

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 of :
 Thomas F. Cloney, Jr. :
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 Years 1970, 1971 & 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 18th day of May, 1982, he served the within notice of Decision by certified mail upon Thomas F. Cloney, Jr., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas F. Cloney, Jr.
135 E. 74th St.
New York, NY 10021

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
18th day of May, 1982.

Bernice D. Highland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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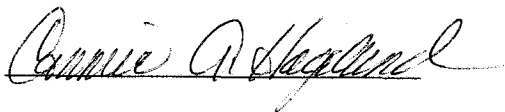
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 18th day of May, 1982, he served the within notice of Decision by certified mail upon Barry Salkin the representative of the petitioner in the within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

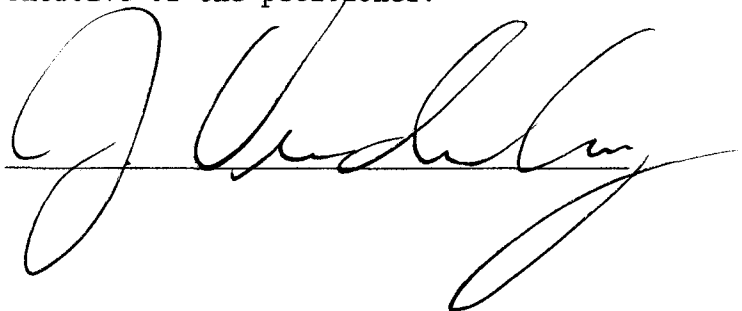
Barry Salkin
Kelley, Drye & Warren
350 Park Ave.
New York, NY 10022

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
18th day of May, 1982.





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

May 18, 1982

Thomas F. Cloney, Jr.
135 E. 74th St.
New York, NY 10021

Dear Mr. Cloney:

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
Barry Salkin
Kelley, Drye & Warren
350 Park Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THOMAS F. CLONEY, JR.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1970,	:	
1971 and 1972.	:	

Petitioner, Thomas F. Cloney, Jr., 135 East 74th Street, New York, New York 10021, 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 1970, 1971 and 1972 (File No. 11965).

On October 17, 1980, petitioner, by his attorneys Kelley, Drye & Warren, Esqs. (E. Lisk Wyckoff, Jr., Esq., and Barry L. Salkin, Esq., of counsel), waived a formal hearing and consented to submission of this matter to the State Tax Commission. The following decision is rendered upon the file as presently constituted.

ISSUE

Whether income derived from petitioner Thomas F. Cloney, Jr.'s activities as an associate odd lot broker was properly subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Thomas F. Cloney, and his wife filed New York State income tax resident returns and unincorporated business tax returns for each of the years at issue.

2. For each of the years at issue, petitioner filed a Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Tax, the amounts of which claims were as follows:

<u>YEAR</u>	<u>AMOUNT OF CREDIT OR REFUND CLAIMED</u>
1970	\$1,597.00
1971	2,718.00
1972	3,381.00

The basis of such claims was petitioner's assertion that he was not an independent contractor, but merely an employee, of an odd lot dealer and therefore, his income was not subject to unincorporated business tax. The Audit Division denied the claims in their entirety; Mr. Cloney timely filed a petition in response thereto.

3. Carlisle & Jacquelin and DeCoppet & Doremus, New York Stock Exchange ("Exchange") firms, were the two principal odd lot dealers on the Exchange. On January 1, 1970, the firms merged. The successor firm known as Carlisle, DeCoppet & Co., a New York partnership, was the only principal odd lot dealer on the Exchange. Mr. Cloney was an associate odd lot broker at Carlisle, DeCoppet & Co. ("the firm") during the years at issue.

4. In connection with doing business as an odd lot dealer, the firm maintained for its own account, an inventory of the securities listed on the Exchange and used by the firm on a daily basis, to satisfy buy and sell odd lot orders (orders for less than 100 shares) received from members and member firms of the Exchange.

5. In order to function as an odd lot dealer, the firm engaged the services of "associate odd lot brokers," such as Mr. Cloney. While partners of the firm executed odd lot orders, such associate odd lot brokers, who were not member partners, executed most of the odd lot orders on behalf of the firm.

6. The duties, responsibilities and functions of all of the associate odd lot brokers were identical.

7. The first duty of an associate odd lot broker, after acquiring a seat on the Exchange, was an assignment to work, for a short period of time, with an experienced associate odd lot broker engaged by the firm, who would teach the new associate odd lot broker. As a new associate odd lot broker became more experienced, the odd lot dealer assigned him a "book" which contained stocks at a trading post in which he was to execute odd lot orders on behalf of the firm.

8. The work of an associate odd lot broker was divided into two parts: (a) the filling of odd lot orders on behalf of the firm received by the firm from its customers, solely other member firms of the Exchange, and (b) execution of offsetting round lot trades in securities owned by the firm which it used to fill odd lot orders received from other member firms of the Exchange.

9. The firm's Floor Committee, consisting of firm partners, was in full charge of all the firm's operations on the floor of the Exchange, including the management of positions. The associate odd lot broker was to keep each position within a prescribed limit (e.g., under 200 shares) with the following exceptions: (a) a partner instructed the associate odd lot broker to increase the inventory in a particular stock; (b) the associate odd lot broker, believing that it would be beneficial to carry more than the minimum inventory in a particular stock, suggested such course of action to a partner, who then approved. The associate odd lot broker was expected to maintain accurate and current records of his position in each stock assigned to him. When utilizing the round lot market to keep each position in line with firm policy, the broker was of course expected to exercise good judgment with an eye to the firm's profit.

10. The associate odd lot broker was required to compute the net position change for his book (the cumulative net sum of changes in inventory of all stocks on his book) at 11:30 A.M., 1:00 P.M. and 2:30 P.M. daily and to promptly report the changes to the firm. Throughout the day, the associate odd lot broker was required to notify the firm of significant "up books" or "down books", important turns of position from long to short or vice versa, and any other unusual situation.

11. The physical processing of limited orders received by the firm was handled not by the associate odd lot broker but by clerks of the firm who frequently trained to be associate odd lot brokers and who also handled the physical processing of market orders when volume was too great for an associate odd lot broker to handle.

12. Until 1968, the associate odd lot broker received 2 1/4 cents per share on stocks selling at or over \$10 per share and 1 1/8 cents per share on stocks selling under \$10 per share (the "differential"), for executing odd lot orders; the odd lot differential was added to the price of the effective round lot sale or to the effective offer on customers' orders to buy, and subtracted from the effective round lot sale or the effective bid on customers' orders to sell. The rate was established by the firm. In 1968, the rate was reduced to the minimum set by the Exchange.

13. In 1968, the physical processing and handling of most odd lot orders was taken away from the associate odd lot brokers, moved off the floor of the Exchange and handled exclusively by clerks of the firm below the floor; but an associate odd lot broker still continued to receive monies from the execution by the firm of odd lot orders although the associate odd lot broker no longer actually processed such orders. From 1968 until mid-1972, pricing and processing

of odd lot orders was done by clerks of the firm. Again, however, the actual execution of the orders was done by the associate odd lot broker.

14. The associate odd lot broker, in addition to the sums paid him for executing odd lot orders, also earned commissions on round lot orders executed by him in maintaining the firm's inventory of stock. Such commissions were paid to the associate odd lot broker by the firm.

15. By mid-1972, Carlisle, DeCoppet & Co. caused the complete computerization of the execution of odd lot orders by its back office, and payment to the associate odd lot broker on execution of odd lot orders ceased. The only compensation which the associate odd lot broker thereafter received was derived from the execution of round lot orders on behalf of the firm. In this regard, the associate odd lot broker received instructions from the firm's computer as to what round lot transactions to effect.

16. Books were assigned by the firm primarily on the basis of an individual associate odd lot broker's performance in executing odd lot orders and managing the inventory of stocks of the firm.

17. The associate odd lot broker never shared in any profit made by the firm on the broker's execution of round lot trades, nor did he have to make up any losses which he incurred in such execution; his activities in this respect were riskless although he might be given a poorer book if he sustained substantial losses. He did not participate in the profits or losses of the firm.

18. The associate odd lot broker was not required to, and did not, contribute or use any of his own capital in executing odd lot or round lot orders on behalf of the firm. At all times, the inventory of stocks in the book which he was running were owned by the firm. He was not required to and did not contribute

his Exchange membership to the odd lot dealer, but he had to own said membership in order to transact business on the floor of the Exchange.

19. The associate odd lot broker was required to work exclusively for the firm.

20. The associate odd lot broker was engaged under an oral contract by the firm. The arrangement was terminable, without notice, at any time by either the associate odd lot broker or the firm. After the merger of the two odd lot dealers in 1970, many associate odd lot brokers were fired.

21. The associate odd lot broker was responsible for his assigned book during the entire five and one-half hours of the trading day. He was permitted one-half hour for lunch, during which time his book was run by a relief broker or by another associate odd lot broker assigned to the same post.

22. The associate odd lot broker was permitted such vacation time as he desired, so long as the firm had enough associate odd lot brokers available each day to conduct the day's business efficiently.

23. The firm provided rent-free a desk or office space in the office of the odd lot dealer; secretarial help, if needed, at no charge; and local telephone services to the brokers. Long-distance telephone calls were billed to the associate odd lot broker at cost. The firm urged the associate odd lot broker to belong to the Stock Exchange Luncheon Club and reimbursed the broker for the entertainment of customers at the Club. If approved in advance by the firm, certain other exceptional customer relations activity was also reimbursed by the firm.

24. Associate odd lot brokers were provided with the same hospitalization and group life insurance coverage as was issued to employees. They were also issued insurance identification cards describing them as "employees".

25. Neither Federal, state nor social security were withheld from sums paid to the associate odd lot broker by the firm.

26. Petitioner, Thomas Cloney, Jr. paid self-employment tax on the net profit he derived from his business activities as a stockbroker.

27. On its 1970, 1971 and 1972 New York State partnership returns, Carlisle, DeCoppet & Co. deducted commissions paid to associate brokers at the line denominated "other deductions", and not at the line denominated "salaries and wages" to employees.

28. For 1970, 1971 and 1972, Mr. Cloney filed Federal Schedule C, Profit (or Loss) from Business or Profession, deducted "other business expenses" in the amounts \$15,069.00, \$16,680.00 and \$17,910.00, respectively, and detailed such expenses. For example, for 1972 he furnished the following details:

Typing & secretarial services	\$ 720
Maintenance services	180
Office expense	360
Public relations expense	2,080
Technical services	600
Business entertainment	3,688 *
Telephone	559
Electricity	45
N.Y. Stock Exchange Club	2,410
Xmas expense	782
Professional development	360
Fees - N.Y. Stock Exchange	4,119
Fees - Sec. Inv. protection	430
Auto expense - business only	918
Travel out of town	359
Promotional costs	300

* Reduced to \$735 upon Federal audit.

Petitioner Thomas Cloney, Jr. also showed deductions for rent on business property, interest expense, legal and professional fees, and depreciation on furniture and fixtures.

CONCLUSIONS OF LAW

A. That the rendering of services by an individual as an employee is not considered an unincorporated business for purposes of Article 23 of the Tax Law.

"The performance of services by an individual as an employee or as an officer or director of a corporation, society, association, or political entity, or as a fiduciary, shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual." Section 703(b).

B. That the determination whether services were performed by an individual as an "employee" or as an "independent agent" turns upon the unique facts and circumstances of each case.

"The distinction between an employee and an independent contractor has been said to be the difference between one who undertakes to achieve an agreed result and to accept the directions of his employer as to the manner in which the result shall be accomplished, and one who agrees to achieve a certain result but is not subject to the orders of the employer as to the means which are used.' (Matter of Morton, 284 N.Y. 167, 172.) 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, affd. 33 N.Y.2d 778; Matter of Frishman v. New York State Tax Comm., 33 A.D. 2d 1071, mot. for 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., 289 N.Y. 110, 112.)" Matter of Liberman v. Gallman, 41 N.Y.2d 774, 778.

The degree of direction and control which results in the conclusion that an employer/employee relationship exists cannot be stated with mathematical precision. Nor is any one particular characteristic of the relationship dispositive. The entire fabric of the relationship between Mr. Cloney and the odd lot dealer must be scrutinized.

C. That the firm failed to withhold income taxes from the odd lot differentials and commissions received by Mr. Cloney: the firm treated him, for withholding tax purposes, as self-employed. Id. In a similar vein, the firm deducted commissions paid to associate brokers under the category "other

deductions", as opposed to under "salaries and wages" on its partnership returns. Mr. Cloney stated that certain business expenses were assumed by the firm (e.g., secretarial and local telephone) and others reimbursed (e.g., entertainment); however, the reimbursements were limited and he availed himself of substantial miscellaneous business deductions. Matter of Pochter v. State Tax Commission, 70 A.D. 2d 972; Matter of Bander v. State Tax Commission, 65 A.D. 2d 847; Matter of Seifer v. State Tax Commission, 58 A.D. 2d 726.

D. That Mr. Cloney was restricted from doing business for any other firm carries no weight in the present context. Prior to 1970, there were only two odd lot dealers with which a broker could associate if he wished to pursue an occupation as an odd lot broker; after the merger, of course, there was only one odd lot dealer.

E. That petitioner lays great emphasis upon the supervision the firm exercised over his daily activities. As to his working hours, these were the hours of the trading day. As to the procedures prescribed by the firm, these were mainly of the clerical type. The source of most of the substantive constraints upon Mr. Cloney's activities was the rules of the Exchange, of which he was an independent member. The very nature of acting as a broker on the floor of the Exchange demanded that Mr. Cloney fully utilize and rely on his experience, business acumen and good judgment, in determining to whom stock should be sold and from whom purchased, and in maximizing the profits which would enure to the firm and to him.

F. That capital, in the form of a Stock Exchange membership, which petitioner Thomas Cloney, Jr. was required to own, was a material income producing factor within the meaning and intent of section 703 of the Tax Law and 20 NYCRR 203.11(b)(2). This regulation is substantially the same as 20

NYCRR 281.4, Question 43, which had been promulgated under Article 16A of the Tax Law. Petitioner, without said membership, would not have received commission income since he would not have been allowed to transact business on the floor of the Stock Exchange.

G. That petitioner Thomas F. Cloney, Jr. was an independent agent associated with Carlisle, DeCoppet & Co. in 1970, 1971 and 1972; therefore, income derived from his activities as an odd lot broker was properly subject to unincorporated business tax.

H. That the petition and the claims for refund of Thomas F. Cloney, Jr. are hereby denied in all respects.

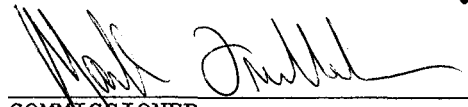
DATED: Albany, New York

MAY 18 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER