

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Keith H. Wood :  
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 1967 - 1969. :  
\_\_\_\_\_

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 Keith H. Wood, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Keith H. Wood  
5 Robert Dr.  
Chatham, NJ 07928

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.

Gunnar P. Hageland

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Keith H. Wood :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
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Business Tax under Article 23 of the Tax Law for :  
the Years 1967 - 1969 :  
\_\_\_\_\_

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 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.

Annie A. Hageland

J. Vredenburg

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

May 18, 1982

Keith H. Wood  
5 Robert Dr.  
Chatham, NJ 07928

Dear Mr. Wood:

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

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In the Matter of the Petitions  
of  
KEITH H. WOOD  
for Redetermination of Deficiencies or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Years 1967,  
1968 and 1969.

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DECISION

Petitioner, Keith H. Wood, 5 Robert Drive, Chatham, New Jersey 07928, filed petitions for redetermination of deficiencies or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967, 1968 and 1969 (File Nos. 13477 and 13478).

On October 17, 1980, petitioner, by his attorneys Kelley, Drye & Warren, Esqs. (E. Lisk Wyckoff, Jr., 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.

ISSUES

I. Whether income derived from petitioner's activities as an associate odd lot broker was properly subject to unincorporated business tax.

II. Whether the notices of deficiency were barred by the three-year statute of limitations.

III. Whether gain from the sale of a stock exchange membership in 1969 was subject to unincorporated business tax.

IV. Whether petitioner was liable to a penalty under section 685(a) of the Tax Law for failure to file an unincorporated business tax return.

FINDINGS OF FACT

1. Petitioner, Keith H. Wood, timely filed nonresident personal income tax returns (with his wife) for the years at issue on which he stated his occupation as "dealer in securities" or "stockbroker" and indicated his income under the category "business income". He did not file any unincorporated business tax return.

2. On June 25, 1973, the Audit Division issued to petitioner a Notice of Deficiency asserting unincorporated business tax, plus penalties and interest thereon, for the years 1967 and 1968 and on March 31, 1975, a Notice of Deficiency asserting unincorporated business tax, plus penalties and interest thereon, for 1969, the amounts scheduled as follows:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1967	\$ 3,850.64	\$ 962.66	\$1,200.01	\$ 6,013.31
1968	6,862.63	1,715.66	1,726.91	10,305.20
1969	6,355.30	1,588.82	1,891.53	9,835.65
	<u>\$17,068.57</u>	<u>\$4,267.14</u>	<u>\$4,818.45</u>	<u>\$26,154.16</u>

The penalties were asserted under subdivision (a) of section 685 of the Tax Law for failure to file unincorporated business tax returns and to pay the tax required to be shown thereon.

Petitioner takes exception to the deficiencies on the ground that his activities as an odd lot broker did not constitute the carrying on of an unincorporated business for purposes of Article 23 and as to the 1969 deficiency, on the ground that it was barred by the statute of limitations. Petitioner contended that the unincorporated business tax imposed on the gain from the sale of the stock exchange membership in 1969 should be payable by the partnership of DeCoppet & Doremus of which he was a member as of January 1, 1969, and not him individually. He did not offer any evidence to support his contention.

Petitioner stated that he "discontinued his activities as a sole proprietor on December 31, 1968. Items shown on Schedule C reflect settlement of transactions entered into in 1968, but not completed cashwise until 1969." He became a member of the partnership of DeCoppet & Doremus on January 1, 1969. Petitioner also contended that penalty imposed for said year was improperly assessed but offered no satisfactory evidence to show that his failure to file an unincorporated business tax return was due to reasonable cause.

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. Petitioner was an associate odd lot broker at DeCoppet & Doremus in 1967, 1968 and 1969.

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 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. Wood. 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 were 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 the 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 taxes were withheld from sums paid to the associate odd lot broker by the firm.

26. The DeCoppet & Doremus Brokers' Manual, in its definition of "associate broker", stated in relevant part:

"An Exchange Member acting thus as an odd-lot broker associated with the firm is an independent contractor who undertakes, as a condition of his association with the firm, to devote his entire time to the responsibilities assigned to him by the firm." (Emphasis in original.)

27. For each of the years 1967, 1968 and 1969, petitioner filed Federal Schedule C, Profit (or Loss) from Business or Profession (sole proprietorship), deducted "other business expenses" in the amounts \$4,322.00, \$2,497.00 and \$1,050.32, respectively, and detailed such expenses. For 1967, he furnished the following detail:

Telephone	\$ 176
N.Y. Stock Exchange fees & dues	2,025
Business entertainment	1,628
Gratuities	493

Petitioner also showed deductions for interest on business indebtedness and for taxes on business and business property.

28. Petitioner was required to purchase at substantial expense and hold in his individual name a seat on the New York Stock Exchange.

#### CONCLUSIONS OF LAW

A. That subdivision (a) of section 683 of the Tax Law states that except as otherwise provided, the tax imposed by Article 22 shall be assessed within three years after filing of the return. Subdivision (c) of said section provides that where no return is filed, the tax may be assessed at any time. Section 683 is made applicable to Article 23 by section 722.

B. That petitioner's personal income tax return did not supply sufficient information to comply with section 722 and therefore did not commence the running of the period of limitation. Accordingly, the deficiency for 1969 was

not time-barred. See Matter of Arbesfeld, Goldstein et al. v. State Tax Commission, 62 A.D.2d 627, mot. for lv. to app. den. 46 N.Y. 2d 705 (1978).

C. 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).

D. 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. Wood and the odd lot dealer must be scrutinized.

E. That the firm failed to withhold income taxes from the odd lot differentials and commissions received by petitioner: the firm treated him, for withholding tax purposes, as self-employed. Id. According to the DeCoppet &

Doremus Brokers' Manual, the firm considered its associate odd lot brokers "independent contractors". Mr. Wood 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.

F. That Mr. Wood 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.

G. 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. Wood'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. Wood 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.

H. That capital, in the form of a Stock Exchange membership, which petitioner 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.

I. That petitioner Keith H. Wood was an independent agent associated with DeCoppet & Doremus in 1967, 1968 and 1969; therefore, income derived from his activities as an odd lot broker was properly subject to unincorporated business tax.

J. That the Stock Exchange membership was not subject to any ownership control by DeCoppet & Doremus nor was it an asset which was pledged to creditors by said firm. [See Matter of Gaines v. Tully, 66 A.D.2d 106, affd. 49 N.Y. 2d. 1008 (1980)]; therefore, the gain from the sale of petitioner's stock exchange membership is subject to unincorporated business tax to petitioner since said seat was an asset employed in his own business within the meaning and intent of section 705(a) of the Tax Law.

K. That petitioner did not sustain his burden of proof imposed by section 689(e) of the Tax Law to show that his failure to file an unincorporated business tax return was due to reasonable cause and not due to willful neglect. Therefore, the penalties imposed are sustained.

L. That the petitions of Keith H. Wood are hereby denied and the notices of deficiency issued June 25, 1973 and March 31, 1975 are sustained, together with penalties and interest.

DATED: Albany, New York

MAY 18 1982

STATE TAX COMMISSION

*James H. Tully*  
PRESIDENT

*Frank R. Koeng*  
COMMISSIONER

*Mark J. [illegible]*  
COMMISSIONER

KELLEY DRYE & WARREN

101 PARK AVENUE

NEW YORK, N. Y. 10178

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September 2, 1982

\* NOT ADMITTED IN NEW YORK

Paul LeFebvre, Esq.  
Department of Taxation  
and Finance  
Building 9, Room 100  
State Office Campus  
Albany, NY 12227

Re: Keith Wood

Dear Mr. LeFebvre:

This letter will confirm our telephone conversation of September 1, 1982. You informed me that a corrected decision for Keith Wood has been prepared, and that it is reasonably anticipated that the decision will be mailed by September 8th. Please notify me promptly if there will be any delay in mailing the corrected decision. In this regard, please be advised that future communications regarding any of the odd-lot broker cases should be mailed to me at the following address:

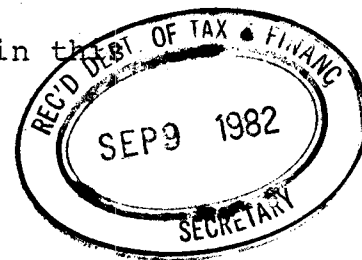
Kelley Drye & Warren  
101 Park Avenue  
New York, NY 10178

Thank you for your continuing assistance in the  
matter.

Very truly yours,

*Barry L. Salkin*

Barry L. Salkin



BLS:lg

cc: Paul Coburn  
Michael Alexander  
Keith Wood