

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Charles Brady :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Year 1976. :

State of New York
County of Albany

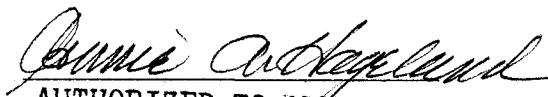
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Charles Brady, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Charles Brady
613 Silvermine Rd.
New Canaan, CT 06840

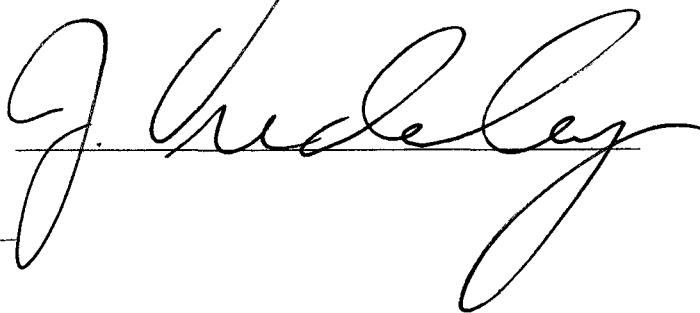
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
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AFFIDAVIT OF MAILING
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Business Tax under Article 23 of the Tax Law for :
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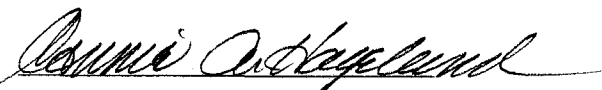
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of December, 1982, he served the within notice of Decision by certified mail upon Rose Marie Manger the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rose Marie Manger
55 North Ave., 14P
Fort Lee, NJ 07024

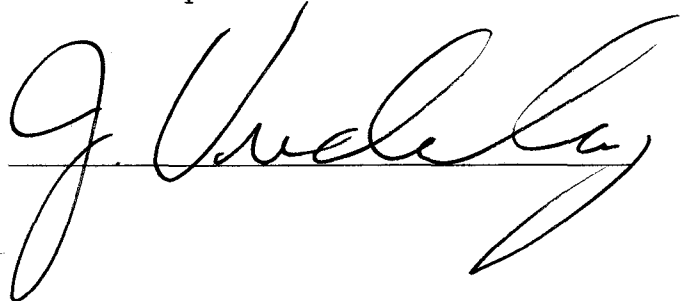
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
14th day of December, 1982.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



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

December 14, 1982

Charles Brady
613 Silvermine Rd.
New Canaan, CT 06840

Dear Mr. 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) 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Rose Marie Manger
55 North Ave., 14P
Fort Lee, NJ 07024
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CHARLES BRADY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Year 1976.	:	

Petitioner, Charles Brady, 613 Silvermine Road, New Canaan, Connecticut 06840, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1976 (File No. 30302).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 23, 1982 at 9:15 A.M. Petitioner appeared with Rose Marie Manger, Esq. The Audit Division appeared by Paul B. Coburn (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether petitioner's activities as a sales representative constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Charles Brady (hereinafter petitioner) filed a joint New York State Income Tax Nonresident Return with his wife for the year 1976 whereon he reported New York business income of \$29,605.00 derived from his activities engaged in as a "Sales Rep." Although petitioner filed an unincorporated business tax return for his sportswear manufacturing sole proprietorship

"Challe", he failed to report on such return his net profit derived from his sales representative activities engaged in on behalf of two principals.

2. Petitioner filed a separate Federal Schedule C (Profit or (Loss) From Business or Profession) for each of his aforestated activities. One was filed for "Challe" wherein he reported a net loss of \$5,613.00, while the other was filed for his activities engaged in as a sales representative and reported a net profit of \$35,218.00.

3. On March 14, 1980, the Audit Division issued a Statement of Audit Changes to petitioner wherein it held that "when two or more business are operated by the same entity net incomes must be combined in determining balance subject to New York State unincorporated business tax". Accordingly, a Notice of Deficiency was issued against petitioner on April 4, 1980 asserting unincorporated business tax of \$1,078.28 plus interest of \$272.18, for a total due of \$1,350.46.

4. Petitioner contended that his sales representative activities were engaged in as an employee of his two principals. Accordingly, he argued that the income derived from such activities is exempt from the imposition of unincorporated business tax.

5. During 1976 petitioner rendered services for Pandora Industries (Pandora), a manufacturer of knitwear. He served as a liaison between customers and executives of its mill in Manchester, New Hampshire. His activities consisted of selling Pandora's unbranded line to national chains such as Sears Roebuck and J.C. Penney. Petitioner worked in conjunction with Pandora's designers and merchandisers to create a line of unbranded goods which would be produced during openings in production schedules. Petitioner began his association with Pandora in 1971.

6. Petitioner reported directly to Pandora's president and was required to attend monthly meetings with Pandora's executives at the mill in Manchester.

7. Petitioner contended that he worked out of Pandora's design room located at 1372 Broadway, New York City; however, his business address reported on both Schedules C was listed as 21 East 37th Street, New York City. A rental deduction of \$9,000.00 was claimed for this office on the Schedule C filed for Challe. Depreciation of office furniture was claimed against both the income from Challe and the income from petitioner's sales representative activities.

8. Petitioner's compensation from Pandora during 1976 was approximately \$50,000.00. The hearing record is unclear as to whether petitioner was compensated on a commission or salary basis.

9. Pandora reimbursed petitioner for expenses incurred on his trips to the mill. Most other ordinary and necessary business expenses incurred with respect to petitioner's activities for Pandora were not reimbursed.

10. Pandora's secretarial staff was made available for petitioner's use.

11. Petitioner was required to periodically visit the mill to inspect initial production of unbranded lines before full scale production commenced.

12. Petitioner needed the approval of Pandora's president for scheduling of his vacation. Orders written by petitioner also needed approval.

13. Pandora did not withhold income or social security taxes from petitioner's compensation. Such compensation was reported on a Federal information return, Form 1099.

14. Pandora did not furnish petitioner with pension or sick leave benefits.

15. During 1976 petitioner also rendered services for a mill known as "Hamshire" which was also located in Manchester, New Hampshire.

16. Petitioner worked for Hamshire for approximately twelve (12) weeks and was compensated \$300.00 per week. Services rendered for Hamshire were essentially the same as those rendered for Pandora. Petitioner testified that Pandora permitted him to work for Hamshire.

17. Petitioner testified that his time spent with respect to activities engaged in for Hamshire was minimal.

18. Petitioner testified that his involvement in Challe was minimal. He claimed that he basically acted as the financier of Challe.

19. Challe was incorporated in New York on July 26, 1976. Petitioner contended that it did not function in the corporate form until 1977.

CONCLUSIONS OF LAW

A. That it is the degree of control and direction exercised by the employer that determines whether the taxpayer is an employee. (E.g., Matter of Greene v. Gallman, 39 A.D.2d 270, 272 aff'd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D.2d 1071, mot. lv. to app. den. 27 N.Y.2d 483; Matter of Hardy v. Murphy, 29 A.D.2d 1038; see 20 NYCRR 203.10; cf. Matter of Sullivan Co., Inc., 289 N.Y. 110, 112.) Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

B. That sufficient direction and control was not exercised by Pandora or Hamshire over petitioner's day-to-day activities so as to form a relationship of employer-employee. Accordingly, petitioner's activities did not constitute services rendered as an employee of Pandora and Hamshire within the meaning and intent of section 703(b) of the Tax Law.

C. That petitioner's sales representative activities constituted the carrying on of an unincorporated business pursuant to section 703(a) of the Tax

Law. Accordingly, the income derived therefrom is subject to the imposition of unincorporated business tax pursuant to section 701(a) of the Tax Law.

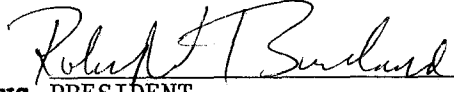
D. That petitioner's net income derived from his sales representative activities is to be combined with his net loss from Challe since both activities constitute one unincorporated business. (20 NYCRR 203.5)

E. That the petition of Charles Brady is denied and the Notice of Deficiency dated April 4, 1980 is sustained together with such additional interest as may be lawfully owing.

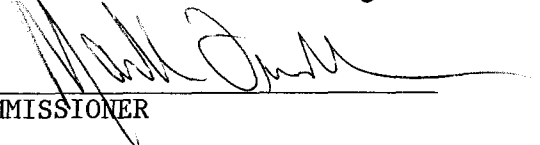
DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER