contained therein), they cannot be held taxable under Tax Law § 1105(d). Accordingly, the Division erred in taxing the admission charges in this matter under Tax Law § 1105(d)(i).

F. Petitioner's constitutional protection arguments are not addressed herein, as the admission charges have been determined to be not taxable.

G. The petition of 677 New Loudon Corporation d/b/a Nite Moves is granted to the extent indicated in Conclusions of Law C, D, and E and the Notice of Determination dated February 13, 2006 is hereby modified accordingly; except as so modified, the Notice of Determination is in all other respects sustained.

DATED: Troy, New York
March 12, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE

APPENDIX E

Court of Appeals of New York

In the Matter of 677 New Loudon Corporation,
Doing Business as Nite Moves,
Appellant,

v.

State of New York Tax Appeals Tribunal et al.,
Respondents.

Submitted December 3, 2012
Decided February 7, 2013

Motion for reargument denied with $100 costs and necessary reproduction disbursements [*see* 19 NY3d 1058 (2012)].