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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF 677 NEW LOUDON CORPORATION,

Appellant,

-against-

No. 157

TAX APPEALS TRIBUNAL OF THE STATE

OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York 12207
September 5, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of 677 New
2 Loudon Corporation.

3 Counselor, do you want any rebuttal time?

4 MR. MCCULLOUGH: Three minutes, if you
5 would, Your Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.
7 Go ahead.

8 MR. MCCULLOUGH: Afternoon. May it please
9 the court, counsel, my name is Andrew McCullough. I
10 practice primarily in Salt Lake City. I also have
11 been a member of the New York State Bar for many
12 years, native of Albany. I represent Nite Moves and
13 we would say, we have said, we continue to say, that
14 Nite Moves is a theatrical venue in which
15 choreographed dance performances are performed.

16 JUDGE SMITH: Do they have to be
17 choreographed? If they were improvised, would you
18 still be - - - would you have to pay the tax?

19 MR. MCCULLOUGH: Well, that's an
20 interesting question. Typically, as the Appellate
21 Division mentioned, you get up on that pole and you
22 improvise too much, you may fall on your head, and -
23 - -

24 JUDGE PIGOTT: Do you pay the girls, or do
25 the girls pay you?

1 MR. MCCULLOUGH: The girls pay us.

2 JUDGE PIGOTT: All right. So the money you
3 get is not for their dancing. They pay you so they
4 can go perform whatever - - -

5 MR. MCCULLOUGH: Yes.

6 JUDGE PIGOTT: - - - they're going to
7 perform.

8 MR. MCCULLOUGH: And so the money - - - the
9 primary - - - the money that's at issue right here is
10 money that's gotten at the door. When you come in,
11 you pay a certain price - - -

12 JUDGE CIPARICK: Admission fees.

13 MR. MCCULLOUGH: - - - admission fees.

14 JUDGE CIPARICK: Admission fees from
15 patrons?

16 MR. MCCULLOUGH: Yes. And then if you want
17 a more private show in a more private room - - - and
18 it is not totally private, it's more private - - -
19 you pay a separate admission charge.

20 JUDGE PIGOTT: And again, the girls pay
21 you, right?

22 MR. MCCULLOUGH: Yes.

23 JUDGE PIGOTT: So - - -

24 MR. MCCULLOUGH: Well - - -

25 JUDGE PIGOTT: - - - you're a custodian of

1 an establishment where girls come, pay you for the
2 privilege of getting up on stage - - -

3 MR. MCCULLOUGH: Yes.

4 JUDGE PIGOTT: - - - and then if they make
5 an arrangement with one of the customers, pay you,
6 again, for the use of the room.

7 MR. MCCULLOUGH: Well, in actuality - - -

8 JUDGE PIGOTT: You're not involved in the
9 art business, is my point.

10 MR. MCCULLOUGH: - - - in actuality, Your
11 Honor, if they do a private, that's paid to the - - -
12 you go up to the doorman and you pay him, and then
13 that's split. So that is a separate sort of thing.
14 It is an admission charge collected by the club.

15 JUDGE GRAFFEO: If I could ask - - -

16 CHIEF JUDGE LIPPMAN: Counsel - - - go
17 ahead.

18 JUDGE GRAFFEO: If I could ask you some
19 questions - - -

20 MR. MCCULLOUGH: Sure.

21 JUDGE GRAFFEO: - - - about our standard of
22 review here, because this is a tax tribunal - - -

23 MR. MCCULLOUGH: Um-hum.

24 JUDGE GRAFFEO: - - - appeal. Do you
25 disagree that you have had to carry the burden of

1 showing that their determination was irrational?

2 MR. MCCULLOUGH: Well - - -

3 JUDGE GRAFFEO: Or was legally erroneous?
4 Isn't that our standard of review?

5 MR. MCCULLOUGH: Yes. And whereas the
6 Appellate Division said that it was rational, they
7 didn't talk a lot about the fact that there are legal
8 errors.

9 JUDGE GRAFFEO: Well, my next question was,
10 what proof did your expert put in about what
11 activities occurred in the private rooms? I didn't
12 read - - -

13 MR. MCCULLOUGH: Well - - -

14 JUDGE GRAFFEO: - - - that your expert
15 observed what occurred in the private rooms.

16 MR. MCCULLOUGH: Well, and that was - - -
17 that's been argued quite a bit. The point, of
18 course, is that my expert's an expert. My expert did
19 not come into this cold. My expert has been to a
20 hundred and some-odd clubs, and interviewed and
21 watched - - - she claims - - - and she wrote - - -
22 she literally wrote the book on it. I have a copy
23 here.

24 JUDGE CIPARICK: I don't think we're
25 disputing the fact that your expert's an expert. But

1 the question is what knowledge does she have, what
2 actual knowledge did she have at the time of what was
3 happening in the private rooms, if any?

4 MR. MCCULLOUGH: Well, she didn't have
5 direct observation of what happened in the private
6 rooms at Nite Moves, but she did have direct
7 observation of hundreds of these things.

8 JUDGE GRAFFEO: Right. So the question is,
9 was that sufficient to carry the burden that was your
10 responsibility - - -

11 MR. MCCULLOUGH: Well, the administrative -
12 - -

13 JUDGE GRAFFEO: - - - under our - - -

14 MR. MCCULLOUGH: - - - law judge - - -

15 JUDGE GRAFFEO: - - - under this standard
16 of review?

17 MR. MCCULLOUGH: Yeah. The administrative
18 law judge said that it was.

19 CHIEF JUDGE LIPPMAN: Yes, but why does the
20 tax tribunal have to agree with your expert?

21 MR. MCCULLOUGH: Well, they - - - the
22 expert, you have to remember, Your Honor, that - - -

23 CHIEF JUDGE LIPPMAN: I mean, what's the
24 test, as Judge Graffeo said before? Why - - - they
25 disagree.

1 MR. MCCULLOUGH: Well, the expert witness
2 is there to present evidence. You could, of course -
3 - -

4 JUDGE SMITH: She's there to give an
5 opinion, isn't she?

6 MR. MCCULLOUGH: Yes. Exactly. You could,
7 of course - - -

8 JUDGE SMITH: But wasn't there also a fact
9 witness on what happened in the private room? Didn't
10 your proprietor testify that it was much the same
11 thing that was in the public?

12 MR. MCCULLOUGH: Yes, yes. And one of the
13 girls did, as well. But, Your Honor, you could
14 obviously - - -

15 JUDGE SMITH: When you say - - - I mean, is
16 there anything unconventional about experts
17 expressing opinions based on what other witnesses
18 testified to?

19 MR. MCCULLOUGH: No. No, and she tes - - -
20 she interviewed dancers. Remember, she's been doing
21 this for years. She literally wrote the book on it.
22 She is the foremost expert on exotic dance in the
23 United States. And when you go in and you say well,
24 she didn't look at a specific dance on this specific
25 day, that's not particularly relevant.

1 JUDGE GRAFFEO: Well, there's a lot of
2 YouTube instructional videos on this - - -

3 MR. MCCULLOUGH: Yes. Yes.

4 JUDGE GRAFFEO: - - - and I suppose there's
5 people that have these poles in their house and they
6 do it.

7 MR. MCCULLOUGH: Yes.

8 JUDGE GRAFFEO: Are all these people
9 engaged in a choreographed artistic performance?

10 MR. MCCULLOUGH: Well, you know what? That
11 - - - we didn't ask her that. We asked her if people
12 engaged in the type of activity that goes on at Nite
13 Moves were engaged in choreographed dance
14 performances, and she was absolutely firm about that.

15 JUDGE SMITH: Suppose you hadn't called the
16 expert.

17 MR. MCCULLOUGH: Sure.

18 JUDGE SMITH: Suppose all you had was a
19 video of these people dancing. Isn't - - - why isn't
20 that a showing that you're putting on a musical or
21 dramatic performance for dramatic - - - where musical
22 is defined to include choreographic activity?

23 MR. MCCULLOUGH: Well, Your Honor, I was
24 looking - - - when I started representing this club,
25 the first thing I did was read the 1605 Book Center

1 case. And the 1605 Book Center case said - - - it
2 wasn't this court so much as it was the Appellate
3 Division - - - nobody really gave us any evidence as
4 to whether or not the performances that were going on
5 - - - they described their performance - - -

6 JUDGE SMITH: Well, as I remember, 1605
7 Book Center didn't involve the issue of whether it
8 was choreographic or not.

9 MR. MCCULLOUGH: No. No, but they - - -

10 JUDGE SMITH: But I guess when I read the
11 statute, it looks to me like choreographic is just a
12 synonym for dance. Do you read it differently?

13 MR. MCCULLOUGH: Well, the dictionary says
14 "planned movements", but no, I don't really.

15 JUDGE SMITH: And it just seems odd to me
16 that anybody - - - that the legislature would say
17 well, we're only going to - - - we're going to tax
18 improvised dance and not choreographed dance.

19 MR. MCCULLOUGH: Well, that's exactly our
20 point. We don't know that there's a line; we don't
21 know that there could be a line. And certainly, the
22 people who run the tax department aren't going to be
23 able to decide the line.

24 JUDGE CIPARICK: Isn't this a place of
25 amusement that - - - I mean, primarily it's a place

1 of amusement?

2 MR. MCCULLOUGH: Yes. But it's a place
3 where the amusement is choreographed dance
4 performances. There's nothing else. There's no - -
5 -

6 JUDGE CIPARICK: And that takes it out of
7 the tax - - -

8 MR. MCCULLOUGH: Yes.

9 CHIEF JUDGE LIPPMAN: But again, why would
10 we overturn the tax tribunal? That's what I want you
11 to focus on. What is it that they did that was
12 wrong? They felt there just wasn't enough evidence
13 to support your position.

14 MR. MCCULLOUGH: Well, because - - -

15 CHIEF JUDGE LIPPMAN: We can only overturn
16 them in certain circumstances. What is that
17 circumstance?

18 JUDGE READ: Would we have to say that
19 there's just not - - - that there's insufficient
20 proof that the dances were choreographed
21 performances?

22 MR. MCCULLOUGH: Well, the tax - - - the
23 Appellate Division is supposed to affirm, and I
24 suppose the next step, you are supposed to affirm the
25 Tax Appeals Tribunal when their decision is based on

1 substantial evidence. And it certainly isn't. The
2 substantial evidence is clearly on our side.

3 CHIEF JUDGE LIPPMAN: Is it your view that
4 they're making a judgment as to the worth of what's
5 going on there rather than looking at the evidence?
6 Is that what you're saying?

7 MR. MCCULLOUGH: Oh, absolutely.
8 Absolutely.

9 CHIEF JUDGE LIPPMAN: So your position is
10 that because of the nature of what's going on,
11 they're making a - - - whatever the basis is - - -
12 moral or just you don't like what it is - - - what
13 they do. Is that - - -

14 MR. MCCULLOUGH: Well, that - - -

15 CHIEF JUDGE LIPPMAN: - - - is that the
16 bottom line of your argument, that that's why we
17 should overturn the tax tribunal?

18 MR. MCCULLOUGH: That is certainly one of
19 the reasons. I wrote a sixty-page brief. That - - -
20 it's not all right there. There's a lot of other - - -
21 -

22 CHIEF JUDGE LIPPMAN: The thrust of your
23 position.

24 MR. MCCULLOUGH: That is one of the
25 thrusts. There's also the one that - - - there's

1 some legal errors. They said that we don't have - -
2 - that an exemption is different than an exclusion
3 and we have a lot to talk about that. And then we
4 talk about the layering of (f)(1) and (f)(3). But
5 one of the main - - - obviously, one of the main
6 thrusts is that we brought in the evidence that the
7 courts have previously asked for, and it was good
8 evidence, it was solid evidence. The administrative
9 law judge saw it, felt it - - - and gave us what we
10 asked for.

11 CHIEF JUDGE LIPPMAN: But if the Tax
12 Tribunal said that - - - thought, basically, that it
13 has no artistic value, that's not enough for them to
14 - - -

15 MR. MCCULLOUGH: No.

16 CHIEF JUDGE LIPPMAN: - - - to rule against
17 you?

18 MR. MCCULLOUGH: No, it's not.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. MCCULLOUGH: And they did that.

21 CHIEF JUDGE LIPPMAN: Sure. Judge Read?

22 JUDGE READ: By the way, the word
23 "choreography", that doesn't appear in the statute,
24 does it? That's just in the regulation?

25 MR. MCCULLOUGH: It does. It's - - -

1 JUDGE READ: It's in the statute too?

2 MR. MCCULLOUGH: Well, it's a - - - it
3 talks about musical arts performances - - -

4 JUDGE READ: Right.

5 MR. MCCULLOUGH: - - - and then it talks
6 about, as part of the definitions, it talks about
7 choreographic.

8 JUDGE CIPARICK: It says, "live, dramatic,
9 choreographic or musical performance."

10 MR. MCCULLOUGH: Yes.

11 JUDGE READ: But that's the regulation,
12 isn't it, or no? Or is all this - - -

13 MR. MCCULLOUGH: No, that's part of the - -
14 -

15 JUDGE READ: - - - the statute. Okay.

16 MR. MCCULLOUGH: - - - statute.

17 JUDGE READ: Okay.

18 CHIEF JUDGE LIPPMAN: Okay. Thanks,
19 counsel.

20 MR. MCCULLOUGH: Thank you.

21 CHIEF JUDGE LIPPMAN: You'll have rebuttal.
22 Let's hear from your adversary.

23 MR. GOLDFARB: Good afternoon. May it
24 please the Court, Rob Goldfarb appearing for the
25 Commissioner of Taxation and Finance.

1 CHIEF JUDGE LIPPMAN: What is the basis for
2 the tribunal's decision?

3 MR. GOLDFARB: The basis - - -

4 CHIEF JUDGE LIPPMAN: You agree that the
5 tribunal can't act arbitrarily, right?

6 MR. GOLDFARB: Absolutely.

7 CHIEF JUDGE LIPPMAN: Okay. So what - - -

8 MR. GOLDFARB: Petitioner's charges - - -

9 CHIEF JUDGE LIPPMAN: - - - what supports
10 their conclusion?

11 MR. GOLDFARB: What supports their
12 conclusion is that petitioner's charges are taxable
13 under two separate provisions here - - - 1105(f)(1)
14 or (f)(3) - - - and in fact, are taxable regardless
15 of the choreographic nature of these performances.

16 JUDGE GRAFFEO: Well, I guess - - -

17 JUDGE SMITH: Do you say they have to be
18 actually choreographed? An improvised dance is not -
19 - - has to pay tax?

20 MR. GOLDFARB: I'm arguing that these
21 charges - - -

22 JUDGE SMITH: Is there a yes or no to that
23 one?

24 MR. GOLDFARB: - - - are taxable regardless
25 of the nature - - -

1 JUDGE SMITH: Is there a yes or no to that
2 one? Do you say an improvised dancer has to pay tax?

3 MR. GOLDFARB: The legislature did not
4 exempt any type of dance. It exempted choreographed
5 performances which has to mean something - - -

6 JUDGE SMITH: But can't you read that
7 defini - - - choreographic as just a synonym for
8 dance there? It says theatrical, dramatic or
9 choreographic performances, just means plays or
10 dances?

11 MR. GOLDFARB: I don't think so, Your
12 Honor. I think that - - -

13 JUDGE SMITH: In the regulation, the
14 regulation, don't they use "dance" as a synonym for
15 "choreographic"? Remember that Theater in the Round
16 example, where they say if a Theater in the Round
17 puts on dance performances, it doesn't have to pay
18 tax?

19 MR. GOLDFARB: Your Honor, even if these
20 are considered choreographed performances, these
21 charges are still taxable. And I would like to start
22 with (f)(3) - - -

23 JUDGE SMITH: Okay.

24 MR. GOLDFARB: - - - because petitioner is
25 a cabaret or similar place. The charges of a cabaret

1 or similar place are taxable if the establishment's
2 sale of refreshments are more than merely incidental,
3 even if the entertainment consists of choreographed -
4 - -

5 CHIEF JUDGE LIPPMAN: But what about the
6 amount of money that's collected from this?

7 MR. GOLDFARB: Well - - -

8 CHIEF JUDGE LIPPMAN: When you say incident
9 - - - defined incidental.

10 MR. GOLDFARB: Well, I would define
11 incidental as minor or rather inconsequential. And
12 that is not the case here.

13 JUDGE SMITH: I've got quite a few
14 authorities that say the test is whether it's a part
15 of the - - - a significant part of the attraction for
16 the audience.

17 MR. GOLDFARB: That is one test. But the
18 fact - - -

19 JUDGE SMITH: An indeed, isn't there an
20 opinion of the Department of Taxation that says that
21 if it - - - I mean, if it's the refreshments that are
22 bringing people in, then it's taxable?

23 MR. GOLDFARB: That is only - - -

24 JUDGE SMITH: You're not claiming that
25 anyone came to this bar for the juice?

1 MR. GOLDFARB: Absolutely, not. Although,
2 Your Honor, I would submit, if the women kept their
3 clothes on, no one would be coming to this bar for
4 the dance performance.

5 JUDGE SMITH: Of course not.

6 MR. GOLDFARB: But let me address the - - -

7 CHIEF JUDGE LIPPMAN: But that's the point,
8 counsel, isn't it?

9 MR. GOLDFARB: My point is - - -

10 CHIEF JUDGE LIPPMAN: No, but isn't that
11 the point that Judge Smith is making, that they're
12 not coming for the juice?

13 MR. GOLDFARB: That is only one possible
14 test for merely incidental.

15 CHIEF JUDGE LIPPMAN: So in terms of when
16 you say that - - - when you say whether the tax
17 should be or not, whether it's incidental or not,
18 where does your argument prevail?

19 MR. GOLDFARB: I'd like to articulate what
20 the tribunal's basis for finding - - -

21 JUDGE SMITH: I promise I'll stop
22 interrupting you - - -

23 MR. GOLDFARB: Yes.

24 JUDGE SMITH: - - - after this one more
25 time.

1 MR. GOLDFARB: Thank you.

2 JUDGE SMITH: The Tax Appeal Tribunal
3 actually said that it's not the issue whether people
4 were attracted by the juice or by the dance. There
5 are plenty of cases that say it is an issue, aren't
6 there?

7 MR. GOLDFARB: The cases that I'm aware of
8 are from the federal courts, because there's a
9 federal cabaret tax. And what those cases say is
10 there is no one test for merely incidental.

11 JUDGE SMITH: Okay, but - - - understood.

12 MR. GOLDFARB: You have to look at the
13 nature - - -

14 JUDGE SMITH: My question is, that
15 statement in the Tax Appeal Tribunal decision is
16 wrong?

17 MR. GOLDFARB: I don't think that that's
18 wrong, because refreshments can be more than merely
19 incidental, even if they did not come - - -

20 JUDGE SMITH: They say that whether it
21 attracts people or not is irrelevant. At least
22 that's what I read them as saying. You're not saying
23 it's irrelevant.

24 MR. GOLDFARB: I wouldn't say it's entirely
25 irrelevant. I would say that the tribunal's decision

1 that these were not merely incidental is rationally
2 based on substantial evidence. And I'd like to say
3 what that is.

4 Petitioner had a two-drink minimum during
5 this period; sold drinks at a substantial mark-up, up
6 to five dollars for a nonalcoholic beverage; and in
7 fact, its receipts from the beverages were greater
8 than its receipts from the door admission charges,
9 which are clearly not incidental parts of
10 petitioner's business. They were greater than the
11 receipts from the house fees paid by the dancers,
12 which are not incidental.

13 JUDGE SMITH: Yes, but there's a history of
14 what's incidental. And fourteen percent is rather
15 low compared to some of the numbers in the other
16 authorities, aren't they?

17 MR. GOLDFARB: The other authorities are
18 mostly federal authorities which say that the - - -

19 JUDGE SMITH: Well, what about - - -

20 MR. GOLDFARB: - - - amount of receipts is
21 only one factor to be considered.

22 JUDGE SMITH: - - - what about that same
23 opinion of the Department of Taxation, where they - -
24 - they had thirty-three percent. They said thirty-
25 three percent is not too low as a matter of law, but

1 on these facts, it's not taxable. How - - - here,
2 the only thing, as I read it, that the tribunal
3 relied on, was fourteen percent. That's less than
4 half of thirty-three.

5 MR. GOLDFARB: No. The tribunal also, Your
6 Honor, relied on the fact that these were mandatory
7 purchases. The tribunal reasonably concluded that,
8 first of all, a mandatory requirement is not merely
9 incidental. And when the drink receipts exceed even
10 the amounts taken in from the door receipts, which I
11 think that even petitioner would not argue is merely
12 incidental, that drink sales were, in fact, a core
13 component of petitioner's business model, and more
14 than merely incidental.

15 But I would like to go on and argue that
16 petitioner also failed to prove that its
17 entertainment was limited to dramatic or musical arts
18 performances, and therefore it's taxable under either
19 (f)(1) or (f)(3). We're dealing here with exemptions
20 from a generally applicable sales tax.

21 JUDGE SMITH: I'm sorry. This argument,
22 was this something that the tribunal found, or is
23 this an alternative argument.

24 JUDGE READ: This is your alternative
25 argument. You're making your alternative argument

1 now, aren't you?

2 MR. GOLDFARB: With respect to dramatic or
3 musical arts performance?

4 JUDGE READ: No, with respect to the
5 (f)(3).

6 JUDGE CIPARICK: (f)(1) and (f)(3).

7 JUDGE READ: (f)(1) and (f)(3). You're
8 making the (f)(3) argument now.

9 MR. GOLDFARB: The (f)(3) argument, it has
10 to be merely incidental refreshments.

11 JUDGE SMITH: Okay. And you just finished
12 making that - - -

13 MR. GOLDFARB: Yes.

14 JUDGE SMITH: - - - and we're going to go
15 on to something else. Tell me again what the
16 something else is?

17 MR. GOLDFARB: The something else is that
18 the petitioner failed to prove that its entertainment
19 is limited to dramatic or musical arts performances.
20 So it doesn't enjoy the exemption in either (f)(1) or
21 (f)(3).

22 JUDGE SMITH: Is that because it wasn't
23 choreographic or for some other reason?

24 MR. GOLDFARB: That is because it was not
25 choreographic and one other reason.

1 CHIEF JUDGE LIPPMAN: Why is it not
2 choreographic again?

3 MR. GOLDFARB: Let me first say - - -

4 CHIEF JUDGE LIPPMAN: No, no. But answer
5 that. Why is it not - - -

6 MR. GOLDFARB: Well, with respect to the
7 private dances, the only direct evidence on this
8 issue was - - -

9 CHIEF JUDGE LIPPMAN: What about the public
10 dance? That you say is choreographed?

11 MR. GOLDFARB: No, Your Honor, I think that
12 the tribunal rationally concluded that wasn't
13 choreographed. The tribunal applied a commonly
14 understood dictionary definition of choreography,
15 meaning a dance where the steps and the moves are all
16 planned, arranged, and composed in advance and then
17 it's performed that way. And the record just simply
18 does not bear this out.

19 JUDGE SMITH: So you are saying that an
20 improvised dance is taxable?

21 MR. GOLDFARB: I think that's correct, Your
22 Honor. Well, not the dance itself, but admission
23 fees.

24 JUDGE SMITH: If I - - - if that Theater in
25 the Round that's in the example, if it puts on

1 improvised dance, it has to pay taxes? That's not
2 what the regulation says.

3 MR. GOLDFARB: Well, the statute uses the
4 term "choreographic". It doesn't use the term
5 "dance".

6 JUDGE SMITH: The regulation uses the word
7 "dance" as a synonym.

8 MR. GOLDFARB: That is an example in the
9 regulation, and it's not controlling over the
10 statute.

11 What the record reflects is simply that
12 there are some commonly used moves in stripping. The
13 women would perform what they called various pole
14 tricks, some of which are very difficult to perform,
15 but that doesn't make the entire performance a
16 choreographed one.

17 CHIEF JUDGE LIPPMAN: Wouldn't you say that
18 the most creative performers are often ones who don't
19 have every move choreographed before they start, and
20 that creative artistic people, particularly in the
21 dance mode, certainly there are many instances of
22 that - - - are kind of creative? They're designing
23 their moves as they go along, although they have a
24 whole repertoire of different moves that they might
25 have. Isn't that couldn't that be - - -

1 JUDGE READ: Or maybe - - -

2 CHIEF JUDGE LIPPMAN: - - - artistic or
3 choreographic?

4 JUDGE READ: - - - or maybe there are a
5 certain number of counts when you're doing - - -
6 you're a ballet dancer, and you're performing a
7 pirouette or a series of pirouettes to a certain
8 number of counts, and you may vary it every time you
9 do it. It's improvised.

10 MR. GOLDFARB: I would - - -

11 JUDGE READ: That's not choreographed?

12 MR. GOLDFARB: - - - not dispute that that
13 is creative. But the legislature used - - -

14 JUDGE SMITH: You say it's taxable?

15 MR. GOLDFARB: - - - the term
16 "choreographic".

17 JUDGE SMITH: So you say that if Judge
18 Read's ballet dancer varies her counts, then someone
19 who charges admission to her performance has to pay
20 the tax?

21 MR. GOLDFARB: No, I don't think so, Your
22 Honor. I think if there's some de minimis departure
23 from choreography - - -

24 JUDGE SMITH: It has to be de minimis?

25 MR. GOLDFARB: I think so, Your Honor. I'd

1 MR. GOLDFARB: Because there was plainly
2 insufficient evidence here that the private dances,
3 from which petitioner derives virtually - - - most of
4 its revenue, were choreographed performances. The
5 only direct evidence - - -

6 JUDGE SMITH: You call them private dances.
7 You admit they were dancing in there. I'm a little
8 suspicious myself. But you're calling them dance - -
9 -

10 MR. GOLDFARB: Well, no. I don't admit
11 that. The only direct evidence of what occurred in
12 these private rooms in which petitioner took over
13 300,000 dollars in receipts in, in a quarter, came
14 from one former dancer who testified - - -

15 JUDGE SMITH: Another one - - -

16 MR. GOLDFARB: - - - that she stood,
17 totally nude, near or above the patron and "danced
18 for him that way".

19 JUDGE SMITH: It sounds credible to me,
20 actually. But - - - do you - - - I could imagine the
21 possibility that something other than dance goes on
22 in those rooms once in a while. But you're really
23 saying they weren't dancing, or you're just saying it
24 wasn't very high class dancing?

25 MR. GOLDFARB: I'm saying that there was no

1 proof that it was a choreographic performance, which
2 is what the statute requires.

3 JUDGE SMITH: So your argument does depend
4 on the idea that there's a distinction between a
5 choreographic performance and a dance?

6 MR. GOLDFARB: No, my argument does not
7 depend on that, because all charges of a cabaret or
8 similar place are taxable if - - -

9 JUDGE SMITH: Okay. But you're - - - I'm
10 sorry. But your (f)(1) argument does depend on that?

11 MR. GOLDFARB: My (f)(1) does not depend on
12 that, because - - - and I'd like to get this point
13 out, because my red light is on - - - the main stage
14 performances were only one component of the adult
15 entertainment that was provided in the main room.
16 When the women were not on the stage, they would come
17 off the stage, they'd mingle with the patrons, they'd
18 interact with them. While they were doing this, they
19 would perform so-called table dances and lap dances,
20 during which the patron would - - - the woman would
21 apparently sit in the patron's lap. The tribunal
22 reasonably concluded that just sitting and moving in
23 a patron's lap is not a choreographed performance.

24 JUDGE SMITH: No, I understand - - - I
25 think I understand that argument. But I don't see

1 that particular argument in the tribunal's decision.

2 MR. GOLDFARB: I think that the tribunal
3 described the additional adult entertainment in its
4 decision. And this - - - these interactions out on
5 the floor were really a large part of the
6 entertainment that was provided in exchange for the
7 door charge. So the charges don't qualify for the
8 exemption - - -

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 MR. GOLDFARB: - - - for this reason alone.

11 CHIEF JUDGE LIPPMAN: Okay. Thanks,
12 counsel.

13 MR. GOLDFARB: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor.

15 MR. MCCULLOUGH: Thank you, Your Honor.

16 CHIEF JUDGE LIPPMAN: Are you contending
17 that the latter activity of lap dances or whatever
18 the description is, that that's not choreography,
19 right?

20 MR. MCCULLOUGH: We are contending that
21 it's all part of the choreographed performance. Our
22 expert says - - -

23 CHIEF JUDGE LIPPMAN: It is?

24 JUDGE PIGOTT: You've got an owner who says
25 we don't require dance training; it's not necessary.

1 She gains confidence; she works some busier nights
2 and makes more money for herself. And she - - -

3 MR. MCCULLOUGH: Yes.

4 JUDGE PIGOTT: - - - so I mean, the idea
5 that there's any training isn't there. And as I
6 recall your dancer, she said that she was a single
7 mom on welfare, and a friend of hers said you can
8 make money here. And she went. And there was no
9 training whatsoever.

10 MR. MCCULLOUGH: Well, she said that it
11 took her about seven or eight months, her testimony
12 was - - -

13 JUDGE PIGOTT: Can we get past the idea
14 that somehow this is the Bolshoi? I mean, it just
15 seems to me that what you're doing, is you're having
16 these girls pay to come to your establishment and
17 then - - - and you don't train them, and they do what
18 they do, and they make a lot of money and so do you.
19 And the twain never meet.

20 MR. MCCULLOUGH: Well, Your Honor, get away
21 from the fact that it's the Bolshoi. I'm not
22 suggesting that it's the Bolshoi. What I am
23 suggesting - - -

24 JUDGE SMITH: Well, if the State of New
25 York were to say we're going to tax these erotic

1 dancers and exempt the Bolshoi wouldn't there be a
2 Constitutional problem?

3 MR. MCCULLOUGH: Well, exactly. And we've
4 brought that up. The point is that the State of New
5 York doesn't get to be a dance critic.

6 JUDGE PIGOTT: No. But the tax tribunal
7 gets to make decisions based upon what's taxable and
8 not; they have. The measure is whether there's
9 substantial evidence to support what they said. And
10 you're arguing that because these people are Bolshoi
11 ballet dancers that they are somehow art and
12 therefore they're wrong.

13 MR. MCCULLOUGH: No, I'm not. What I'm
14 suggesting, Your Honor, is that the State of New York
15 has no business differentiating between the Bolshoi
16 and what we do.

17 JUDGE PIGOTT: Well, how about if they
18 don't train - - - if the owner himself says we don't
19 require any dance training whatsoever, and they pay
20 us to come to our establishment. He doesn't hire
21 these people to be dancers. He hire - - - they hire
22 him so they can come in and do whatever they do. He
23 gets paid by them, and he gets paid by them for the
24 rooms.

25 MR. MCCULLOUGH: He provides - - - he's the

1 one who's provided the training by way - - -

2 JUDGE PIGOTT: No, he's not.

3 MR. MCCULLOUGH: - - - in some cases it's
4 video. In some cases it's - - -

5 JUDGE PIGOTT: No, he's not. He's just
6 giving them a pole and a stage and saying give me
7 twenty-five bucks and you can go do what you're
8 doing.

9 MR. MCCULLOUGH: He said in his testimony
10 that he provided other dancers to help and also
11 videos to help, and that it takes a period of time to
12 learn. If you saw - - - and it's part of the record
13 - - - if you saw what these dancers do, you would be
14 saying, no, it's not the Bolshoi, but it's good. And
15 I would point out, Your Honor, that pole dancing is
16 under serious consideration as an Olympic sport. And
17 there are people - - -

18 JUDGE PIGOTT: Are you comparing it to
19 dressage now?

20 MR. MCCULLOUGH: You know, I don't make
21 those decisions either.

22 JUDGE PIGOTT: Well, then why make the
23 argument?

24 MR. MCCULLOUGH: But if it's under
25 consideration as an Olympic sport, these girls,

1 certainly the ones that you would see on these
2 videos, would be in standing to make the team.
3 They're that good.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. MCCULLOUGH: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you both.
7 Appreciate it.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of 677 New Loudon Corporation v. NYS Tax Appeals Tribunal, No. 157 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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