To be argued by W. Andrew McCullough
Time Requested: 20 minutes

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

In the Matter of

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

Index No. 509464

Petitioners,

-against-

STATE OF NEW YORK TAX APPEALS TRIBUNAL; and JAMIE WOODWARD, *in his official capacity as Commissioner of the New York State Department of Taxation and Finance,*

Respondents.

PETITIONER'S BRIEF

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PRELIMINARY STATEMENT

Petitioner is an entertainment establishment in Latham, Town of Colonie, NY, featuring female dancers, in which non-alcoholic beverages are sold. Petitioner underwent a sales tax audit for the period of December 1, 2002 through August 31, 2005. in which the auditor found that Petitioner had not properly paid sales tax on admissions, and assessed an additional $124,921.94 due for such taxes on the price of admissions. Petitioner contested that assessment, claiming that they were exempt from the tax as a place of amusement featuring dramatic or musical arts performances. Also Petitioner claimed that the admissions were exempt as a place of entertainment in which the sale of food or beverages was merely incidental to the entertainment.

The Administrative Law Judge, in a Determination dated March 12, 2009, held in favor of Petitioner, ruling that, while the admissions at issue were undoubtedly to a place of amusement, they were subject to the exemption contained in Tax Law § 1105 (f) (1) in that Petitioner's establishment was a place that featured "dramatic or musical arts performances" as provided therein.

The Administrative Law Judge also determined that, if Petitioner's establishment was deemed a "roof garden, cabaret or other similar place" under Tax Law § 1105 (f) (3), it was exempted from tax under Tax Law § 1101(d)(12) which excludes an establishment which

features entertainment from the statutory definition, if the sale of food and beverage is "merely incidental to such performances" .

The Administrative law Judge futher rejected the argument of the Division that Petitioner's admissions were separately subject to tax under Tax Law § 1105(d)(i), which taxes cover charges associated with "restaurants, taverns or other establishments". The Administrative Law Judge found that this section of the Tax Law was focused on establishments which primarily serve food and drink; and also that this section by its terms excepted "those receipts taxed pursuant to subdivision (f) of this section".

The Division thereafter filed an exception to the Determination of the Administrative Law Judge, and on June 12, 2009, filed a brief in support of its exception.

In its brief, The Division contended that Petitioner's admissions were subject to tax under all three of the Tax Law sections referred to above; as an admission to a place of amusement under Tax Law § 1105(f)(1); as an admission to a "roof garden, cabaret or other similar place under Tax Law § 1105(f)(3); and as a cover charge at a "restaurant, tavern, or other establishment" under Tax Law § 1105(d)(i).

Oral arguments were held before the Tax Appeals Tribunal on October 14, 2009, acting with two commissioners due to a vacancy which was not filled until March, 2010.

On April 14, 2010, the Tax Appeals Tribunal reversed the Administrative Law Judge on all contested issues. The Tax Appeals Tribunal specifically upheld the tax on admissions

to Petitioner's establishment under all three of the Tax Law sections referred to above: as an admission to a place of amusement under Tax Law § 1105(f)(1); as an admission to a "roof garden, cabaret or other similar place under Tax Law § 1105(f)(3); and as a cover charge at a "restaurant, tavern or other establishment" under Tax Law § 1105(d)(i).

QUESTIONS PRESENTED

1. Is Petitioner exempt from sales tax on its admission charges and private dance performances under Tax Law § 1105(f)(1), and § 1101 (d)(5) as an admission to a theater or "other hall or place of assembly" featuring choreographed dance performances? The Tax Appeals Tribunals held that Petitioner was subject to sales tax on admissions, and that this exemption did not apply.

2. Is Petitioner's establishment exempt from sales tax on its admissions and private dance performances under Tax Law § 1105(f)(3) and § 1101 (d)(12), as a "roof garden, cabaret, or other similar place which furnishes a public performance for profit", where the sales of drinks or other refreshments are merely incidental to the performance? The Tax Appeals Tribunals held that Petitioner was subject to sales tax on admissions, and that this exemption did not apply.

3. Is Petitioner subject to the drink tax levied under Tax Law § 1105(d)(i), which by its terms only applies to establishments not taxed under Tax Law §§ 1105 (f)(1) and (3)? The Tax Appeals Tribunal held that this tax applied, along with those above, in seeming disregard

of the specific statutory prohibition against application of both Tax Law §1105(f) and Tax Law §1105(d).

4. Is the application of sales taxes as applied by the Tax Appeals Tribunal unlawfully discriminatory under the First Amendment to the U.S. Constitution, and under the Constitution of New York, Art. I §8? The Tax Appeals Tribunal dismissed this argument in one paragraph; but the Tribunal does not have jurisdiction to finally answer this question, which is left for this court.

STATEMENT OF FACTS

The following Statement of Facts is taken from the Findings of Fact made by the Division of Tax Appeals, with modifications of those Findings made by the Tax Appeals Tribunal in brackets. Additional evidence presented to the Division, but not completely reflected in the Division's Findings are added at the end, with citations to the record.

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. [The Tribunal added that the lunch items were discontinued in 2004].

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 to the the Division, petitioner should have paid tax on test period items totaling $281,665.00 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 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. [The Tribunal added that the auditor proceeded based his knowledge of "prior

similar audits"; and that "There is no evidence that petitioner inquired about possible exemptions from sales tax."]

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. [The Tribunal found that "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)."]

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 Tribunal noted that there were three DVDs , and that the first one was undated. It deleted the reference to the ballet and acrobatic nature of the performances].

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. [The Tribunal said that the video was 22 minutes in length, that there were two dancers, and that the private areas of the club were not shown].

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.

9. 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 Tribunal added that "Some have no prior experience at all".]

10. 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. [The Tribunal added that the private dances "generate the most income for the club". Also added was that "Petitioner's expert, Judith Lynne Hanna, a cultural anthropologist testified that she did not observe the private dances at the club] .

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. [The Tribunal added that Mr. Dick made the videos and sent them to Dr. Hanna to review. He also worked with the dancers who used the videos to practice and learn dance moves. These videos were in the public area of the club; and there were no videos of the private areas.]

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. [The Tribunal deleted some of the references to Dr. Hanna's qualifications and referred to other parts in a footnote.]

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. [The Tribunal added the following quote from Dr. Hanna's testimony:

> 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).]

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. [The Tribunal added the following excerpt from Dr. Hanna's 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 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)]

Following is additional testimony from the hearing before the Tax Appeals Division, which was not included in the Findings of Fact, but which is relevant to these proceedings:

16. The auditor took the error percentage figure (Finding No. 3) and multiplied it by gross sales in each of the audit quarters to find the amount due. That figure for "unsubstantiated exempt sales" appears on page 4 of the audit report, and is $124,921.94. This includes door admission charges and private dances. (R.. 122).

17. The auditor had done at least five or six similar audits before. (R. 124).

18. The auditor walked around and observed the layout of the club, prior to opening. He also talked briefly with management about the operation. There is a stage area for the dancers, and seats for the patrons to watch. While one dancer is dancing, others may mingle and encourage customers to have a private dance. No observation was made of either the stage dances or the private (couch)dances as part of the audit. (R.123, 126-127).

19. All "prior similar audits" found amounts owing. Prior to doing the audit, a pre-audit analysis was done, involving a review of the law, including case law and advisory opinions. The pre-audit analysis in this case included a review of In the Matter of the Petition of Zodiac Lounge and Restaurant, 1999 WL 825611 (N.Y.Div.Tax.App. October 7, 1999); and 1605 Book Center v. Tax Appeals Tribunal (83 N.Y.2d 240, 609 N.Y.S.2d 144, cert. denied 513 U.S. 811)(N.Y. 1994). (R. 125). The letter from the Conciliation Conferee cites the Zodiac Lounge decision as its authority (R. 307).

20. The auditor had a preconceived opinion that "the admissions for the door were taxable and that the private dances were taxable"; and that the audit would focus on calculating the amounts owed for those items. (R. 126).

21. The auditor determined that there was a two-drink minimum, paid for at the time of admission, without which entrance would be denied. (R. 124).

22. The percentage of drink sales as part of the total club income was not discussed or considered as part of the audit. (R. 127-128).

23. The theatrical exemption to sales tax was not discussed or considered as part of the of the audit. No discussion of such possible exemptions were discussed with the auditor's supervisor either. (R. 128-129).

24. Dancers circulate in the audience, do short table dances, and may stop and talk to customers. Dancers also may attempt to sell private dances, for which the club gets a percentage. (R. 132).

25. There is a stated two drink minimum; but, according to Mr. Dick, it is not enforced. It is customary to have a drink with the show. Drinks are $3.00 to $5.00. On weekends especially, there are regularly people who decline. Regular customers are often aware that it is not required. The two drink minimum is pretty much standard in the

industry.(R. 139, 135, 162-165).

26. Bars which feature dancers are subject to the six foot rule of separation of dancers and patrons. Dancers are topless only. This establishment is not subject to such rules. While a patron may go to a bar to have a drink, and may consider the entertainment an extra, the entertainment is the main reason for patronizing this establishment. Patrons do not come to this establishment for the drinks.(R. 136).

27. An inexperienced dancer will be encouraged to work with more experienced dancers, and given shifts with a smaller customer count, as she learns. Busier shifts are given to dancers who have developed more skills (R. 142).

28. Dancers are encouraged to wear attention-getting costumes, which fit the atmosphere. Costumes are available through merchants who come to Petitioner's establishment, a nearby costume shop, and various websites. (R. 142).

29. A main feature of the kind of dancing done at Petitioner's establishment is the use of pole dancing, or "pole tricks". The use of the pole includes a number of simple-to-complicated maneuvers, using the pole located on the stage. (R. 144).

30. The establishment sometimes has "Feature dancers" involving elaborate costumes and routines. An example of such routines is the Miss Nude Capital District Pageant

formerly held at Petitioner's establishment. The pageant included prizes and celebrity judges and a professional feature dancer. Music is picked to fit the theme. (R. 154).

31. The policy of paying sales tax only on drink sales was done on the advice of the establishment's CPA, Mr. Carley Byrne. (R. 161-162).

32. Dancers on stage earn tips from customers for their dance. The admission charge is to watch the stage show. Tipping may be quite heavy for the stage show on busy nights.(R. 171175).

33. Dr. Hanna has studied exotic dance as adult entertainment. This includes substantial literature, including scholarly articles in theater arts, anthropology, social work and womens' studies; and also news items, and participation in various listserves.(R. 178).

34. She has written popular articles on exotic dance for the New York Times and other periodicals; and has written eight peer reviewed articles for scholarly publications, and reviewed articles on exotic dance. (R. 179-180).

35. Dr. Hanna wrote an expert witness report in preparation for her testimony in this matter. In doing so, she reviewed and analyzed the Nite Moves dancer video which was prepared for this case. This review required watching the videos several times, and taking notes on the "elaborate moves". The evaluation was included in her expert witness report.

(R. 181-182).

36. The dancers' moves were both typical of adult entertainment, and showed individual creativity in using the mirror, the pole, the tipping rail, the ledge over the stage, and interaction with customers. (R. 183-184).

37. She also reviewed the YouTube videos provided to the Court, and found that some of those moves were included in the routines by Petitioner's dancers. She also interviewed one of the dancers, Michelle, on her background and observations, prior to the preparation of her Report. Additionally, she talked to some of the other dancers during a visit to the club the day prior to her testimony. (R. 184-185).

38. Dr. Hanna prepared a Power Point presentation as a synopsis of her expert witness presentation, which she presented in Court.

39. Dr. Hanna, in her expert report, and in her testimony,

> "found 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." (R. 187).

40. There are a lot of misconceptions about exotic dance. The media portrays "strip joints" as "little dives". In the 1980's Michael J. Peter, a former Cornell student in hotel

management upgraded the presentation considerably. Exotic dance has roots in burlesque and in Middle Eastern dancing, introduced to the U.S. at the 1893 World's Fair. (R. 188-189).

41. Choreography is the arrangement of dance movements. The aesthetic principles are different from jazz or hip-hop. (R. 189)

42. Exotic dance has symbolism and fantasy, to point attention to the secondary sex characteristics or beauty of the female. (R. 190).

43. Dance has grammar, the way it is put together. Pole dancing features grabbing the pole and lifting herself up. Exotic dance is done in the context of adult theater. It communicates through the sense of sight, sound, smell, proximity, touch, music and costume. (R. 190-191).

44. The elements of dance are time, space and effort. The use of space can be in moving from place to place, or in using the pole to raise the body off the floor. Dance has tempo, accent and meter. The dance shown in the video was slow and languid, and then picked up tempo with the music. (R. 192).

45. The dancers use the mirror, usually in slower moments, to show the body in all its dimensions, and to show that the dancer knows she is beautiful, and that you should think

so too. (R. 192).

46. Dance is theater in that it charges an entrance fee, it is performed on a raised stage, it uses special lighting and a professional sound system. It has dressing rooms for the dancers, it employs a master of ceremony (DJ), it uses ushers and waitpersons to set the tone of expected behavior. And, like many theaters, it offers beverages for sale. (R. 193).

47. Exotic dance is studied in university departments, and is written about in Dance Magazine, so it is considered a theater art. George Ballanchine, choreographer for the New York Ballet, would go to the Crazy Horse in Paris. He especially enjoyed the way the strippers communicated with the audience. (R. 193).

48. A lot of dance forms borrow from exotic dance. You can see the movements on MTV. Back-up dancers for singers use those moves. (R. 193-194).

49. Exotic dance is an art in that is a learned skill. It is creative and imaginative, and it communicates within an artistic style. Exotic dance has two parts. The first part, on stage for the general audience, is a showcase for the later private dance. There is rapport on stage with the audience. The individual dance allows the patron to be "the pasha for the moment", with the special attention of a beautiful woman. She creates a fantasy for the patron through the personal dance. (R. 194).

50. In the 22 minute video presentation (Exhibit 4), there was an arrangement of 62 moves. There was theme, variation, repetition, and locomotion (movement from place to place). The dancer used the pole, the tip rail, and the mirror. She struts, "the stripper strut", and uses gestures of the hands as well. The moves were charted on pages 10 to 12 of the expert witness report. (R. 195-196).

51. The presentations shown on video, and observed in the club, were "absolutely" choreographed dance routines. They had sequences of dance movements put together. The atmosphere was like that of an off-Broadway theater, where interaction with dancers often takes place. (R. 197-198)(Finding 14, 15).

52. Other experts agree with the conclusions, and "I don't think anybody who has analyzed the dance would come to another conclusion." (R. 199).

53. Dr. Hanna did not observe private dances at Nite Moves, but has done so in other clubs. (Id.). Further, on page 7 of the expert report (R. 348), Dr. Hanna states:

> In the second part of exotic dance, a performer dances for a particular patron for a fee. This individual patron-focused dance, a customized performance, takes place next to a patron's table or couch seat, and sometimes on the patron's lap. The dancer artistically communicates to a patron, though her choreographed body movement, proximity, touch and dim light, the fantasy of "I am interested in you and you alone, I understand you, you're special and important to me, I want you, I desire you." When the patron directly gives a gratuity to a dancer, the patron communicates a message of approval and

> enjoyment of the performance. In this way, the dancer learns that she has been successful in communicating the message of exclusive interest in the patron. She will then continue or improve her dancer-patron routine,.
>
> The individual patron-focused dance creates a sense of intimacy, spontaneity and multisensory and emotional communication not found in a stage dance. If the dancer was only to perform on stage and distant from the patron, this would, by contrast with individual patron-focused dances, denote coldness and impersonality toward him. Onstage, the dancer is viewed as on a pedestal and inaccessible. The impersonal "Bugaku," an erotic ballet performed by the New York City Ballet in a 3,000-seat opera house at distances of several hundred feet from the general audience, provides an illustrative contrast with individual patron-focused dances: "Bugaku" is communication between a man and woman onstage as they simulate the consummation of a marriage for an entire audience. By contrast, an individual patron-focused dance is a communication between one dancer and one patron.

54. Private dances do not have poles, tip rails, mirrors and other features of the stage. They are done in a smaller space, but they use similar movements, like body rotation, shimmy, spins, twirls, head shaking or twisting. It is still a choreographed dance performance. (R. 199-201, 375).

55. Michelle Miller currently is a bartender for Nite Moves. She has been for about a year and a half. She serves non-alcoholic drinks to customers. (R. 202).

56. She approaches customers and encourages them to buy a drink, but will leave them alone if they indicate they do not want one. She knows many regular customers and what they drink. She also knows some who prefer to have nothing to drink, and she does not

bother them. (R. 203).

57. Prior to full time bartending, Michelle was a dancer. She danced at Nite Moves, and also at other clubs. In high school, she was a cheerleader, which helped with the dancing. She was shy, and a friend helped her learn to dance and overcome her shyness.(R. 204).

58. She was on welfare, and a dancer friend convinced her to try dancing at another non-alcohol club. (R. 205).

59. She learned by watching a lot of different dancers. She saw some moves that she really liked, and tried to pick up on them. Dancers helped her learn pole tricks. There is creativity involved. Some dancers do not like others copying their moves exactly. She used some of her cheerleading routines as well. She felt comfortable as a good entertainer in about eight months to a year. (R. 206).

60. As a dancer, she bought costumes regularly from a costume salesman. She still has an angel costume, cop costume, schoolgirl outfits. She has done vampire theme sets, with gothic music and smoke. She practiced at the club when it was not busy, and also practiced at home. The moves changed as she learned new ones, and became better at the older ones. (R. 207-208).

61. She also did private dances, using the same dance moves, and more intimate moves, such as more eye contact and closer proximity (R. 209).

62. She danced on stage and made money from tipping while on stage. She also made money from private dances. It varied whether she made more of her money from stage dancing or from private dances. She did not share in the admission fee. (R. 211).

63. Private dances are for individual attention to customers, one-on-one. She had a number of regular customers who liked her dancing and wanted "a moment to himself". Floor dances were not fully nude, while private dances were. (R.211-212).

64. Table dances sometimes included lap dances, but always with choreographed moves. (R. 213).

65. Private dances are not done in total privacy. There is a small room with a curtain, but a person in the hallway can see what is going on. There is no "hanky panky". (R. 214).

ARGUMENT

POINT I

PETITIONER IS EXEMPT FROM SALES TAX ON ITS ADMISSION CHARGES AND PRIVATE DANCE PERFORMANCES AS AN ADMISSION TO A THEATER FEATURING CHOREOGRAPHED DANCE PERFORMANCES.

Pursuant to CPLR § 7803, this Court has jurisdiction to determine the following

questions regarding a decision of the Tax Appeals Tribunal:

> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, . . .
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law is, on the entire record, supported by substantial evidence. (Emphasis added).

Petitioner claims that the Tax Appeals Tribunal committed legal errors in its Decision, that its Decision is arbitrary and capricious, and that its Decision is not supported by substantial evidence. In fact, Petitioner claims that the Decision is contrary to all of the competent and uncontroverted evidence presented.

This Court has stated that the Tribunals's Decision will be upheld if it rationally based upon and supported by substantial evidence". Matter of Transervice Lease Corp. v. Tax Appeals Trib. Of State of N.Y., 214 A.D.2d 775, 777 (N.Y. App. Div. 1995). See also Matter of CS Integrated v. Tax Appeals Trib. Of State of N.Y., 19 A.D.3d 886, 889 (N.Y. App. Div. 2005). In Rubin v. Tax Appeals Trib. Of State of N.Y., 29 AD3d, 1089, 1092 (N.Y. App. Div. 2006), this Court specifically stated that:

> . . . the ALJ has discretion to resolve credibility issues that arise during these proceedings see Matter of Brew v. New York State Div. Of Parole, 22 A.D.3d 930, 930). These determinations will be upheld if they are supported by substantial evidence (see Matter of Courtney v. New York State Div. Of Parole, 283 A.D.2d 707, 707).

In this case, the ALJ found the uncontroverted evidence to be both credible and substantial; and she was overruled by the Tribunal, which disregarded the substantial evidence supporting the ALJ's determination, which renders the decision both arbirary and capricious. This is not a question of competing evidence where the Tribunal found one presentation more credible than the other. Petitioner acknowledges previous decisions of this Court which held that: "Exemptions from tax are strictly construed against the taxpayer, who bears the burden of demonstrating entitlement to such an exemption. Matter of Upstate Farms Co-op. v. Tax Appeals Trib. Of State of N.Y., 290 A.D.2d 896, 897-898 (N.Y. App. Div. 2002). The ALJ correctly determined that Petitioner had carried that burden in this case. And while strict construction is the general rule, it certainly is nonsensical to suggest that the legislature did not intend the exemption to apply to businesses which meet the "plain language" of the exemption statute. Petitioner is required to put on evidence that it meets the exemption criteria. If the evidence clearly shows that it meets the requirements, it prevails. The Tribunal arbitrarily disregarded all such evidence. The Division of Taxation stipulated to the expert credentials, and made no effort to refute the evidence. Cross examination of the expert witness takes up one page of the Transcript (R. 198-199).

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

N.Y. Tax Law § 1101(d) contains applicable definitions:

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, choreographed or musical performance.

In New York Codes, Rules and Regulations (NYCRR) Title 20, Chapter IV, Subchapter A, Part 527, under the subheading of "(d) Admissions excluded from tax", is the statement: "(2) Charges for admission to dramatic or musical arts performances are excluded from tax." Five examples are given, including the following:

20 NYCRR 527.10(d), Example 4:

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

Petitioner's business has all the attributes of a theater, featuring dance routines. The Example above does not restrict the "dance routines" to those that are certified as having been choreographed by a professional. Petitioner met its burden under Tax Law § 1132(c)

to show "that the routines were choreographed dance routines" and "that its place of business constituted 'a theater, opera house, concert hall or other hall or place assembly for a live dramatic, choreographic or musical performance.'" The expert testimony and report of Dr. Hanna were uncontroverted, and were clear and convincing in their conclusions. Petitioner thus falls within the exception set forth in N.Y. Tax Law §§ 1101(d)(5) and 1105(f)(1), and the regulations thereunder, and is not subject to the tax for admission to its entertainment. The Division of Tax Appeals correctly ruled that the auditor and the Division erred in applying the sales tax to its admissions.

The auditor, the Division of Taxation, and the Tribunal relied in part on 1605 Book Center v. Tax Appeals Tribunal (83 NY2d 240, 609 NYS2d 144, cert denied 513 US 811) for authority. The Court of Appeals there 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 consisted of separate booths surrounding a stage from which patrons were able to view nude or partially nude females performing (though no description of the performance was included). 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. Petitioner argued that the money paid to see the "peep shows" were exempt as the proceeds from a coin operated amusement device. The Court of Appeals held:

> 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. (Emphasis added). 1605 Book Center v. Tax Appeals Tribunal, 83 N.Y. at 245.

The Tax Appeals Tribunal, in its earlier decision in the same case, In the Matter of the Petition of 1605 BookCenter, Inc., 1991 WL 155241 (N.Y.Tax.App.Trib. 1991) set out a number of stipulated facts, among them being one on the status of the performances at issue there:

> (f) That the use of the terms "performance", "performer", "dance", and "dancer" in this stipulation is not meant to constitute an agreement or disagreement that the live peep shows, live shows and/or private "peep shows" are musical or dramatic arts performances within the meaning or intent of Tax Law § 1105(f)(1). (p. 7). (Emphasis added)

The ultimate decision by the Court of Appeals noted the lack of evidence on the subject. There is nothing contained in earlier decisions which supports the Tribunal's rejection of evidence that Petitioner's entertainment falls within the specific exemptions to the tax levied by Tax Law § 1105(f)(1).

The Tribunal, in the instant case, stated: "petitioner is an adult juice club for adult entertainment and not a theater or a theater-in-the-round contemplated by the statute." (R. 45). The Tribunal did not address the ruling of the Court of Appeals that even peep show

booths "are factually not taxably distinguishable from a usual theater". The Tribunal also held that, while Dr. Hanna claimed to be an expert on dance, "We note that Dr. Hanna did not qualify as an expert in what constitutes theater." (R. 46). The Court of Appeals used an expansive definition of "theater" in 1605 Book Center; and the Tribunal is bound by it. But the tax law does not restrict the exemption to a theater. Certainly, Petitioner's business is an "other hall or place of assembly" where dance performances are viewed. This holding by the Tribunal is clear legal error; and it evidences an arbitrary and capricious view of the facts. It essentially rejected the entirety of Dr. Hanna's expert opinion, and substituted its own, despite no claim of expertise in this area. In fact, the Tribunal substituted a simple dictionary definition of the term "choreography" for the opinion of Dr. Hanna: "As we use the term here, 'choreography" is 'the art of composing ballets and other dances and planning the movement, steps and patterns of dancers'". (R. 45) . Certainly that is exactly what Dr. Hanna testified to. A dictionary is a valuable tool, when it is used as a starting place; but it cannot substitute for years of scholarly and peer reviewed research. The Tribunal goes on to say: The record shows that some of the moves are very difficult; and one had best plan how to approach turning upside down on the pole to avoid injury." Id. The Tribunal suggests that the difficult moves might be as much as part of gymnastics as of a choreographed dance performance, (Id.). This ignores the fact that women's gymnastics are indeed choreographed, especially as they relate to the dance portion of the floor exercises. Those dance moves are

performed, like the routines at Petitioner's establishment "to canned music". The Tribunal seems to be conceding the choreography, even while denying it. Such a decision is arbitrary and capricious, as it merely reflects the moral disapproval of this art form by the Tribunal.

The Tribunal suggested 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." (R. 46). In this, the Tribunal appeared to be consciously looking for an escape from the evidence presented. Dr. Hanna testified that she had viewed many private dances of this type. She testified that the private dances given at Petitioner's establishment, and other such venues, are indeed choreographed dance performances, similar to, but not as elaborate as, the stage shows which were shown by video reproduction at the hearing. (R. 199, 200-201). She did not come into this case without knowledge of the form and format. Her Curriculum Vitae includes numerous articles on exotic dance in both scholarly and popular publications (R. 314-329). Regarding her observations, her Expert Report states:

> My research has taken me thus far to one hundred and thirty-one(131) adult clubs.
>
> While in the clubs, I observed no fewer than 1500 performances and how they were choreographed. I interviewed over 1,000 dancers, managers, owners, bartenders, disc jockeys, housemothers and house dads, patrons and community members. I learned about some of the performers' background and training; relationship to the clubs and income; artistic control of the intended

> messages of their dance communication; imagination, creativity, judgment and skills used in the choreography; and their perceptions of patrons' expectations. (R. 345).

Whether she actually observed private performances in this club prior to her testimony is not relevant to the expertise of her testimony. Thus, there is no factual or legal basis for treating the admission to the private dances differently than the stage performances in front of the larger audience.

Petitioner contends that, once the determination is made that the admission charge is to a place featuring dramatic of musical arts, and that the exemption applies, the inquiry is complete, and the admissions are not taxable. The Division in its brief below, perhaps without realizing the effect of its argument, cited the same paragraph of the 1605 Book Center case cited above (p.28), and stated:

> This is the clearest indication that the Court of Appeals viewed exotic dancing as taxable under Tax Law 1105(f)(1) regardless of whether the performers were viewed through a booth or in a theater. Clearly, the 1605 Book Center Decision discusses the exact situation presented in this matter. After all, the entertainment offered at night Moves is exotic entertainment provided not though private booths but in a theater in the company of others. Dr. Hanna's testimony does not change the fact that what was viewed though private booths in 1605 Book Center, is exactly the same thing that was viewed on stage and in private rooms at Nite Moves. (Emphasis added). (St. Br. 13-14).

The very language relied upon by the Division to claim that the admissions are taxable, makes it clear that they are not. The Division states that Tax Law § 1105 (f)(1)

applies; and it forcefully argues that the entertainment in the private rooms is "exactly the same" as on stage. The admission charges for private rooms, for the viewing dancers, constitute the same type of admission to a theater as the admission to watch the stage dances. The reference of the Court of Appeals to 20 NYCRR 527.10(b)(3) is to the general imposition of sales tax on admissions to theaters. Courts have previously noted the lack of evidence that performances were choreographed dance performances; and in the absence of such evidence, it was assumed that they were not. The exemptions, however, modify the tax imposed. The invitation to prove that admissions are exempt has been left open; and this Petitioner has accepted. The Division, in their brief below, accused the Division of Tax Appeals of "ignor[ing] the precedent on this issue; but there is no such precedent. The Division seemed surprised by the fact that the Division accepted the expert testimony on the subject of choreographed performances; but the Division effectively stipulated to that evidence. No objection was made to its introduction; and no cross-examination was attempted, to limit its effect.

Just two paragraphs after claiming that the dances on stage and in private rooms are "exactly the same'; the Division in its brief below, strongly opposed that statement.(St. Br. p. 14-15): "these performances are starkly different from what occurred in the private rooms." (St. Br. 14-15). The Division does not indicate in what way, and on what facts it

bases this claim. Dr. Hanna testified that the private dances given at Petitioner's establishment, and other such venues, are indeed choreographed dance performances, similar to, but not as elaborate as, the stage shows which were shown by video reproduction at the hearing. (R. 199-201, 348). Thus, there is no factual or legal basis for treating the admission to the private dances differently than the stage performances in front of the larger audience.

The auditor testified that he also relied in part, in his assessment of taxes due, on the case of In the Matter of the Petition of Zodiac Lounge and Restaurant, 1999 WL 825611 (N.Y.Div.Tax.App. October 7, 1999). Petitioner recognizes that this decision is not precedent either in this Court, or before the Tribunal; but the discussion of the issues there is illustrative of the matters now before this Court. The Zodiac case relied on 1605 Book Center and specifically cited to it. That audit also involved an establishment featuring dancers. The ALJ found that the admissions were taxable pursuant to § 1105(f)(1). The Lounge argued that its dance routines fit within the definitions referred to above; but the argument was made casually. The ALJ noted that the Lounge could have put on evidence as to the choreographed performances, but chose not to do so:

> However, at the hearing petitioner provided no evidence at all about the routines of its nude dancers to indicate that the routines were choreographed dance routines. [FN7] Furthermore, petitioner made no arguments, much less presented evidence, to support a finding that its place of business constituted "a theater, opera house, concert hall or other hall or place assembly for a live

> dramatic, choreographic or musical performance." (Tax Law § 1101[d][5].) Petitioner has therefore, failed to meet its burden of proof pursuant to Tax Law § 1132 on this issue and the admission charges it collects from its patrons are determined to be taxable under Tax Law § 1105(f)(1). (Emphasis added). (p. 10).

The burden is on the Petitioner to show "that the routines were choreographed dance routines" and "that its place of business constituted 'a theater, opera house, concert hall or other hall or place assembly for a live dramatic, choreographic or musical performance.'" This Petitioner did so with testimony which was clear and convincing. Petitioner's expert witness testified carefully and methodically, both as to the choreography and the theatrical venue for the dance performances.

The auditor determined that all dance establishments were to be treated the same under the Zodiac Lounge case; and he did not choose to view any performance, interview any employees or customers, or make any factual determinations. He did not give any consideration to whether the dance routines were choreographed performances. The Zodiac and 1605 Book Center cases left the door wide open to proof that dances were choreographed, and that the venue had the attributes of a theater "or other hall or place assembly for a live dramatic, choreographic or musical performance." Petitioner clearly and fully bore its burden in this matter; and the Division chose not to contest the factual presentation. Therefore this Court must reinstate the determination of the Tax Appeals

Division that Petitioner fits within the statutory exception.

The Division, in Point 3. C. of its brief below, makes the following argument:

> However, Petitioner did not identify what portion of the admission charges were collected for stage performances. In fact, petitioner did not segregate its receipts in this manner. Patrons paid a general admission charge which allowed them to view the stage performances and purchase "lap dances." That general charge also allowed patrons the option to enter a private room after paying an additional charge. Clearly, patrons could not enter the private rooms without first paying the general admission fee. Therefore, a portion of the general admission charge must be allocated to the admission to private rooms. (Emphasis added). (St. Br. p. 14).

That argument is self-contradictory. If a patron wants to view the entertainment at this establishment, he pays the admission. If he wants a private dance, he pays another admission. It is not a difficult or complicated series of transactions. The Division states:

> Nevertheless, even if some portion of its receipts were not subject to tax, no evidence was provided what portion may be exempt. The inability of petitioner to prove the portion that may be exempt renders all of the receipts taxable. (Id.)

This statement is patently false. The argument is not supported by the record or authority, and is made in less than one page. The audit showed exactly how much money was collected for each of these two "separate admissions". Mr. Mulloy testified that:

> On pages 5 though 7, we were given daily journal records as far as sales go for the test period, which was June though August of 2005. The journals show that they had divided their sales into four different categories, which are shown

here; door couch, register and house fees. We just did a calculation of each category.(R. 115).

The audit shows clearly the figures for that test period, of $64,612 for the door charges and $321,535 for the couch dances. The figures by category are set out in the Division's brief below, and the details of those transactions are in the audit, at R. 284-301. If the admissions are separate, as the Division concedes, and if the records easily identify each item, there is no merit to the argument made here by the Division. The fact that a person must first be admitted to the premises (door fee) in order to be admitted to the private room for the couch dances, does not make part of the door fee part of the admission price to the private rooms.

POINT II

PETITIONER'S ESTABLISHMENT IS EXEMPT FROM SALES TAX ON ITS ADMISSIONS AND PRIVATE DANCES AS A CABARET OR SIMILAR VENUE WHERE THE SALES OF REFRESHMENTS (DRINKS) ARE MERELY INCIDENTAL TO THE PERFORMANCE.

Petitioner contends that the analysis above should end the inquiry; but the Tax Appeals Tribunal also committed legal error in its analysis of the Cabaret provisions. At the time of this audit, Tax Law § 1105(f)(3) imposed a tax on "the amount paid as charges of a

roof garden, cabaret of other similar place in the state."[1] Tax Law, § 1101(d)(12) contains an exception, as part of its definition of terms:

> When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:
>
> > Roof garden, cabaret or other similar place. 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, refreshments or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances. (Emphasis added).

The Tribunal concluded that Petitioner's establishment is a cabaret: "We find that petitioner's place of business constitutes a cabaret or similar place where a public performance is staged for profit." (R. 48). The Tribunal held that the sale of food or beverage is more than incidental to the performances., and thus taxable under Tax Law § 1105(f)(3). The Tribunal found that income from the sale of beverages was more than that from door admission; and that "the underlying policy remained" of selling two drinks to each customer (Id.) Petitioner serves no food, and the percentage of income from drinks was found by the auditor to be less than 15%. The Tribunal held that since, "drink sales totaled approximately $460,000 or 15% of total sales, it is clear that beverage sales were not merely

[1] In 2006, the legislature passed Tax Law § 1123 which exempts most cabarets from this tax.

incidental to the business." (R. 49). The Tribunal cited cases that held that the percentage of drink sales to gross sales is a factor to be considered; but it did not cite precedent that 15% was "not merely incidental to the business." The Division of Tax Appeals correctly found that the sales of drinks is "incidental" to the entertainment purpose. Petitioner concedes that the sales of beverages in its establishment are subject to sales tax; and that tax has always been paid in full. The Tribunal stated that "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." (R. 48). The Commissioner relied on Federal case law on this exemption in an Advisory Opinion on Petition No. S901101A, dated March 7, 1991. There he stated:

> Where the sale of refreshments assumes importance as a significant attraction for its own sake, it is not merely incidental. Stevens v. United States, 302 F.2d at 163. Thus, the selection of food and refreshments, the dining atmosphere created and extent of service available would all tend to indicate the extent to which such food and refreshments serve as an attraction in their own right. For example, in Ross v. Hayes, 337 F.2d 690, the Court concluded that the beer, Coca-cola, Seven-Up, ice, potato chips, pretzels crackers peanuts and chewing gum in question offered little or no attraction to the patrons of the establishment and, therefore, were merely incidental to the real attractions which was the dancing provided. (Emphasis added).

The testimony was clear in this matter that there is little or no independent attraction for the drinks, though many people do have one or two, while watching the show, and the Division of Tax Appeals so found. (R. 92). The Tribunal concurred: we do not doubt, that

the club's customers do not frequent the establishment for its drinks." (R. 49). But the Tribunal found it to be a "profit center", and thus more than incidental. The Commissioner, in the Advisory Opinion, cited with approval, the case of Ross v. Hayes, 337 F.2d 690, 692 (5th Cir. 1964). There, the Court ruled that the sales of drinks, candy and gum at a dance hall was incidental to the purpose of the dance hall, despite the fact that it was over 40% of the gross receipts:

> There may be situations where the percentage of gross income attributable to refreshment sales will be so high that this factor alone will compel a directed verdict, but such a situation is not presented here. Cf. Jones v. Fox, D. Md., 1957, 162 F. Supp. 449, 461-462. The legislative history of the 1951 amendment, embodying the "merely incidental" exception to the cabaret tax, makes it plain that Congress intended that 27% should be considered incidental. . (Emphasis added).

The Tribunal also cited Dance Town, U.S.A. v. United States, 319 F.Supp. 634 (S.D. Tex 1970), affd. 446 F.2d 882 (5th Cir. 1971) for the position that "one of the factors to be considered is the ratio for refreshments to gross sales" (R. 48). There, the Court found that 45% of the income was from sales of food and refreshments, 67% of the company's gross profits was attributable to the sale of refreshments; and that these refreshments was a significant factor in drawing customers to the establishment. The Court reviewed other cases in which the percentage of income was over 40% and seemed to indicate that this might be the threshold for such a finding. The facts thus very much sets it apart from the instant case.

The Tax Appeals Division, in the previously cited case of In the Matter of the Petition of Zodiac Lounge and Restaurant, 1999 WL 825611 (N.Y.Div.Tax.App. October 7, 1999) also found the sales of refreshments to be more than incidental:

> 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 for refreshments to gross sales (see, Roberto v. United States, 319 F Supp 634). In the present case petitioner's refreshments sales constitute 48% of its total sales. This percentage by itself illustrates that the selling of refreshments was not merely incidental to petitioner's business, but was an integral part of that business (see, Dance Town U.S.A. v. United States, supra). (Emphasis added.)

Once again, the percentage is over 40%; and the difference between the cases is quite significant. The ALJ found it significant that the sign indicating a two drink minimum had been taken down, and that there was no enforced minimum. The Tribunal, however, quoted the auditor as having obtained information on the two drink minimum from the taxpayer, though he was there before the business opened and made no observations (R. 49, 123-124). The Tribunal went on to say "We view it as significant that the auditor's testimony was not challenged on cross-examination" (R.49). The testimony, given in less than half a page was not significant as it related to the issue at hand. It did not contradict the clear evidence that the sales of drinks were a small part of revenues. Nor did this testimony contradict the findings of both the ALJ and the Tribunal that "the primary reason people visit the petitioner['s] business is for the entertainment provided, not the beverages." (R. 49, 92).

Petitioner, unlike the other cited cases, surely could stop selling drinks tomorrow and still make a profit.

In the recent Federal District Court case of Alameda Books v. City of Los Angeles, 2008 us dist lexis 108860 (C.D.Cal. Case No. CV-95-07771; July 16, 2008) the Court dealt with a dispute over the zoning of adult entertainment businesses. The City contended that an adult video store which also contained an arcade where movies could be previewed was essentially two businesses. In order to lessen the "negative secondary effects" of the two businesses combined, the City required the businesses to separate and locate more than 1000 feet from each other. The specific question which the Court faced here was whether the "two businesses" were viable entities which could separately exist. The Court likened them to a multiplex movie theater where the central area contained a concession area which features "extremely expensive popcorn, soda, hot dogs, and other goods." The Court found that:

> People are willing to pay exorbitant prices for popcorn because, at least in part, the convenience of being able to buy an item within a few feet of the theater entrance outweighs the increased cost of the item." (P.28).

Nobody would seriously argue that the sale of "extremely expensive popcorn" at a move theater was anything more than "incidental" to the theatrical experience. Likewise, the sale of soft drinks, water or fruit juices adds to the experience of Petitioner's theatrical experience. Just as obviously, however, it is incidental both as to the percentage of the

business income, and the function of this business.

The Division argues that the tax(es) levied by Tax Law § 1105 (1) and (3) are separate taxes. Thus, if Petitioner is exempt from the entertainment tax under § (f)(1) as a "dramatic or musical arts performance", it will still be taxed under §(3) unless it also meets the exemption there, for the merely incidental sale of beverages. That argument is flawed, as the Code speaks of the tax as s single entity. See Tax Law § 1101(d) which refers to the tax in the singular: "the tax imposed under subdivision (f) of section eleven hundred five". Petitioner contends that, if the establishment falls within the definition of § (f)(1) and the exemption contained therein, the State does not get a second bite at the apple. So, if the establishment is a place of entertainment featuring "dramatic or musical arts performances", it is not taxed. It is nonsensical to suggest, as the State does, that the establishment is both exempt and non-exempt, and that the second provision overrides the exemption granted. The definitions relating to §(f)(1) are more specific and more precise. A cabaret, which is not clearly defined in the Code, is a term usually associated with the service of food and/or drink as more than a sideline. The American Heritage Dictionary, Houghton Mifflin Co., New York, 1991, defines the term as a "restaurant or night club providing short programs of live entertainment". The emphasis there is on "restaurant"; and the "short programs of live entertainment" seems to be the sideline. There is also a note on derivation, from a French

term, meaning "liquor store". Certainly, most people would assume that a cabaret serves alcoholic beverages, and that this is a major focus of the business. While Petitioner might be a "cabaret", it most certainly is "a place of a place of amusement featuring dramatic or musical art performances". Since it so firmly fits into that definition, it is not necessary or proper to look for another, less fitting, category which might be stretched to fit and to save the tax. Nevertheless, everyone agrees that "the customers do not frequent the club for its drinks"; and this suggests that the sales of drinks is merely incidental. When read together, it appears that the exemption to the cabaret tax is intended to prevent the tax levied by Tax Law §1105(f)(3) from being applied when the sale would otherwise be exempt from §1105(f)(1). In other words, if the establishment properly fits into the category of "theater", it is not taxed as a cabaret, which is a different business which features food and beverage. While a business might be a hybrid (a dinner theater) Petitioner is most certainly not.

As of December 1, 2006, admissions to cabarets or roof gardens are substantially exempt from sales tax pursuant to Tax Law§ 1123:

> The portion of the amount paid as the charge of a roof garden, cabaret or other similar place in the state for admission to attend a dramatic or musical arts performance at the place shall be exempt from the tax imposed by paragraph three of subdivision (f) of section eleven hundred five of this article . . . .

The law imposes some conditions on the exemption, including a requirement that admission be separately charged, and that drinks are priced at a fair price for the type of

establishment. Those conditions, however, are simple and easy; and the effect is that most such businesses are now exempt. This is an important statement of public policy. Petitioner suggests that this change, while not retroactive, should act to resolve any doubts in favor of Petitioner. A decision in favor of the Division here will not result in an increase in revenue to the State, as it cannot be applied prospectively to other similar taxpayers. This collection effort is an anachronism, which will only result in a hardship to this particular taxpayer, without any corresponding benefit to the State or its continuing tax enforcement efforts. Thus, Petitioner is entitled to judgment in its favor.

POINT III

PETITIONER IS NOT SUBJECT TO THE TAX LEVIED BY TAX LAW § 1105(d)(i).

The auditor did not explicitly cite the section of the tax code under which he proceeded in his audit; but he did cite as his authority the two cases referred to above which relied on Tax Law § 1105 (f)(1) and (3). The Division of Taxation additionally cited Tax Law § 1105(d) in its presentation to the Appeals Division and the Tribunal. The Division claimed below that:

> Door admission charges are taxable under the following three separate provisions of the Tax Law: section 1105(d), section 1105(f)(1) and section 1105(f)(3). Each of those sections has different requirements as to when an admission fee is taxable. Consideration of each of these provisions is

necessary as petitioner's door admission is taxable under each and every one. (Emphasis added). (St. Br. 7).

The Tax Appeals Tribunal agreed, and committed legal error in its Conclusion that the admissions to Petitioner's establishment were a cover charge in a "restaurant, tavern or other establishment", and taxable under Tax Law § 1105 (d)(i). Further, the Tribunal committed legal error in applying this section of the Tax Law to an establishment that is subject to the provisions of Tax Law §1105 (f). Tax Law § 1105(d) specifically states that it applies to receipts, including "any cover, minimum, entertainment or other charge . . . (except those receipts taxed pursuant to subdivision (f) of this section)" (Emphasis added). Once the admission is determined to fall under §1105(f), subsection (d) does not apply. The Division of Tax Appeals was correct that, once an establishment is deemed to fall within the provisions of Tax Law §1105(f), it is not subject to the tax assessed by Tax Law § 1105(d)(i). Likewise, if it is exempted under § 1105(f), it does not fall back within the provisions of subsection (d), so as to cancel the exemption specifically granted. The Tax Appeals Tribunal incorrectly read the tax law to be designed to cancel out exemptions that are specifically granted, by adding in an "alternative" tax when an exemption applies. This is a question of statutory interpretation; and this Court owes no deference to the Tax Commission. An ambiguity in a Tax statute should be construed in favor of the taxpayer. Astoria Gas Turbine Power, LLC v. Tax Commission of City of New York, 788 N.Y.S.2d 417 (N.Y. App. Div.

2005). Should Tax Law § 1105(d)(i) also be read to override the new Tax Law § 1123, which expands the "cabaret" tax exemption as well? This would have the effect of voiding most exemptions which are specifically granted. The Division would seem to say that; and the result of that argument is nonsensical. It also denies Petitioner due process of law in violation of the Fourteenth Amendment to the U.S. Constitution and Article I § 6 of the Constitution of New York.

The Tribunal did not address the specific provision of subsection Tax Law § 1105(d) that prohibits the taxation of admissions under both § 1105(f) and (d). It is an integral part of the State's case that the admission charges in this matter are taxable under several different sections of the Tax Law. The Division and the Tribunal take the position that one exemption, or even two, are of no value to the Petitioner if the State can find a third or fourth provision that could arguably apply, even less specifically. The ALJ directly rejected this argument:

> 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 the 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 section, and then determine whether the primary focus of petitioners' transactions, occurring in the context of this business venue, results in a taxable event. (R.87-88)

The ALJ reached the legally correct result, holding first that "the focus of Tax Law § 1105(d)(i) is to tax food and beverages." (R. 92). The Division objected to that statement below: "There is no support in fact or law for this conclusion" (St. Br. 11). But the State did not respond to the second part of the Determination, which is more important: the fact that the statutes do not, by their specific terms overlap, as the Division claims they do:

> Secondly, the proper interpretation of the parenthetical "Except those receipts taxed pursuant to subdivisison {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)(I). ®. 64, 65[63A-63B])

The tax levied by § 1105(d) taxes the sales of beverages sold in any "establishment" in the State, "including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers", in the absence of the more specific, and exclusive tax levied by Tax Law § 1105(f). If, however, that section could be used to justify taxing the beverages and the door charge, there is no connection with the separate admission fee charged for private dances. Consequently, the Division, if relying on this section, must concede that the private dances are not taxable as they are not connected to the serving of drinks in any way. This is the same separate admission paid by booth patrons in 1605 Bookcenter. The exclusivity provision prevents the Division from relying on one section for the door charge and another for the private dances. Neither is it sufficient to plead them in

the alternative, as the Division has done. It is the duty of the Division to set out the authority for taxing Petitioner.

The Division cited below a case before the Tribunal, Matter of Edward Yager and Patrick McKeon db/a California Brew Haus, Tax Appeals Tribunal, March 23, 1989, File No. 802980. That case is also without precedential value in this Court; but it helps to frame the issues. That case involved a cover charge at a tavern. The difference between Petitioner's establishment, which features entertainment as its major draw, and a tavern, which exists primarily to sell alcoholic beverages, (or food or other beverages) is legally significant. In the Yager case, the cover charge was made at the door to cover the expenses of the bands that sometimes appeared at the tavern. The bands were responsible for collecting the money at the door; and if the money so collected did not meet a minimum set by contract, the tavern would pay the difference. The question before the Tribunal there was whether the tax on the cover charge was owed by the tavern, even though it was not directly collected by the tavern. The tavern in Yager never claimed any exemption for a theatrical performance, or because the amount of food and drink sold there was insignificant. No mention was made in that case of the possible application of Tax Law § 1105(f), or any exemption which might apply thereunder. The Division erroneously stated below that this case and Yager involve "the exact [same] issue." (St. Br. 10). If the legislature exempted certain entertainment venues

from sales tax, the most sensible approach is to assume that this is what the legislature intended to do. The Division and the Tribunal assume that it is all a shell game, in which they can find the tax under one shell, even when there is a clear exemption under the first one. Nowhere is there a hint of authority that an establishment which is exempted from the tax under Tax Law § 1105 (f)(1) or (3) can be taxed under Tax Law § 1105(f)(1); and common sense seems to preclude this effect.

POINT IV

NUDE DANCING IS PROTECTED EXPRESSION, AND NOT SUBJECT TO A DISCRIMINATORY TAX.

The Tax Appeals Tribunal is not charged with determining whether a particular tax law is within the power of the legislature to impose; or whether that provision is in conflict with provisions of the Constitutions of the United States or the State of New York. That decision rests with this Court. See Matter of Fourth Day Enterprises, Inc., (NYS Tax Tribunal, October 27, 1988). The Tribunal, however, may decide whether the tax, which is presumed to be facially valid, is constitutionally applied. See Matter of General Electric Company, (NYS Tax Tribunal, March 5, 1992). Petitioner did contest below the constitutionality of the tax, as applied. This issue was fully briefed to the Administrative Law Judge, who did not reach the issue in her decision. This argument was also presented to the Tax Appeals Tribunal, who did address it and ruled against Petitioner in one brief

paragraph, citing no authority:

> 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 differently than any similarly situated taxpayer. Thus, this argument, too, is rejected. (R. 51)

The decision of this Court on the constitutional issue is not a review of the Tribunal's decision, but is effectively a de novo review. Petitioner's establishment is entitled to First Amendment protection for its expressive conduct. At the very least, the application of this tax must pass "intermediate scrutiny", pursuant to United States v. O'Brien, 391 U.S. 367 (1968), which the Tax Appeals Tribunal did not apply. In fact, the Tribunal did not apply ANY analysis to the constitutional claims. The Tribunal did not analyze the argument, nor did it explain its summary ruling. The issue may well not be within its jurisdiction; but Petitioner has preserved it through the appellate process in the expectation that this Court would address it. By discounting the idea that exotic dancing such as that presented by Petitioner constitutes a "choreographed dance performance", the State and the Division seem to deny that this dance form really has the characteristics of dance theater. Federal case law assures us that it does. In the case of Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), the

Court recognized First Amendment protection for topless dancing in places not selling alcohol. The Court, however, indicated that there are limited protections for such types of dancing. The Court said:

> Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed. 2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. 422 U.S. at 931.

The question of nude dancing as protected expression was again addressed by the Supreme Court in Schad v. Mount Ephraim, 452 U.S. 61 (1981). In that case, an adult bookstore expanded its facility to include live nude dancing. The Borough of Mount Ephraim, New Jersey outlawed any such entertainment. The Supreme Court found the ordinance overbroad in that it would prohibit much constitutionally protected expression. The Doran and Schad decisions continue to be quoted with approval, through the most recent nude dancing cases. Federal courts have allowed “reasonable time, place and manner restrictions” on businesses featuring nude dancing to combat “secondary effects”, or urban decay alleged by some to accompany adult entertainment venues.. See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) and City of Erie v. Pap’s A.M., 529 U.S. 277 (2000). Both the plurality and the dissent cited approvingly both Doran and Schad. The Seventh Circuit Court, in Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000), a case

involving fully nude dancing, decided after City of Erie, said:

> Although once furiously debated, it is now well-established that erotic dancing of the sort practiced at the Island Bar enjoys constitutional protection as expressive conduct. See City of Erie v. Pap's A.M., ___ U.S. ___, 120 S.Ct. 1382, 1385 (2000); Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990), rev'd sub nom. on other grounds, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). Of course, no one argues that erotic dancing at the Island Bar represents high artistic expression, but "[n]ude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree nonetheless." Miller, 904 F.2d at 1087. The Supreme Court has agreed, explaining that "nude dancing of the type at issue here is expressive conduct, although . . . it falls only within the outer ambit of the First Amendment's protection." Erie, 120 S.Ct. at 1391 (addressing nude barroom dancing); see also Barnes, 501 U.S. at 566 ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."). (some citations omitted). 228 F.3d at 839.

In making its artistic judgment on the lack of "high artistic expression", the Schultz Court (as well as other courts cited above) had neither the opportunity to watch the well-presented dances viewed in this matter, nor the expert witness testimony also heard here. Perhaps the Court would have refrained from such value judgments if it had such material before it. See also the recent Eleventh Circuit case of Peek-A-Boo Lounge of Bradenton v. Manatee County, 337 F.3d 1251 (11th Cir. 2003) which gave a particularly thorough treatment to the legal history, and constitutional protection, of exotic dancing.

Locally, the U.S. District Court for the Northern District of New York spoke

specifically to the argument that nude dancing as practiced in a bar should not have equal footing with "high artistic expression." In Nakatomi Investments, Inc. v. City of Schenectady, 949 F.Supp. 988 (N.D.N.Y. 1997), the Court said:

> Is a cabaret different from the theatre or opera, to such a degree as to justify disparate treatment by the City of Schenectady in its role as protector of order and morality, merely because the audience is "less cultured"? Because the music originates from a stereo speaker rather than an orchestra? Because the costumes in a theatre or opera are more elaborate? Because cabaret dancers earn tips? Perhaps the establishments are distinguishable because the dances in a cabaret are not formally choreographed. Perhaps the City of Schenectady finds the performances in cabarets more objectionable because the audience is mostly men who prefer to drink Budweiser while they view the . . . form engaged in dance, rather than the couples at the opera who prefer Dom Perignon with their falsetto. (Emphasis added). 949 F. Supp. at 998-9.

The Court there held invalid local ordinances designed to prohibit by regulation, such venues, based on their "message". Once again, it appears that the Court was not presented with evidence of the choreography, such as was presented here. Petitioner's dancers are not generally "formally choreographed" by someone with a college degree. It can hardly be doubted, however, that the dance presentations shown in this matter "a live dramatic, choreographed or musical performance". They are planned and practiced at length; and they contain all the elements of choreographed dance. The Division chose not to challenge this evidence or to put on contrary evidence in the form of its own expert. The difference in taxation treatment between Petitioner and a modern dance or ballet company (where high

priced drinks are almost certainly served) is also indefensible, and must be assumed to be based on the determination that this art form is not entitled to fair and equal treatment under the law, because some are offended by it. This position offends the First Amendment; and it offends the New York Constitution, Art. I, § 8 as well. By treating this dance form differently from others which meet the approval of the apparently somewhat prudish members of the Tax Commission, Petitioner is also denied the Equal Protection of the Law in violation of both the 14th Amendment to the U.S. Constitution and Art. I, § 11 of the Constitution of New York.

The U.S. Supreme Court, back in 1819, stated: "That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 427 (1819). From that, we get the oft repeated statement that "the power to tax is the power to destroy." Since then, the Supreme Court has invalidated several attempts to tax speech, as a violation of the First Amendment. In Minneapolis Star v. Minnesota Comm'r of Rev.,460 U.S. 575, 586 (1983), the Supreme Court invalidated a "use tax" on paper and ink used by newspapers. In doing so, the Court said:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance

that it cannot achieve without differential taxation. (Emphasis added).

The Supreme Court, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), invalidated a discriminatory tax on certain magazines. There, the Court held:

> As we stated in that case, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." 481 U.S. at 230.

In the more recent case of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 445 (2002) Justice Kennedy, concurring in the result and providing the fifth vote to support the plurality, cited Arkansas Writers, and applied the principles to a zoning ordinance affecting adult businesses:

> On the other hand, 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 is true even if the government purports to justify the fee by reference to the secondary effects. Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.(Internal citations omitted) (Emphasis added).

Under Marks v. United States, 430 U.S. 188 (1977), this opinion is the controlling one. See also the recent decision of the Texas Court of Appeals in Combs v. Texas Entertainment Association, 287 S.W.2d 852 (Tex. Ct. App. 2009) declaring a discriminatory tax aimed at exotic dance clubs (and dubbed by the Texas press as “the pole tax”) to be in violation of the First Amendment. By denying that exotic dancing such as that presented by

Petitioner constitutes a "choreographed dance performance", the Division and the Tribunal are also denying that this dance form really has the characteristics of dance theater. Dr. Hanna's expert opinion and Federal case law assure us that it does. Certainly, there has been no argument by the Division that the discriminatory application of this tax is justified by reference to any secondary effects.

The New York Constitution grants additional protection to nude or topless dancing beyond that granted by the First Amendment to the U.S. Constitution. In Bellanca v. New York State Liquor Authority, 429 N.E.2d 765; 54 N,Y.2d 228 (NY 1981) while claiming not to reach the question of whether Art. I § 8 of the New York Constitution is broader than the First Amendment, the Court of Appeals used that provision to strike down a provision of State Liquor Control Law severely restricting such dancing. This was done only after the U.S. Supreme Court had upheld the law against a First Amendment challenge. In People ex rel. Arcadia v. Cloud Books, 510 N.Y.S.2d 844 (N.Y. 1986), the Court of Appeals found that the same State Constitutional provision allowed it to reverse an order upholding the closing a bookstore. Likewise, that action had been upheld by the U. S. Supreme Court against a First Amendment challenge. Clearly the New York Constitution contains independent protection for adult entertainment featuring nude dancing; and the kind of discrimination upheld by the Tribunal violates that Consitution.

CONCLUSION

The decision of the Tax Appeals Tribunal that Petitioner's admissions are subject to taxation under Tax Law §1105 (f)(1), under Tax Law §1105 (f)(3), and under Tax Law §1105 (d) should be reversed. There are clear exemptions which apply to this Petitioner; and those exemptions should be upheld.

The determination of the Tax Appeals Division that Petitioner's admissions are to a place featuring dramatic or musical arts performances, and are exempt from the sales tax on admission to a place of amusement pursuant to Tax Law §1105(f)(1) should be reinstated. The determination of the Tax Appeals Division that, if Petitioner's establishment is a "cabaret, the sale of beverages is not more than incidental, and thus not within the definition of establishments taxed under Tax Law §1105(f)(3) should also be reinstated.

The determination of the Tax Appeals Division that Tax Law §1105(d)(i) does not apply to businesses which are exempt from tax pursuant to one of the exemptions or exceptions above should also be reinstated

Further, attorneys fees should be awarded to Petitioners under the Equal Access to Justice Act.

[oral argument request and signature on next page]

ORAL ARGUMENT

Petitioner believes that there are important issues of statutory construction and Constitutional law at issue here, and that oral arguments are appropriate and necessary. Petitioner asks for 20 minutes to present oral arguments.

DATED this ____ day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on ____ day of January, 2011 I did mail a true and correct copy of the foregoing Brief, postage prepaid, to Robert Goldfarb, Attorney for Respondents, New York State Capitol, Albany, New York 12224.

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