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

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of

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

Index No. 509464

Petitioner and Appellant,

Mo. No. 2011-784

-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.

BRIEF FOR PETITIONERS AND APPELLANTS

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DISCLOSURE STATEMENT PURSUANT TO COURT OF APPEALS RULE 500.1(f):

The corporate Petitioner, 677 New Loudon Corp., d/b/a/ Nite Moves, is a closely held corporation and has no parent or subsidiaries.

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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. (A35) 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. (A37) Petitioner contested that assessment, claiming that they were exempt from the tax as a place of amusement featuring dramatic or musical arts performances pursuant to Tax Law § 1105(f)(1) . (A42) 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, pursuant to Tax Law § 1105(f)(3). Id.

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. (A35-A48)

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 was not subject to 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" . Id.

The Administrative law Judge further rejected the argument of the Division that Petitioner's admissions were separately subject to tax under Tax Law § 1105(d), 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". Id.

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. (R 76-R 78).

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. (R 52-74).

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). (A11-A33).

Petitioner thereafter paid the contested tax and filed a Petition with the Appellate Division, pursuant to CPLR Article 78 and Tax Law §2016, contesting each of the Tribunal's conclusions regarding the applicability of the Tax to Petitioner's admissions. R1-R 20 The Appellate Division, on June 9, 2011, issued a Memorandum and Judgment affirming the Tribunal's assessment of taxes under Tax Law §§ 1105(f)(1) and 1105(f)(3). Because the Appellate Division found that these provisions supported the imposition of the Tax, it did not review the decision of the Tribunal regarding the imposition of a tax under Tax Law § 1105(d). (R29-R51)

Petitioner filed a timely Motion for Leave to Appeal in this Court, and it was granted on October 20, 2011. (A1).

New York Tax Law § 1105 (f) imposes a tax on entertainment, but then excludes or exempts certain forms of entertainment, including "dramatic and musical arts performances" and entertainment which follows certain guidelines, held at "cabarets". "Musical arts performances most certainly includes "choreographed" dance performances held in a theater,

or "other place of assembly". Petitioner has contended, from the beginning of this process, that its entertainment clearly fits the definitions contained in the statutes, and is therefor not subject to the tax levied by Tax Law § 1105(f). This Court has previously used an expansive definition of "theater" in reference to this portion of the Tax Code. That leaves only to be decided whether Petitioner's dance performances qualify as "choreographed" under the definitions contained in Tax Law §1101(d)(5). The evidence of that fact is clear, convincing and essentially uncontroverted. While the ALJ saw this, the Tax Appeals Tribunal stretched and pulled at both the law and the facts to avoid what appears to Petitioner to be obvious: that this establishment qualifies as one which features "choreographed" performances, and thus is excluded from the tax at issue. In making its ruling the Tribunal set itself up as a dance critic, despite claiming no expertise in the field. It determined that there was no merit to the expert opinion offered by Petitioner, despite no attempts before the ALJ to impeach or undermine her. The ruling was most certainly arbitrary and capricious; and it most certainly relied on legal error in its legal underpinnings. The Appellate Division found the Tribunal's decision to be "rational", but failed to address any of the legitimate issues raised by Petitioner. In doing this, the Appellate Division deprived Petitioner of Due Process and Equal Protection of the Law and failed to recognize the free speech interests of Petitioner and its performers.

JURISDICTION OF THE COURT OF APPEALS

This Court has jurisdiction of this action under CPLR § 5602.1(i) as an appeal of a final judgment of the Appellate Division, in a matter which originated in an administrative agency. Jurisdiction in this Court is by Motion, and not by right. This Court granted the Motion for Leave to Appeal on October 20, 2011. The issues brought before this Court were argued and preserved at all levels of the process.

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? Petitioner raised this question before the Administrative Law Judge, who found for Petitioner on this point. (R 79-93). Evidence on the issue of whether the performances are choreographed was presented through testimony of Dr. Judith Hanna, Steven Dick and Michelle Miller (R 105-214). The Tax Appeals Tribunals held that Petitioner was subject to sales tax on admissions, and that this exemption did not apply. Petitioner also raised this in its Article 78 Petition (R 10, 13). The Appellate Division affirmed that decision.

2. Does Petitioner's establishment constitute 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? As such is it excluded from sales

tax on its admissions and private dance performances under Tax Law § 1105(f)(3) and § 1101 (d)(12)? Petitioner raised this issue before the Administrative Law Judge, who held in Petitioner's favor on the issue. (A 35, 41, 44-45). The Tax Appeals Tribunals held that Petitioner was subject to sales tax on admissions under this section. Petitioner raised it in its Article 78 Petition (R 16, 17). The Appellate Division affirmed this decision.

3. 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 Appellate Division held that "petitioner's various constitutional claims" have "no merit". (A9) Petitioner raised the constitutional issues at all levels. The Administrative Law Judge did not reach the argument, as she ruled for Petitioner on all questions (A48); but the Tribunal and the Appellate Division ruled against Petitioner on this point. (A33; A9-A10) Petitioner also included it in its Article 78 Petition (R 17, 51).

STATEMENT OF FACTS

A. GENERAL FACTS

1. 677 New Loudon Corporation, doing business as Nite Moves (Petitioner), operated an entertainment establishment, located in Latham, New York, offering exotic dancing by females during the audit period at issue, December 1, 2002 through August 31, 2005. (R 250; A35).

2. N.Y. Tax Law § 1105(f)(1) imposes a tax on admissions to places of amusements,

but includes an exception:

> 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).

3. N.Y. Tax Law § 1101(d)contains definitions specifically for this subsection of § 1105:

> 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.

4. Tax Law § 1105(f)(3) provides for a sales tax on "the amount paid as charges of a roof garden, cabaret or similar place in the state." But this tax is subject to the following qualification:

> Tax Law, § 1101(d)(12):
>
> 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).

5. Petitioner filed a Petition with the Division of Tax Appeals on January 8, 2007, claiming an exemption from the Tax as an admission charge for "dramatic or musical arts performances" (R 232-243). The Division filed its Answer to the Petition on March 28, 2006 (R 244-246).

6. A hearing on the Petition was held before the Division of Tax Appeals, Catherine Bennett, Administrative Law Judge, on February 5, 2008. Briefs were submitted by the parties by September, 2008. The Administrative Law Judge, in a Determination dated March 12, 2009, held in favor of Petitioner. (A35-48).

7. The Division filed an exception to the Determination of the Administrative Law Judge on May 13, 2009 (R 76-78); and on June 12, 2009, filed a brief in support of its exception.

8. 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 (R 52-75).

9. On April 14, 2010, the Tax Appeals Tribunal reversed the Administrative Law Judge on all contested issues, including a "modification" of ten of the Administrative Law Judge's fifteen Findings of Fact (R 29-51; A11-A33).

10. Petitioner filed an Article 78 Petition in the Appellate Division, Third Department, on April 26, 2010 (R 1-20). The Commissioner filed her Answer on September 8, 2010 (R

21-26). Briefing was completed in March, 2011, and the matter was argued before the Appellate Division on April 20, 2011.

11. The Appellate Division rendered its decision affirming the Tax Appeals Tribunal on June 9, 2011. Petitioner was served with the Decision, with Notice of Entry, on June 14, 2011.

B. FINDINGS OF FACT BY DIVISION OF TAX APPEALS AND TAX APPEALS TRIBUNAL.

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]. (A35, A12).

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. (A35).

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 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. (A35-A36) .

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. (A36-37).

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."](A37; A14).

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)."] (A37; A14-A15).

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. (A37-A38).

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. (A38; A15-16).

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".] (A38-A39; A16).

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] . (A39; A16-A17).

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. (A39).

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 rehearse and learn dance moves. These videos were in the public area of the club; and there were no videos of the private areas.](A39-A40; A17).

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.] (A40; A18).

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).] (A40-41; A18)

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, and also additional findings after the excerpt:

> 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)]
>
> 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 examination that the dances in the private areas were choreographed performances. (A19).

C. ADDITIONAL STATEMENT OF FACTS FROM RECORD.

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. (A77).

17. The auditor had done at least five or six similar audits before. (A79).

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. (A78, A81-A82).

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 (A262).

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. (A81).

21. The auditor determined that there was a two-drink minimum, paid for at the time of admission, without which entrance would be denied. (A79).

22. The percentage of drink sales as part of the total club income was not discussed

or considered as part of the audit. (A82-A83).

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. (A83-84).

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. (A87).

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. (A90, A94, A117-A120).

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. (A91).

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. (A97).

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. (A97).

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. (A99).

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. (A109).

31. The policy of paying sales tax only on drink sales was done on the advice of the establishment's CPA, Mr. Carley Byrne. (A116-A117).

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.(A126-A130).

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. (A134).

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.134-A135).

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. (A136-A137; A306-A309).

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. (A138-A139).

37. She 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. (A139-A140).

38. Dr. Hanna prepared a Power Point presentation as a synopsis of her expert witness presentation, which she presented in Court. (A320-A333)

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." (A142).

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. (A143-A144).

41. Choreography is the arrangement of dance movements. The aesthetic principles are different from jazz or hip-hop. (A144)

42. Exotic dance has symbolism and fantasy, to point attention to the secondary sex characteristics or beauty of the female. (A145).

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. (A145-A146).

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. (A147).

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. (A147).

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. (A148).

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. (A148).

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. (A148-A149).

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. (A149).

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. (A150-A151; A306-308).

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. (A152-A153)(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." (A154).

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, 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. (A303).

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. (A154-A156; A330).

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. (A157).

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. (A158).

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.(A159).

58. A dancer friend convinced her to try dancing at another non-alcohol club. (A160).

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. (A161).

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 rehearsed at the club when it was not busy, and also rehearsed at home. The moves changed as she learned new ones, and became better at the older ones. (A162-A163).

61. She also did private dances, using the same dance moves, and more intimate moves, such as more eye contact and closer proximity (A164).

62. She danced on stage and was compensated from tipping while on stage. She also was compensated for private dance shows. It varied whether she made more of her money from stage dancing or from private dance shows. She did not share in the admission fee. (A166).

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. (A166-A167).

64. Table dances sometimes included lap dances, but always with choreographed moves. (A120).

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". (A169).

66. The Tribunal made the following additional findings:

We find, notwithstanding Dr. Hanna's testimony, that petitioner is an adult juice club and not a theater or theater-in-the-round contemplated by the statute and the 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 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 choreographic performance, all one needs to do is move in an aesthetically pleasing way to music, using unity, variety, repetition, contrast, transition (A27).

We reject the argument that petitioner's place of business constituted " a theater, opera house concert hall or other 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 taxable sweep of section 1105(f)(1) (citations omitted)' (Matter of 1605 Book Ctr. V. Tax Appeals Tribunal, supra) (A29).

ARGUMENT

POINT I

PETITIONER IS EXEMPT FROM SALES TAX ON ITS ADMISSION CHARGES AND PRIVATE DANCE PERFORMANCES, AS AN ADMISSION TO A THEATER FEATURING DRAMATIC OR MUSICAL ARTS.

In New York Codes, Rules and Regulations (NYCRR) Title 20, Chapter IV,

Subchapter A, Part 527(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.

The statues and rules use the terms "excluded" and "exempt" interchangeably. Petitioner is excluded (or 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 "a live dramatic, choreographed or musical performance". The Tax Appeals Tribunal held that Petitioner was subject to sales tax on admissions, and that this exclusion or exemption did not apply. The Tribunal held that Petitioner's establishment could not be considered a "theater or theater in the round"; and that the establishment is "an adult juice bar", apparently a mutually exclusive category. (Rec. 46-47).

Pursuant to CPLR § 7803, the Appellate Division Court is 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).

The decision of the Appellate Division affirming that decision is legally erroneous and in conflict with the decision of this Court in 1605 Book Center v. Tax Appeals Tribunal, 83 N.Y.2d 240, 244, 245, 609 N.Y.S.2d 144, Cert Denied, 513 U.S. 811 (N.Y. 1994) which stated:

> Ambiguity in tax statutes should, of course, "be construed in favor of the taxpayer and against the taxing authority, and the burdens they impose are not to be extended by implication".
>
> Notably, 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, 20NYCRR.10[b][3]). The booths are factually not taxably distinguishable from a usual theater except for the element of privacy. (Emphasis added).

The auditor, the Division of Taxation, and the Tribunal relied in part on this case for authority. This Court there upheld the 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 entered the booths and deposited coins in a slot, resulting 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 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)

Thus the door was left open for the presentation of evidence on that point. This Appellant did so. The ultimate decision by this Court noted the lack of evidence on the subject. Since the burden is on the taxpayer to show that the exemption applies, it was assumed that it did not. There is nothing in earlier decisions which supports the Tribunal's rejection of the evidence that Petitioner's entertainment falls within the specific exemptions (or exclusions) to the tax levied by Tax Law § 1105(f)(1). The Division, before the Tribunal, quoted tha same passage from this case and said that the ALJ "ignores the precedent on this issue". There is no such precedent. The ALJ accepted the expert testimony on the subject of choreographed performances, because but the Division effectively stipulated to that evidence. See also the determination of the Division of Tax Appeals in In the Matter of the Petition of Zodiac Lounge and Restaurant, 1999 WL 825611

(N.Y.Div.Tax.App. October 7, 1999) citing 1605 Book Center:

> 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].). (Emphasis added). (p. 10).

Here, the Appellate Division determined first that the private one-on-one shows (similar to peep show booths in format, though without barriers between customer and performer) were not choreographed performances, and then extrapolated that the stage performances were also not choreographed performances. Neither portion of that decision comported with the evidence. Certainly, even "at a bare minimum" such an extrapolation was not supported by "substantial evidence." (A6-A7). This Court used an expansive definition of "theater" in its previous ruling, while the Tribunal and the Appellate Division used a much more narrow one. They are the ones who appear to "ignore precedent". Further, the Tribunal and the Appellate Division ruled that the "choreography" at issue must meet some standard for formality; but they declined to enunciate it. Such a ruling is not supported by statutory language or by the regulations. Previous cases have only held that there must be evidence of the choreography. Petitioner has met its burden, in the absence of other specific standards. The Legislature clearly intended to exclude or exempt admissions to "a live dramatic, choreographed or musical performance" from sales tax. The

Appellate Division noted, however, that: "the club's dancers are not required to have any formal dance training and, in lieu thereof, often rely upon videos and suggestions from other dancers to learn their craft." (A8). There is no support in the statute for a requirement of "formal dance training"; and no suggestion for how much training would be sufficient. While dancers at the New York City Ballet might all meet whatever standard the Tribunal sets up, the training and experience in musical theater, modern dance companies, and other dance performances are likely to be as varied as are those who dance at Petitioner's establishment. Is a college degree necessary to "choreograph" dance performances for tax purposes? Must each venue offering dance performances submit to a review by the Tax Division of the level of its professionalism? Are summer theaters, which exist all over the State, "professional" enough to be excluded? As part of their audit, Tax Division employees are acting as dance/ theater critics with the power to determine, on the basis of their personal opinion, whether the dancing is excluded or exempt. Certainly the Tribunal set itself up as the ultimate dance critic; and this is simply not the role of government. That simply could not have been what the legislature intended in passing the statute. See Nakatomi Investments, Inc. v. City of Schenectady, 949 F.Supp. 988 (N.D.N.Y. 1997), discussed below. The only guidelines that the Tribunal had were the uncontroverted expert testimony presented by Petitioner. Thus the question is not only whether the Tribunal's Decision was arbitrary and capricious, but also whether that decision (and the affirmance by the Appellate

Division) was "affected by an error of law" under CPLR § 7803.

The decision of the Tax Commission, which disregarded the entirety of Petitioner's expert testimony and relied on their own judgment without any stated basis, was both arbitrary and capricious. It was not "rationally based upon and supported by substantial evidence". CPLR § 7803. The decision by the Appellate Division giving the Tax Appeals Tribunal carte blanche to disregard all of the evidence in this case is in conflict with several previous decisions, including Transervice Lease Corp. v. Tax Appeals Trib. of State of N.Y., 214 A.D.2d 775, 777 (N.Y. App. Div. 1995); Matter of CS Integrated v. Tax Appeals Trib. of State of N.Y. , 19 A.D.3d 886, 889; 798 N.Y.S.2d 166 (N.Y. App. Div. 2005); The Appellate Division, in Rubin v. Tax Appeals Trib. Of State of N.Y., 29 A.D.3d 1089, 1092; 814 N.Y.S2d 804 (App. Div. 2006) said: "we note that the ALJ has discretion to resolve credibility issues that arise during these proceedings. These determinations will be upheld if they are supported by substantial evidence". (Citations omitted, emphasis added). There was no "credibility issue" before the ALJ. She accepted the only evidence she had, ruling in favor of Petitioner. The ruling of the Appellate Division referred to the evidence presented in support of Petitioner's position and the total disregard for that evidence, by the Tribunal:

> 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 forgoing DVD. The expert further concluded that the private dances performed at Petitioner's club involved "similar kinds of movements" as those portrayed by the dances on stage and, therefore, also qualified as choreographed performances (A6). (Emphasis added).

The Court used the term "expert" in relation to Dr. Hanna four times in the one paragraph, and then joined the Tribunal in totally dismissing her testimony:

> 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. (A7). (Emphasis added).

That Appellate Division's affirmance of the Tribunal's total disregard for the testimony by the Tribunal, after the acceptance of it by the ALJ, is not consistent with the Court's duty to uphold only findings that are supported by "substantial evidence". The decision of the Tribunal was an abuse of its discretion; and the Appellate division failed to correct this. See Herrick v. Second Cuthouse, 64 NY2d 692 (N.Y. 1984). Thus, this Court can and should require that the proper considerations are made regarding the weight of the evidence, including the requirement that factual findings be based on " substantial evidence". See Varkonyl v. Varig, 22 NY2d 333 (N.Y. 1968).

In this case, the ALJ found the uncontroverted evidence to be both credible and substantial. This is not a question of competing evidence where the Tribunal found one presentation more credible than the other. Petitioner acknowledges previous decisions of the Appellate Division 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 interchangeable statutory language here, however, uses both the terms "excluded" and "exempt". It would appear that the term "excluded" may be more in Petitioner's favor. It is difficult in this situation to reconcile the burden to prove the exemption with this Court's ruling in 1605 Bookcenter that ambiguities "are construed in favor or the taxpayer." The ALJ, however, correctly determined that Petitioner had carried that burden in this case. Petitioner's establishment is excluded or exempt under the "plain language" of the statute. If the evidence clearly shows that it meets the requirements, it prevails. The Division of Taxation stipulated to the expert's credentials, and made no effort to refute the evidence. Cross examination of the expert witness takes up one page of the Transcript. (A153-A154).

Black's Law Dictionary defines a theater:

> Any edifice used for the purpose of dramatic or operatic of other representations, plays or performances, for admission to which entrance-money is received, not including halls rented or used occasionally for conerts

or theatrical productions.

Petitioner's business has all the attributes of a theater, featuring dance routines. 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.'" Dr. Hanna was clear and convincing in her 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 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." (Emphasis added)(A27). Neither the Tribunal nor the Appellate Division addressed this Court's ruling 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." (A28). The Tribunal is bound by expansive definition of "theater" used by this Court; 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 substituted its own opinion for that of Dr. Hanna's, despite no claim of expertise in this area. The Tribunal used a simple dictionary definition of the term: "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'". Id. Certainly that is exactly what Dr. Hanna testified to. The Tribunal went 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." (A27). 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, and many others, 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 moral disapproval of the type of dance performances.

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." (A28). 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. (A106-A108; A299-A304; A309). She did not come into this case without knowledge of

the form and format. That is what makes her an expert. 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. (A299-A300).

Whether she actually observed private performances in this club prior to her testimony is not relevant to the expertise of her testimony. Her expertise is not compromised if she does not observe every dance or every dancer in a particular club. 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, argued 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. Just two paragraphs after claiming that the dances on stage and in private rooms are "exactly the same'; the Division in its brief below, opposed that statement: "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. (A154-A155; A303). 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.

This Petitioner met the burden 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 here did not give any consideration to whether the dance routines were choreographed performances. The 1605 Book Center case 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.

POINT II

PETITIONER'S ESTABLISHMENT IS NOT SUBJECT TO SALES TAX ON ITS ADMISSIONS AND PRIVATE DANCES; AS IT IS A CABARET OR SIMILAR VENUE WHERE THE SALES OF REFRESHMENTS (DRINKS) ARE MERELY INCIDENTAL TO THE PERFORMANCE.

The Division argues that the tax(es) levied by Tax Law § 1105 (1) and (3) are separate taxes. Thus, if Petitioner is exempt or excluded from the entertainment tax under § (f)(1) as a "dramatic or musical arts performance", it will still be taxed under §1105(f)(3) unless it also is excluded there. That argument is flawed, as the Code speaks of the tax as a 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 Tax Law §1105 (f)(1) and is excluded or exempted there from the tax, the State does not get a second bite at the apple. 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 even though the establishment is excluded or exempt, that the second provision overrides the exclusion or exemption. Though this is an important question affecting the structure of the whole of Tax Law § 1105, there appear to no decisions on the point. Petitioner contends that the Tax a singular entity, which either is levied on a particular establishment or is not. The Division, on the other hand, treats the tax as a bit of a "shell game". Under their analysis, the tax is "layered", such that, if the establishment is once ruled either excluded or exempt, the "game" starts over, and it must meet yet another test. So, the Division contends, even if Petitioner

shows that it is not taxed under Tax Law § 1105(f)(1), the Division may go on to examine its drink sales, to determine if it can yet be taxed under Tax Law § 1105(f)(3). Petitioner suggests that the Legislature could not have been that cynical. If the Legislature intended to tax a certain type of establishment, they could have, and should have, just done so. An establishment might have some of the attributes of both a theater and a cabaret. Petitioner's establishment might be an example of such. But that does not allow the Tax Division to apply whichever provision supports the imposition of a tax. While Petitioner might have some attributes of a "cabaret", it most certainly is "a theater, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographed or musical performance". 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. The definitions relating to Tax Law §1105(f)(1) are more specific and more precise; and Petitioner has met its burden in showing that it is entitled to be excluded from taxable entities under Tax Law 1105(f)(1). In fact, the Division has contended that Petitioner's admission are also taxable under a broader provision aimed primarily at restaurants, Tax Law 1105(d). The Administrative Law Judge correctly held that the provision did not apply:

> 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).

The Appellate Division, determined that Petitioner was taxed under Tax Law § 1105(f)(1), and also under Tax Law § 1105 (f)(3). It did not consider the Division's contention that it was also subject to Tax Law § 1105(d). The Appellate Division found, that, once the decision is made that Petitioner's entertainment is not "choreographed" performances, it also is taxed under Tax Law § 1105 (f)(3). Petitioner suggests here that once it is determined that the performances are choreographed, it is easy to see that Tax Law § 1105 (f)(3) does not apply. Petitioner agrees with the Appellate Division that the most important determination is whether the performances meet the "choreographed" standard under Tax Law § 1105(f)(1). Nevertheless, Petitioner claims that its admission are exempt or excluded from the tax under the Cabaret Tax provisions as well.

The Tax Appeals Tribunal and the Appellate Division committed legal errors within the meaning of CPLR 7803 in their analyses 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

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

> 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." (A30). 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):

> Mr. Dick testified, and we have no 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.

Once again, Black's Law Dictionary defines incidental:

> Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.

Certainly it is clear that the main purpose of Petitioner's establishment is not to sell non-alcoholic drinks to customers. Both the ALJ and the Tribunal so found. The principal focus of Petitioner's business is the presentation of dance entertainments shows. 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 incidental to the business." (A31). The Tribunal cited cases which 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." (A30). 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).

In Ross v. Hayes, 337 F.2d 690, 692 (5th Cir. 1964), cited by the Commissioner, 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" (A30). 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 the sale of 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 set it apart from the instant case. 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 sale of drinks was not only a small part of revenues, both the ALJ and the Tribunal found that "the primary reason people visit the petitioner['s] business is for the entertainment provided, not the beverages." (A31-A47).

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

The question, according to the Tribunal, as it was to the ALJ, was whether the sales of non-alcoholic drinks was more than "incidental" to the business of the establishment, which was the presentation of dancing as entertainment. The ALJ determined that it was not; and the Tribunal determined that it was. This exemption, or exclusion, was based on a former Federal provision for excise taxes, and creates a distinctly different exclusion from that in Tax Law § 1105(f)(1). Here, the admission to a cabaret is not taxed, so long as the emphasis is on the entertainment and not the food and drink.

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. Everyone here 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 exclusion from 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 excluded or 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, featuring 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 . . . .

A cabaret is only excluded from the tax when certain conditions are present, 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 not subject to the cabaret tax.. 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.

The decision of the Appellate Division, however, did not simply uphold the decision of the Tribunal. For the first time, the Commissioner argued to the Appellate Division that the requirements of Tax Law § 1105(f)(3) regarding the presentation of "musical arts performances" were precisely the same as those contained in Tax Law § 1105(f)(3). In other words, the Petitioner would need to prove the same elements of choreographed dance in order to even reach the question of the relationship between entertainment and refreshments. This argument made the question of the sale of refreshments, the only one dealt with by the ALJ and the Tribunal, totally irrelevant. (Comm. Br. 25). The Appellate Division accepted this argument, thus changing the nature and basis of the decision. It is an erroneous interpretation of the exemption contained in Tax Law § 1105(f)(3):

> In this regard, although the Tribunal's decision focuses primarily upon whether the club's register sales from the sales of 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 beverage sales would qualify as incidental. (A9).

Such a decision nullifies the separate exemption granted for cabarets, and it does not make sense. This ruling is clearly at odds with the legislative intent expressed in the passage of Tax Law § 1123. The meaning of this section of the Tax Law has been muddied to the point where it cannot now be understood; and the relationship of the two apparently separate

exclusions or exemptions is particularly unclear. The Tribunal made much of the lack of theatrical venue, whatever that might be, in its denial of an exemption under Tax Law § 1105(f)(1). Both the Tribunal and the Appellate Division declared that Petitioner's establishment was a "cabaret". But the Appellate Division held that this was basically irrelevant. Under the Appellate Division's decision, the establishment must first qualify for a n exclusion or exemption under Tax Law § 1105(f)(1) before the exemption or exclusion under Tax Law § 1105 (f)(3) can even be considered. And then, apparently it can all go for naught, unless it also for the exemption or exclusion, based on its "incidental" sales of beverages. This simply cannot be what the legislature intended, as a theater and a cabaret are just not the same business.

While the two sections of the statute both talk about "musical arts performances", the case law regarding the Cabaret provision holds that the entertainment provided in such a place is not to be defined or limited in the same manner as referred to in Tax Law § 1105(f)(1). The case law cited by the Division and the Tribunal, assumes that the definition "musical arts performances" in the setting of a cabaret was broad enough to include a dance establishment where the patrons did the dancing. Until the proceedings before the Appellate Division, it had not been suggested that the "musical arts performances" provisions of Tax Law §§ 1105 (f)(1) and (3) are precisely the same. That argument made in the Commissioner's Brief before the Appellate Division left Petitioner an inadequate

opportunity to respond. It thus should not have been the basis of the Appellate Division decision. See Progressive Casualty Insurance. Co. v. Baker, 290 AD.2d 676, 677; 736 N.Y.S. 2d 447 (N.Y.App. Div. 2002) and Reilly v. Naftal, 753 N.Y.S.2d 534 (N.Y.App.Div. 2002). Nevertheless, Petitioner has indeed shown that it meets whatever the definition may be for "musical arts performances." If Petitioner's performances are not choreographed dance, nobody has suggest what else they may be. The Tax Division accepted that the use of the term "musical arts performances" for the purpose of the Cabaret provision is a broader term, as did the Tribunal and the Commissioner in his Advisory Opinion. Either way, this provision does not strengthen the position of the Division that Petitioner's admission charges are subject to the Tax levied by Tax Law § 1105(f)(3).

POINT III

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

The sales tax as applied by the Appellate Division is unlawfully discriminatory under the First and Fourteenth Amendments to the U.S. Constitution, and under the Constitution of New York, Art. I §8. The Appellate Division held that: "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." (A9). This statement is neither reasonable nor rational, in the face of the evidence which the ALJ held was sufficient

to find for Petitioner. Petitioner contends that the holdings below violate both the First and Fourteenth Amendments to the U.S. Constitution, as well as the Constitution of New York, Art. I, § 8. It is the total disregard for the evidence by the Tribunal and the Appellate Division which proves that "the subject taxing scheme is being applied "in a discriminatory manner." This decision is in conflict with the decisions of the U.S. Supreme Court granting exotic dancing First Amendment protection, including Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) and Barnes v. Glenn Theatre, Inc., 501 U.S. 560 (1991). In Doran, 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:

> 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. 228 F.3d at 839.

In making its artistic judgment on the lack of "high artistic expression", the Schultz Court had neither the opportunity to watch the well-presented dances, nor the expert witness testimony offered here. The Court would likely have refrained from such value judgments if it had such material before it. See also the 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.

The Appellate Division Judgment also conflicts with the decision of the U.S. District

Court for the Northern District of New York in Nakatomi Investments v. City of Schenectady, 949 F.Supp. 988, 999-1000 (N.D.N.Y. 1997), which ruled that disparate treatment for dance performances based on the perceived merit of those performances denied equal protection of the law to the Plaintiff dance establishments. The Court there meticulously dismantled exactly the arguments made here by the Commissioner, and upheld by the Appellate Division: that Petitioner's dance performances were not entitled to equal protection with the dance performances of other theatrical productions. The Court said:

> Examined individually, these distinctions melt away to become simply criticisms. As the Second Circuit has stated: "[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person [at the local pub]." *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975) (*quoting Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, Doran*, 422 U.S. at 922, 95 S.Ct. at 2563). Moreover, it is well established that "[n]udity alone does not place otherwise protected material outside the mantle of the first amendment." *Schad* 452 U.S. at 66, 101 S.Ct. at 2181 (citation omitted). Nor does the fact that the dance is sexual remove the Constitution's protection: "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). And, it is immaterial for constitutional purposes that nude dancing may be performed for profit. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).
>
> The only logical distinction of legal relevance here is that the "erotic message" displayed by the dancers at a cabaret, dance hall, bar tavern, lounge, discotheque or restaurant, which is arguably not presented, or at least not as strongly presented in Strauss's *Dance of the Seven Veils* or in *Oh Calcutta*, is

> more offensive to the City of Schenectady's legislators. In the end, the City's position distills down to the assertion that nude dancing in the seven enumerated establishments is distasteful and/or morally repugnant as compared to the same conduct presented in the theatre or opera. Accordingly, the Court must conclude that § 128-8 of the Schenectady City Code targets these seven establishments based on their distasteful erotic message, which the City finds objectionable; there is no other plausible distinction justifying disparate treatment in furtherance of the City's protection of order and morality. Emphasis added. Id. at 999.
>
> This is precisely the kind of censorship, however, against which the First Amendment aims to guard. "When the government, acting as censor, undertakes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975). As Justice Harlan eloquently stated in *Cohen v. California,* 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971), "we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Although we may find the expression inherent in nude dancing to be objectionable, "[i]f there is a bedrock principle underlying the First Amendment it is the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414, 109 S.Ct. at 2545. (Emphasis added)

The Appellate Division erred in not fully reviewing the constitutional arguments of Petitioner which were made at all levels of this proceeding (Rec. 17, A22; Pet. Br. 52-58). The Tribunal set itself up as a dance critic, apparently claiming knowledge of dance as an art form which was superior to that of Petitioner's expert. The Tribunal did exactly what the Court in Nakatomi held was prohibited. The Tribunal, however, is not charged with reviewing the constitutional issues. That is primarily the province of the Court. The Appellate Division did not adequately undertake its responsibility.

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 constitute "a live dramatic, choreographed or musical performance". They are planned and rehearsed at length; and they contain all the elements of choreographed dance. 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 Tribunal and the Division, 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. (Internal citations omitted) (Emphasis added).

Under Marks v. United States, 430 U.S. 188 (1977), this opinion is the controlling one. 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 specifically not reaching the question of whether Art. I § 8 of the New York Constitution is broader than the First Amendment, this Court 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), this Court found that the same State Constitutional provision supported the reversal an order upholding the closing of 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 the Constitution.

CONCLUSION

The decision of the Appellate Division that Petitioner's admissions are subject to taxation under Tax Law §1105 (f)(1), under Tax Law §1105 (f)(3) should be reversed. There are clear exemptions, or exclusions, which apply to this Petitioner; and the sales tax on admissions does not apply to this establishment.

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.

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

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 December, 2011.

W. ANDREW MCCULLOUGH, L.L.C.

_____

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STATE OF UTAH)
) SS:
COUNTY OF SALT LAKE)

W. Andrew McCullough, being first duly sworn, says: I am not a party to the action, am over 18 years of age and reside at: Lehi, Utah. On the ___ day of December, 2011, I served three copies of the foregoing Brief by mailing them in a sealed envelope, with postage prepaid thereon, in a post office, or official depository of the U.S. Postal Service, addressed to the following at their last known address(es) set forth below:

Hon. Eric T. Schneiderman
New York State Attorney General

Robert M. Goldfarb, Esq.
The Capitol
Albany, NY 12224

(Signature) _____

(Print Name) W. Andrew McCullough _____

Sworn to before me this ___ day of _____.

_____
Notary Public