

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry J. & Gertrude I. Brady :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for the :
Years 1971 and 1972. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Harry J. & Gertrude I. Brady, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry J. & Gertrude I. Brady
208 Fells Rd.
Essex Fells, NJ 07021

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Conna P. Hegeland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of
Harry J. & Gertrude I. Brady :

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& UBT under Article 22 & 23 of the Tax Law for the:
Years 1971 and 1972.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon John P. Volandes the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John P. Volandes
James D. Miller & Co.
140 Nassau St.
New York, NY 10038

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Bernie P. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 2, 1981

Harry J. & Gertrude I. Brady
208 Fells Rd.
Essex Fells, NJ 07021

Dear Mr. & Mrs. Brady:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,
Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
John P. Volandes
James D. Miller & Co.
140 Nassau St.
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARRY J. BRADY and GERTRUDE I. BRADY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated Business Taxes under Articles 22 and	:	
23 of the Tax Law for the Years 1971 and	:	
1972.	:	

Petitioners, Harry J. Brady and Gertrude I. Brady, his wife, 208 Fells Road, Essex Fells, New Jersey 07021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1971 and 1972 (File No. 13088).

Petitioner Harry J. Brady also filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1971 and 1972.

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 30, 1977 and was continued to conclusion at the same location on April 11, 1978. Petitioners appeared by John P. Volandes, CPA and James D. Miller & Co. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUES

I. Whether certain income which Mr. Brady had reported on his personal income tax return as salary income subject to withholding is subject to unincorporated business tax.

II. Whether certain other income which Mr. Brady had reported on his personal income tax return as business income is subject to unincorporated business tax.

III. Whether certain income which Mr. Brady received in fixed amounts and under an agreement constituted an "annuity" which is not subject to personal income tax to a nonresident under Regulation 20 NYCRR 131.4(d).

IV. Whether the income of petitioners is derived in part from non-New York sources so as not to be subject to tax in New York.

FINDINGS OF FACT

1. (a) A Notice of Deficiency was issued on February 24, 1975 for personal income tax for 1971 and 1972 against Harry J. Brady and Gertrude I. Brady. This was in the amount of \$51,171.81 plus interest of \$8,208.55. This tax was attributable to an increase in the amount of wage income and to petitioner's failure to report business income.

(b) A Notice of Deficiency was issued on February 24, 1975 for unincorporated business taxes for 1971 and 1972 against Harry J. Brady. This was in the amount of \$21,901.46, plus penalties under sections 685(a)(1) and (a)(2) of the Tax Law of \$8,357.44, and interest of \$3,542.11, for a total of \$33,801.01. This tax was computed on petitioner Harry Brady's entire amount of wage income subject to tax withholding, plus the amount of business income and less allowance for taxpayer's services and less business exemption. The penalties were for failure to file returns for unincorporated business tax or to pay that tax.

2. Mr. Brady was a resident of Essex Fells, New Jersey and a nonresident of New York.

3. Mr. Brady is in the insurance business. He received income from R.C. Rathbone and Son, Inc. and its successor, Fred S. James, & Co., of New York, Inc. ("James") insurance brokers, from 1923 to 1971. He was primarily a salesman. When he retired in April 1971, he was also Chairman of the Board of Directors of James. He had no stock or other financial interest in that corporation.

4. Mr. Brady specialized in "industrial accounts", the sales of liability property and marine insurance to major corporate clients. He did only sales work. The task of servicing these accounts, including the necessary adjustments, engineering and bookkeeping services, was done by employees of James.

5. The James firm treated Mr. Brady as an employee under its hospitalization and insurance programs. He was considered an employee for purposes of unemployment insurance in accordance with a ruling of the Unemployment Division of the Labor Department in 1967.

6. During his career with James, Mr. Brady had had assistants assigned to him for purposes of making sales. He also conducted training sessions for other salesman.

7. The income reported by Mr. Brady as business income on Schedule C of petitioners' tax returns was from an escrow account which contained insurance income earned by him in prior years from sources outside of the United States. While Mr. Brady contends that this was business done for James, he admits that it was done in his own name and done that way as "a subterfuge" because James could not itself do this business overseas. James had a beneficial interest in the proceeds of that business and it was done to "protect" the other business of James. Mr. Brady has not, however, contradicted the fact that he controlled this business. Mr. Brady and not James had to personally guarantee the payment

of premiums by the ultimate customers in accordance with trade practice in European markets.

8. While Mr. Brady argued that he did some insurance business from an office in his home in New Jersey, he in no way described that office, the type of work done or the amount of time spent there and, therefore, he appears to have abandoned any claim that work performed at his home in New Jersey should be considered to be from New Jersey sources. He did not include the expenses of such an office as a deduction on his tax returns. Mr. Brady's stationery and telephone listing indicated the addresses in New York City used by James.

9. Mr. Brady and James had a written agreement with respect to Mr. Brady's services after his retirement on April 1, 1971. The agreement provided that Brady was not to compete with James and in return Brady was to receive compensation at a fixed rate for a ten year period (to survive his death) and he was to be provided with an office in New York and expenses for travel and entertainment.

10. Petitioners did not file unincorporated business tax returns. Petitioners have not offered any testimony with respect to the penalties under sections 685(a)(1) and 685(a)(2) of the Tax Law as included in the notices of deficiency.

CONCLUSIONS OF LAW

A. That the income Mr. Brady received directly from James (and declared by him as salary income subject to tax withholding) was received by him as an employee since James had sufficient direction and control over his activities. This is further corroborated by his long service and involvement in the management of the firm.

B. That the insurance income reported as business income (on Schedule C of Mr. Brady's tax returns) was received by him as an independent contractor. Mr. Brady chose to do the business for which this income was received in the form of an independent businessman and there is no evidence to show that with respect to this business he is not an independent businessman.

C. That the fixed sums received by Mr. Brady were received under an agreement which provided (in paragraph 9) for his services and for his non-competition with James. An agreement for services or for non-competition is not a "retirement" agreement. Since the agreement is not a retirement agreement the fixed sums in question cannot qualify for the special exception provided for "annuities" in Regulation 20 NYCRR 131.4(d).

D. That Mr. Brady has not shown that he performed any services at any location other than the office of James in New York. An allocation of income to sources outside of New York is not permitted. .

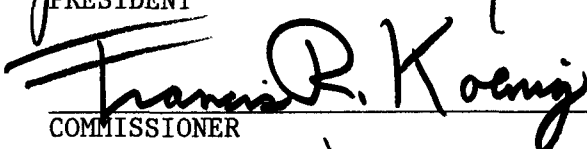
E. That the petition is granted to the extent that petitioner Harry J. Brady's income received directly from James and declared as salary income subject to withholding tax is to be excluded from the computation of the unincorporated business tax and otherwise the deficiencies are confirmed.

DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER