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CHAPTER 279

LAWS OF 20 06

SENATE BILL _____

ASSEMBLY BILL 11594

STATE OF NEW YORK

11594

IN ASSEMBLY

May 30, 2006

Introduced by M. of A. FARRELL, MORELLE -- read once and referred to the
Committee on Ways and Means

AN ACT to amend the tax law, in relation to exempting from sales taxes
imposed by or pursuant to the authority of article 28 or 29 of the tax
law a portion of the amount paid as the charge of a roof garden,
cabaret or other similar place in respect of admission

S 6972-B - Maziarz

DATE RECEIVED BY GOVERNOR:

JUL 14 2006

ACTION MUST BE TAKEN BY:

JUL 26 2006

DATE GOVERNOR'S ACTION TAKEN:

JUL 26 2006

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SENATE VOTE ___ Y ___ N

HOME RULE MESSAGE ___ Y ___ N

DATE _____

ASSEMBLY VOTE ___ Y ___ N

DATE _____

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**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A11594

SPONSOR: Farrell (MS)

TITLE OF BILL: An act to amend the tax law, in relation to exempting from sales taxes imposed by or pursuant to the authority of article 28 or 29 of the tax law a portion of the amount paid as the charge of a roof garden, cabaret or other similar place in respect of admission

PURPOSE OR GENERAL IDEA OF BILL: Section 1 amends Section 1101 (d) (12) of the tax law by specifying that venues offering live dramatic or musical arts performances, where the charge for admission is separate from the charge for food, refreshment or merchandise, are exempt from sales tax upon admission charges. This legislation provides that the Commissioner of Taxation and Finance may establish guidelines for commercially reasonable charges for food, refreshment and merchandise.

Section 2 amends Section 1105 (f) (3) of the tax law to exempt roof gardens, cabaret, dance hall or other similar places that offer live musical or live dramatic arts performances from tax upon admission charges.

Section 3 sets the effective date.

CURRENT LAW: Section 1101 (d) (12) of the tax law exempts sales tax on charges for admission when the serving or selling of food, refreshments or merchandise is "merely incidental."

JUSTIFICATION: Whether admission is exempt from sales tax is based upon a subjective standard, where the selling of food, refreshment or merchandise is "merely incidental" to a live musical or dramatic arts performance. Currently the admission charges to theater, opera, ballet, dinner theatre and live musical arts performances in venues both large and small are not subject to sales tax. However, admission to jazz clubs is subject to sales tax.

This legislation addresses the subjective nature of the current language, by exempting sales tax on admission charges to all venues that offer live musical or dramatic arts performances, where the selling of food, refreshments or merchandise is separate from the charge of admission. It establishes an objective standard, which stresses a "commercially reasonable rate" to prevent any circumvention of the law's intent, for example, by loading food charges into admission charges. The New York State Tax Department has acknowledged that the primary activity and focus of dinner theatre remains the dramatic presentation. The Department found that food and beverage is not connected to the performances in any way other than the fact that it takes place in the same venue. Therefore, tax is not collected on the admission. It is, however, collected on the food and beverage service. Unfortunately, not all venues offering live musical and dramatic arts performances, (such as jazz clubs and dance halls) are afforded the same exemption. These venues and these artists are the source of a substantial portion of the estimated \$2.5 billion in economic activity gener-

ated by NYC's nightlife, according to a New York Nightlife Association's survey in 1997. The same survey found that employment, both direct and indirect, totaled 27,040 jobs. 35% of Nightlife attendees are out-of-town visitors with 89% of these visitors saying that their nightlife attendance is the main reason for coming to NYC. Visitors spend \$1.021 billion as a result of attending music venues and related activities. This legislation ensures that all venues offering live musical and dramatic arts performances are allowed the same exemptions, providing those members of the entertainment industry with similar benefits. Supporting live dramatic and musical art forms with this legislation would strengthen New York City's unique and important cultural attractions, and enhance economic development.

PRIOR LEGISLATIVE HISTORY: This is a new bill

FISCAL IMPLICATIONS: Estimated \$1.7M

EFFECTIVE DATE: This act shall take effect on April first of the year following its enactment.



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

Legislative Bureau

TO: COUNSEL TO THE GOVERNOR

Re: SENATE

ASSEMBLY 11594

Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

ELIOT SPITZER
ATTORNEY GENERAL

Date : July 20, 2006

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B-201

BUDGET REPORT ON BILLS

Session Year 2006

SENATE:
No.

Introduced by:

ASSEMBLY:
No. A11594

Law: Tax

Sections: 1123

Division of the Budget recommendation on the above bill:

Approve: _____ Veto: _____ No Objection: X No Recommendation: _____

1. Subject and Purpose:

This bill would exempt admissions to a live musical or dramatic arts performance on a roof garden, cabaret or other similar place in the State from the sales and use tax.

2. Summary of Provisions:

Section 1 creates a new section 1223 to exempt from tax the admission charge to a roof garden, cabaret or other similar place if:

- The admission charge is separately stated;
- Either the separately stated charges for food, drink, service and merchandise do not fluctuate in price when a performance occurs compared to when a performance does not occur OR If a place is only open when such performance occurs, the food, drink, service and merchandise is priced at a similar price as those in the surrounding area;
- Retains and makes available menus and other statement of charges to the Commissioner of the Department of Taxation and Finance.

Section 2 provides an effective date of the first day of a sales tax quarter at least 60 days following the date on which the bill becomes a law.

3. Legislative History:

A similar bill, A-7385A, was vetoed by the Governor since it placed an undue burden on the Department of Taxation and Finance. This bill is an attempt to correct those issues.

4. Arguments in Support:

In the Governor's veto message, the Department of Taxation and Finance was directed to work with other interested parties in developing legislation that achieves the bill's goal in an appropriate manner. This new bill achieves those objectives.

In addition, Tax Law section 1105(f)(1) specifically exempts admissions to live musical or dramatic arts performance. The admission to a live musical or dramatic arts performance held at a roof garden, cabaret or other similar place should have the same tax treatment.

This proposal would also promote live musical and dramatic arts performances.

5. Arguments in Opposition:

The Department of Taxation and Finance will still face an administrative burden since they must determine if the price of certain goods is being charged fairly and accurately. It also sets another narrow exemption in the Tax Law.

This legislation will reduce revenue to the State's General Fund, but it was not negotiated as part of the Executive Budget or during the "clean-up" process.

In addition, this legislation would reduce local revenue without a local option.

6. Other State Agencies Interested:

None known.

7. Other Interested Groups:

Department of Taxation and Finance

8. Budget Implications:

The State revenue loss is estimated to be \$1.1 million in 2006-07 and \$2.2 million in 2007-08. Local revenue losses would be roughly the same in both years (There is no local option).

9. Recommendation:

Since this provision corrects the issues raised in the veto message and the financial impact has no material impact on the financial plan, the Division of the Budget has no objection to this bill.



STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
W.A. HARRIMAN CAMPUS
ALBANY, NY 12227

Andrew S. Eristoff
Commissioner

July 6, 2006

The Honorable George Pataki
Governor of New York
State Capitol
Albany, New York 12224

Re: Assembly Bill No. 11594
Our File No. L-18063

Dear Governor Pataki:

You have asked for my comments on the above bill which is, or will soon be, before you for executive action.

Generally, the purpose of the bill would be to exempt from State and local sales taxes the portion of the charge of a roof garden, cabaret or other similar place (together, "cabaret") for admission to the place to see a live dramatic or musical arts performance, provided that the admission portion of such charge is charged separately from the other things sold at such place and other conditions are met.

Section 1 of the bill would add Tax Law section 1123 to exempt from State and local sales taxes the portion of a cabaret's charge for admission to attend a live dramatic or musical arts performance so long as certain conditions are met. The cabaret would have to state the admission portion of the charge separately from all other portions of its charge. It would also have to state separately its charges for food, drink, service and merchandise and either (1) its separately stated charges could not be less on a performance day than they are on a non-performance day, or (2), if the place is only open on performance days, then its separately stated charges for food, drink, service and merchandise prices must be comparable to food, drink, service and merchandise offered by nearby cabarets and restaurants for comparable food, drink, service and merchandise. Finally, the place must retain copies of its menus and other statements of its prices as part of the records that persons required to collect sales taxes are required to keep under section 1135 of the Tax Law.

Section 2 provides the bill would take effect on the first day of the sales tax quarterly period next commencing at least 60 days after the bill is enacted, in accordance with the usual transitional provisions in sections 1106 and 1217 of the Tax Law. For example, if the bill were enacted in June, 2006, it would take effect September 1, 2006; or, if enacted in July, 2006, it would take effect December 1, 2006.

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Under current law, cabaret charges are fully subject to tax, including the portion related to admission. Admission charges to a place of amusement to see a live dramatic or musical arts performance are not currently subject to tax. This bill was drafted in response to the Governor's Veto Message No. 63 of A.7385-A of 2005, which directed the Tax Department to work with the sponsors and others to arrive at a workable bill to achieve the above-state purpose. The conditions in the bill for a cabaret's admission charge component to be exempt would provide an objective standard to gauge the reasonableness of the cabaret's charges for food, drink, service and merchandise without the need to determine whether the cabaret's prices are "commercially reasonable" as compared to other establishments. If the cabaret is open only on nights when a performance occurs, then its food, drink, service and merchandise prices must be comparable to food, drink, service and merchandise prices offered by nearby cabarets and restaurants for comparable food, drink, service and merchandise. Comparing the cabaret's prices to actual prices at other places for similar food, drink, service and merchandise is a more readily understandable standard than "commercially reasonable." Requiring a cabaret to retain copies of its menus and other statements of its prices as part of the records it is required to keep under section 1135 of the Tax Law is necessary to ensure that a cabaret's charges comply with the requirements for exemption.

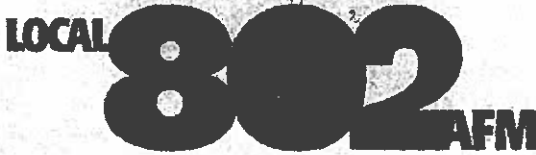
I have no objection to executive approval of the bill.

Sincerely,

/S/

Andrew S. Eristoff
Commissioner

electronic copy sent to:
(Legislative.Secretary@chamber.state.ny.us)



Associated Musicians of Greater New York

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Fax 212-293-0002 (2nd fl) • 489-6030 (3rd fl) • 245-6257 (4th fl) • 245-6255 (5th fl)

July 18, 2006

Honorable George E. Pataki
Governor
State of New York
Executive Chamber, State Capitol Building
Albany, New York 12224

RE: A.11594 (Farrell)

Dear Governor Pataki:

Local 802 AFM (American Federation of Musicians), the largest local union of professional musicians in the world, strongly supports A.11594 (Farrell). This legislation would amend the tax law by specifying that venues offering live dramatic musical arts performances, where the charge for admission is separate from food, refreshment or merchandise, are exempt from sales tax. In 2005, a similar bill received a veto message (Veto #63). We have worked closely with the Governor's Counsel office and the New York State Tax Department to ensure that this legislation s the concerns you raised in your veto message.

Our members live and perform throughout New York State performing in world famous clubs, hotels and cabarets. Local 802 musicians include the greatest jazz artists in the world, as well as talented orchestral musicians who perform at Lincoln Center, on Broadway, and freelance musicians working throughout New York.

Whether admission is exempt from sales tax is based upon a subjective standard where the selling of food refreshment or merchandise is "merely incidental" to a live musical or dramatic arts performance. Currently the admission charges to theatre, opera, ballet, dinner theatre and live musical arts performances in venues both large and small are not subject to sales tax. However, admissions to jazz clubs are subject to sales tax. This legislation addresses the subjective nature of the current language, by exempting sales tax on admission charges to all venues that offer live musical or dramatic arts performances, where the selling of food, refreshments or merchandise is separate from the charge of admission. It establishes an objective standard, which stresses a "commercially reasonable rate" to prevent any circumvention of the law's intent, for example, by loading food charges into admission charges.

Unfortunately, not all venues offering live musical and dramatic arts performances, (such as jazz clubs and dance halls) are afforded the same exemption. These venues and these artists are the source of a substantial portion of the estimated \$2.5 billion in economic activity generated by NYC's nightlife, according to a New York Nightlife Association's survey in 1997.



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MUSICIAN!
We're the **US** in
MUSIC

The same survey found that employment, both direct and indirect, totaled 27,040 jobs. 35% of Nightlife attendees are out-of-town visitors with 89% of these visitors saying that their nightlife attendance is the main reason for coming to NYC.

New York City is the live music capital of the world, and the artists who make it so are Local 802 members. Jazz is the truly authentic American innovation in music and is treasured throughout the world. Visitors spend huge sums in New York to view these and other cultural treasures.

This legislation ensures that all venues offering live musical and dramatic arts performances are allowed the same tax exemptions. Supporting live dramatic and musical art forms with this legislation would strengthen New York City's unique and important cultural attractions, and enhance the State's economic development. Local 802 is working with a number of major jazz clubs in NYC have agreed to direct the savings from the admission tax exemption to the health and pension benefit funds of Local 802 to provide for the musicians. Local 802 is committed to making this a standard practice in the industry.

The Governor's Veto Message urged the parties to come together to address concerns related to feasibility of enforcement. Through meetings with the Counsel's Office and the Tax Department staff, we successfully accomplished this. For the above reasons, Local 802 AFM urges your support for the enactment of this important legislation.

Sincerely,



David Lennon
President, Local 802 AFM

cc: Honorable Herman D. Farrell
Honorable George Maziarz
Ryan McAllister, Counsel to the Governor

STATE OF NEW YORK

11594

IN ASSEMBLY

May 30, 2006

Introduced by M. of A. FARRELL, MORELLE -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to exempting from sales taxes imposed by or pursuant to the authority of article 28 or 29 of the tax law a portion of the amount paid as the charge of a roof garden, cabaret or other similar place in respect of admission

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The tax law is amended by adding a new section 1123 to read
2 as follows:

3 § 1123. Exemption from tax on the charge of a roof garden, cabaret or
4 other similar place. The portion of the amount paid as the charge of a
5 roof garden, cabaret or other similar place in the state for admission
6 to attend a dramatic or musical arts performance at the place shall be
7 exempt from the tax imposed by paragraph three of subdivision (f) of
8 section eleven hundred five of this article but only if:

9 (a) the recipient states the charge for such admission separately from
10 all other portions of such amount;

11 (b) either (i) the separately stated charges for food, drink, service
12 and merchandise are not less on a day when such place offers such a
13 performance as on a day when such place does not offer such performance
14 or (ii) if such place is open for business only when it offers such a
15 performance, it separately states its charges for food, drink, service
16 and merchandise and such separately stated charges are comparable to
17 charges for comparable food, drink, service and merchandise at other
18 such places and restaurants and taverns in the United States census
19 bureau metropolitan statistical area in which such place is located or
20 in an immediately adjacent metropolitan statistical area or in a compa-
21 rable area if such place is not located in a metropolitan statistical
22 area; and

23 (c) such place retains and makes available to the commissioner menus
24 and any other statements of its charges, showing all of its charges for
25 food, drink, service, merchandise and admission, as part of the records

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD16952-01-6

A. 11594

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1 required to be kept under section eleven hundred thirty-five of this
2 article.

3 § 2. This act shall take effect on the first day of a sales tax quar-
4 terly period, as described in subdivision (b) of section 1136 of the tax
5 law, next commencing at least 60 days after this act shall have become a
6 law and shall apply in accordance with the applicable transitional
7 provisions of sections 1106 and 1217 of the tax law.

§ 1123. Exemption from tax on the charge of a roof garden, cabaret or other similar place. 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 but only if:

(a) the recipient states the charge for such admission separately from all other portions of such amount;

(b) either (i) the separately stated charges for food, drink, service and merchandise are not less on a day when such place offers such a performance as on a day when such place does not offer such performance or (ii) if such place is open for business only when it offers such a performance, it separately states its charges for food, drink, service and merchandise and such separately stated charges are comparable to charges for comparable food, drink, service and merchandise at other such places and restaurants and taverns in the United States census bureau metropolitan statistical area in which such place is located or in an immediately adjacent metropolitan statistical area or in a comparable area if such place is not located in a metropolitan statistical area; and

(c) such place retains and makes available to the commissioner menus and any other statements of its charges, showing all of its charges for food, drink, service, merchandise and admission, as part of the records required to be kept under section eleven hundred thirty-five of this article.