Dance, Inc.,
Petitioner,

v.

New Jersey Department of Labor and Workforce Development,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

OAL DKT. NO LID 05679-15
AGENCY DKT. NO. DOL 13-009
(ON REMAND LID 12201-13)

Issued: February 8, 2017

Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development (the Department or respondent) assessed Dance, Inc., a.k.a. VIP Gentlemen's Club (Dance, VIP or petitioner) for unpaid contributions to the unemployment and disability benefits funds for the period from 2002 through 2005. Petitioner requested a hearing with regard to the Department's assessment. The matter was transmitted to the Office of Administrative Law (OAL), where it was scheduled for a hearing before Administrative Law Judge (ALJ) James A. Geraghty. The issue to be decided was whether those individuals who worked as exotic dancers at petitioner's establishment during the audit period, the years 2002 to 2005, were employees of petitioner and, therefore, whether petitioner was responsible under N.J.S.A. 42:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to those individuals during the audit period.

As to what constitutes "employment," N.J.S.A. 43:21-1 et seq. (the Unemployment Compensation Law or UCL), defines the term "employment" broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6).

This statutory criteria, commonly referred to as the "ABC test," is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

Prior to a hearing, petitioner filed a motion before the ALJ, pursuant to N.J.A.C. 1:1-12.5, for summary decision. Respondent opposed the motion and cross-moved for summary decision. Petitioner opposed respondent's cross-motion and replied. Within the brief filed by petitioner in support of its motion for summary decision, petitioner asserted that the Department had failed to meet its threshold burden under N.J.S.A. 43:21-19(i)(6) to establish that the exotic dancers who performed at petitioner's establishment during the audit period did so for remuneration or under any contract of hire, written or oral, express or implied. Petitioner conceded that once that threshold test is met, the putative employer must satisfy each prong of the "ABC test" in order to establish that a given performer is an independent contractor and thereby exempt from coverage under N.J.S.A. 43:21-7. However, petitioner asserted that because the exotic dancers who perform at its establishment receive remuneration in the form of dance fees and tips directly from the establishment's patrons, there are no services performed "for remuneration;" thus, petitioner asserted, there is no need for the petitioner to prove that it meets the ABC test.

In response to petitioner's motion for summary decision, described above, the Department asserted before the ALJ that, (1) petitioner had conceded in its motion papers that the exotic dancers received "tips" during the audit period, the years 2002 through 2005, (2) under N.J.S.A. 43:21-19(o) "wages" includes gratuities a worker regularly receives in the course of his or her employment from other than his or her employer, and (3) under N.J.S.A. 43:21-19(p) "remuneration" means all compensation for personal

services, which must necessarily include wages. Thus, the Department maintained that by petitioner's own account, the dancers had performed services for tips-wages-remuneration during the period from 2002 to 2005 and that "employment" under N.J.S.A. 43:21-19(i)(6) had, therefore, been established, unless and until it could be proven that each of the three prongs of the ABC Test had been met. Consequently, the Department urged the ALJ to deny petitioner's motion for summary decision.[1]

The ALJ granted petitioner's motion for summary decision and denied respondent's cross-motion for summary decision, concluding that petitioner was not liable for contributions to the State unemployment and disability benefits funds for work performed by the exotic dancers at VIP during the audit period, the years 2002 to 2005. The ALJ explained:

> It is beyond cavil that the UCL (Unemployment Compensation Law) is a tax statute. It does not regulate food distribution or alcoholic beverages. It is no more "remedial" as contended by the DOL than a sales tax. Despite respondent's contention to the contrary, the hoary rule of statutory construction is that tax statutes are strictly construed in favor of the taxpayer and against the State. Stryker Corp. v. Dir., Div. of Tax., 168 N.J. 138 (2001); 3A Southerland on Statutory Construction § 66.01, .02; Fedders Fin. Corp. v. Dir., Div. of Tax., 96 N.J. 376 (1984).
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> The Division of Alcohol Beverage Control (ABC) administers the alcoholic beverage control laws and regulations N.J.A.C. 13:2-19. The respondent contends that all services performed by an individual for remuneration constitute employment for purposes of the UCL unless the individual satisfies a three-prong test, which it characterizes as "the ABC test." In this context, ABC does not refer to Alcohol Control Commission[2] but rather to three subparagraphs in the UCL. The upshot is that if services were not performed for remuneration, there is no employment within the meaning of the UCL. Therefore, the cases cited by respondent involving ABC law, or the so-called three-prong test, are inapposite.
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> Respondent argues that the involved dancers indeed receive remuneration in the form of the prestige that adheres to their association with the petitioner. This notion is comparable to saying that being

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[1] In support of its cross-motion for summary decision, the respondent asserted not only that it had met the threshold burden of establishing that services had been performed for remuneration, thereby resulting in a rebuttable presumption of "employment," but also maintained that petitioner had failed to satisfy each prong of the ABC test, thereby justifying a grant by the ALJ of summary decision in favor of respondent.

[2] Presumably, the ALJ meant Alcohol Beverage Control, and not Alcohol Control Commission, since the acronym for Alcohol Control Commission would be "ACC," not "ABC."

> employed by Citibank or General Motors itself is remuneration. This contention is nonsensical and is completely rejected by the OAL. The respondent fails to explain how employment at a go-go bar is prestigious.[3]
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> In apropos cases, federal courts have considered professional entertainers not to be employees for federal tax withholding purposes, and that the entertainers' treatment as lessees was reasonable. Déjà vu Entm't Enter. of Minnesota v. United States 1 F. Supp. 2d 964 (D. Minn. 1998); Marlar v. United States, 151 F.3d 962 (9th Cir. 1998).[4] In anticipation of respondent's argument that Dance, Inc. received a benefit from the dancers in the form of increased patronage, as a threshold matter, the question is not whether the employer benefited from the dancers activities, but rather whether the dancers received remuneration from the employer. [citing AC&C Dogs v. New Jersey Dep't of Labor, 332 N.J. Super. 330 (App. Div. 200), from which opinion the ALJ also includes a quote within his initial decision]

Upon de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions and reply to exceptions filed by the parties, I rejected the ALJ's grant of summary decision in favor of petitioner, as well as the findings of fact and conclusions of law upon which that decision had been based. Specifically, I agreed with respondent that the payments received by the exotic dancers from customers of petitioner, which included dance fees and tips, did in fact constitute remuneration for services. Therefore, I concluded that the services performed by the exotic dancers during the entire audit period had constituted "employment," as that term is defined at N.J.S.A. 43:21-19(i)(6), unless and until petitioner could establish that each of the three prongs of the ABC Test had been met.

By decision, dated March 23, 2015, I remanded the matter to the OAL for a hearing to determine whether petitioner was able to satisfy its burden of meeting each one

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[3] A thorough review of respondent's motion papers reveals no mention of "prestige" adhering to the dancer's association with VIP, nor does respondent appear to assert in those papers that employment at a go-go bar is "prestigious." There is a citation within respondent's motion papers to an OAL initial decision in Earl Riller t/a Citicab and Limo Service v. New Jersey Department of Labor, OAL Docket No. LID627-00, wherein the ALJ observed relative to the threshold issue of remuneration that although the cab drivers at issue in that case had not been paid by the petitioner, "the drivers did receive remuneration in the form of the benefits of association with Citicab, the use of the dispatch service and the staff, the use of the company name and the use of the company's medallions." Presumably it is to this citation by respondent that the ALJ was referring.

[4] The ALJ also noted, citing the same two cases and one other – JJR v. United States, 36 F. Supp. 2d 1259 (W.D. Washington 1999), that "[i]n cases such as the instant matter the courts have awarded the putative employer litigation fees because the State position was unreasonable."

of the three criteria of the ABC Test relative to the exotic dancers who had performed at its establishment during the audit period from 2002 through 2005. The matter was initially assigned to ALJ Jesse H. Strauss, but was later reassigned to ALJ Thomas R. Betancourt. ALJ Betancourt conducted a hearing and issued a new initial decision. In that post-remand initial decision, the ALJ found that petitioner had failed to meet its burden under each of the three prongs of the ABC test. Specifically, the ALJ found the following relative to each of the three prongs of the ABC test:

Prong "A"

The ALJ found the following:

> Under Prong A of the ABC test, petitioner must show that the dancers have been, and will continue to be, free from control or direction over the performance of their services, both under their contracts of service and in fact. According to the Supreme Court in CRW [Carpet Remnant Warehouse], supra, 125 N.J. at 590, specific factors that indicate control include: 'whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally.'
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> In the instant matter, both Mr. Loprete, the owner, and Mr. Clougher, the manager, testified that dancers had no set days or hours. They further testified that the dancers could come and go as they pleased. No dancers testified. Further, no contact information was provided to respondent. The E141A, which is to list who is working at the establishment on any given day, was likewise not supplied to respondent. Petitioner advertised specific dancers on specific days on its website during the audit period. It is difficult to reach the conclusion that petitioner exercised no control at all over the dancers' date and times of performance given the paucity of evidence presented by petitioner. I CONCLUDE petitioner has not demonstrated by a preponderance of the evidence that it satisfied Prong A of the ABC test.

Prong "B"

The ALJ found the following:

> Prong B requires petitioner to prove that the services performed by the dancers were either outside the usual course of business, or performed outside of all the places of business of the petitioner.
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> . . .

> The 2005 tax return of petitioner lists the business activity as "Drinking Place" and the product or service as "Alcohol," [however] it is clear from the testimony and evidence presented that the main business of the establishment was to provide alcohol **and entertainment**, [and that] the services performed by the dancers were an integral part of the business. In addition, the dancing was performed at petitioner's place of business, i.e., the club. Therefore, based on the testimony and evidence presented, I CONCLUDE that the petitioner has failed to satisfy Prong B of the test.

Prong "C"

The ALJ found the following:

> Prong C requires that the petitioner must establish that the dancers in question customarily engaged in an independently established trade, occupation, profession, or business, which would survive the termination of their relationship with the petitioner.
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> . . .
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> Petitioner offered nothing to establish that the dancers were engaged in an independently established trade, occupation, profession, or business, which would survive the termination of their relationship with the petitioner. No dancers were called to testify. The only evidence regarding the dancers' relationship with petitioner was the testimony of Mr. Loprete and Mr. Clougher regarding that dancers were free to dance at other clubs. The burden is petitioner's to establish that it meets all three prongs of the ABC test. I CONCLUDE that petitioner has failed to meet its burden that it satisfies Prong C of the ABC test.

Thus, my having already concluded within the body of the March 23, 2015 remand decision that for the audit period, 2002 through 2005, the dancers had performed services for remuneration, thereby resulting in a presumption of employment, the ALJ concluded that because petitioner had failed to satisfy either Prong "A," Prong "B," or Prong "C" of the ABC test, the exotic dancers who had performed at petitioner's establishment during the audit period had been employees of petitioner. Consequently, the ALJ recommended that petitioner's appeal be dismissed. No exceptions to the ALJ's initial decision were filed.

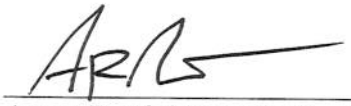
Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, I have accepted and adopted the findings of fact, conclusions and recommendation contained in the ALJ's initial decision.

ORDER

Therefore, with regard to all exotic dancers who performed at VIP's establishment during the audit period, petitioner's appeal is hereby dismissed and petitioner is hereby ordered to immediately remit to the Department for the years 2002 through 2005 $37,804.49 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT



Aaron R. Fichtner, Ph.D., Acting Commissioner
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