

**NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION**

In the Matter of the Petitions

of

SAMUEL D. FRIEDMAN

:
:
: **DETERMINATION**
:
: **TAT(H) 03-21(UB), et al.**
:
:

Murphy, A.L.J.:

Petitioner, Samuel D. Friedman, filed Petitions for Hearing with the New York City ("City") Tax Appeals Tribunal requesting a refund of Unincorporated Business Tax ("UBT") paid for 1992 and 1993, and a redetermination of deficiencies of UBT asserted for the years 1994 through 2000 (collectively, the "Tax Years").¹

Petitioner was represented by Joseph Lipari, Esq. and Ellen S. Brody, Esq., of Roberts and Holland, LLP. The Commissioner of Finance ("Respondent") was represented by George P. Lynch, Esq., and Steven Laduzinski, Esq., Assistant Corporation Counsels.

A Hearing was held on November 30 and December 2, 2004, at which time evidence was admitted, testimony was taken and a Stipulation of Facts and Stipulation to the Identification of Documents were submitted.

Petitioner submitted a Memorandum of Law on June 3, 2005. Respondent submitted a Brief on September 23, 2005. Petitioner

¹ Petitioner filed three Petitions which were designated TAT(H) 03-21(UB), TAT(H)03-22(UB), and TAT(H)03-23(UB). On August 14, 2003, the Tax Appeals Tribunal consolidated these Petitions for hearing under the designation TAT(H) 03-21(UB), et al.

submitted a Reply brief on October 28, 2005 and Respondent submitted a Sur-Reply Brief on December 8, 2005.

ISSUE

Whether Petitioner, as an agent for an insurance company, was an independent contractor whose income was subject to the UBT.

FINDINGS OF FACT

1. Petitioner, Samuel Friedman, was a City resident during the Tax Years.

2. Since 1977, Petitioner engaged in the sale of life insurance and life insurance products for the New York Life Insurance Company ("Company"). For approximately the last ten years, Petitioner has been a "select agent" with the Company.² Petitioner also had an ownership interest in corporations which sell other types of insurance and participated in those corporations' businesses.

3. Petitioner and the Company entered into an Apprentice Field Underwriter's Agreement ("Apprentice Agreement") and a Field Underwriter's Contract ("Contract"), effective June 28, 1977.

4. The Apprentice Agreement, which had a term of three years, designated Petitioner as an employee of the Company and recited specific requirements. The Agreement stated that Petitioner would be "subject to the direction and control, and will devote his

² A "select agent" is an agent who has a high level of production and thus is entitled to certain advantages, including shortening the application process for the agent's customers.

entire time to" the Company's business. (Apprentice Agreement ¶2). The Apprentice Agreement specifically provided that the Agreement would be "automatically" terminated if the employee "engage[d] in any other business or occupation for remuneration or profit." (Apprentice Agreement ¶8). The Apprentice Agreement also provided that after the three-year term, an agent who continues to represent the Company does so as "an independent contractor . . . free to exercise his [sic] own discretion and judgment with respect to the persons from whom he [sic] will solicit applications and with respect to the time, place, method and manner of solicitation and of performance." (Apprentice Agreement ¶14).

5. Following the three-year apprentice training program, Petitioner became an "established field underwriter" for the Company pursuant to the terms of the Contract.

6. The Contract took effect at the termination of the Apprentice Agreement. The Contract was a detailed agreement between the Company and its underwriters or agents, which established the authority of the underwriters to solicit applications for insurance and to collect initial premiums, and articulated limitations which the Company places on such authority. The Contract provided that the Company would pay Petitioner commissions on his sale of insurance and annuity policies, and explained in detail the rates of commission on the sale of insurance and annuities.

7. The Contract (at ¶5) specifically characterized the relationship between the underwriter and the Company:

Neither the term "Field Underwriter" . . . nor anything contained herein or in any of the rules or regulations of the Company shall be

construed as creating the relationship of employer and employee Subject to the provisions hereof and within the scope of the authority hereby granted, the Field Underwriter is an independent contractor, shall be free to exercise his own discretion and judgment with respect to persons from whom he will solicit applications, and with respect to the time, place, method and manner of solicitation and of performance hereunder.

8. The Contract (at ¶9) provided that either party could terminate the agreement "with or without cause, . . . upon written notice . . . effective thirty days after the day on which such notice is dated."

9. At the time he entered into the Contract, Petitioner was issued a Field Underwriter's Handbook. The Handbook contained detailed information and definitions and articulated rules with respect to Company practices and the authority and responsibilities of field underwriters. The Handbook was subsequently officially replaced by the Agent's Handbook, which itself was revised in 1997.³ The Contract (at ¶6) required that the underwriter receive the Handbook and that he or she "abide by the limitations of authority and the rules specified therein." However, in that paragraph the Contract also expressly stated that:

. . . no rule hereafter adopted shall be construed so as to restrict the Field Underwriter's right to direct and control his work in the performance of the contract.

Many of the rules in the Handbook reflected federal and New York State laws and government agency regulations respecting insurance

³ Each subsequent version of the Handbook replaced the previous one. The 1997 *Agent's Handbook (2d Edition)* contained a notice that the Handbook was "substituted for and supersedes all other editions"

agents and the sale of insurance policies. (See, e.g., *Handbook*, Section 6, "Money Laundering Prohibited.")

10. Petitioner was also provided with an Agent's Manual which enumerated the benefits and provisions of the various policies offered by the Company, including detailed premium rates.

11. Petitioner additionally entered into an agreement with New York Life Insurance Annuity Corporation ("NYLIAC"), dated November 16, 1981, with a recited effective date of June 28, 1977 (the "Annuity Contract"). Petitioner, as "Agent" pursuant to the Annuity Contract, agreed to sell Company annuity policies and the Company agreed to pay Petitioner commissions on his sales. The terms of the Annuity Contract were similar to the terms of the Contract, including the *proviso* that "no rule shall be construed so as to restrict the Agent's right to direct and control the Agent's work in the performance of this contract." (Annuity Contract ¶6.)

12. The Company monitored the types of policies sold by each agent and the length of time the policies are held by customers.⁴ The Company established the premium rates for such policies and, with the exception of the first premium, collected the premiums from the customers solicited by its agents. The Company also established minimum sales requirements. If such sales requirements were not met, certain Company benefits were withheld, such as participation in health insurance plans or invitations to certain agents' meetings. During the Tax Years, Petitioner always met the

⁴ Petitioner testified that the Company would penalize an agent if policies lapsed too quickly and, depending upon the agent's length of service, the agent might be fired (e.g., within the first two years) or reprimanded. T. 35, 42-43.

minimum sales requirements and, for many years, led the Company in sales.

13. Petitioner was not required to work set hours as it was necessary that he be available for clients according to their schedules. Petitioner always met the Company's requirement for the minimum number of hours spent "in the field," and testified that his hours were not otherwise monitored. (T. 48). Petitioner was occasionally required to account to the Company for his time, to furnish reports and to maintain contact records of sales calls and telephone logs. Once a year, Petitioner was required to disclose any outside non-Company activity.

14. The Company required agents to meet regularly with a manager supervisor for a review of reports and sales activity. Each Company office had a managing partner who supervised the resident agents. Generally, Company managers supervised thirty to fifty agents. In larger offices, the managing partner of the office was assisted in the supervisory function by other partners. Managers were not permitted to sell insurance and their compensation was based on the production of the agents they supervised. Petitioner testified that he met with managers frequently during the Tax Years (T. 32, 66) and that once or twice a year, managers accompanied him on sales calls (T. 137).

15. The Company's Agents were required to use approved correspondence and Company-generated illustrations.⁵ The Company published guidelines and created a group of "approved" letters.

⁵ An illustration is a printout which contains information tailored to a customer with respect to a policy including, but not limited to its term, its cash value and its death benefit. T. 37

Once a letter was approved, it could be used indefinitely without further review. Generally, Petitioner's letters were approved.

16. Petitioner testified that he advertised widely, both in public and private media. While the Company required that advertising and sales materials be approved by the Sales Material Review Unit of the Company's Compliance Department, Petitioner testified that the Company generally proscribed, rather than suggested, certain materials and that he was free to advertise in the manner he saw fit. Petitioner paid the costs of all advertising and, on Schedules C of his Federal income tax returns, he deducted advertising expenses as business expenses.

17. Once a year, individuals from the Company's Compliance Department visited Petitioner's office to review his files. Generally, these individuals examined ten to fifteen of the approximately three thousand documents Petitioner maintained in his files.

18. While the Company had a sophisticated disciplinary process to address violations of regulatory rules and Company policies and procedures, Petitioner was subject to written reprimands on only two occasions. The first occurred during the Tax Years and involved his representation of the sale of life insurance as an investment vehicle. The second occurred after the Tax Years and concerned the language of certain representations made in e-mails. In each instance, the only consequence was a written reprimand.

19. Petitioner attended scheduled meetings and training sessions several times a year. He was also invited to special meetings of "Councils" which were convened for agents who were especially productive. These programs served to refresh agents'

familiarity with compliance and regulatory rules, to provide them with information concerning new statutory requirements and to teach them about new Company products. The Company held at least four mandatory meetings per year to comply with regulatory agency requirements. Based on his performance, Petitioner was entitled to participate in the "Chairman's Council."

20. Petitioner primarily sold Company products. He also sold insurance products of other carriers when a suitable Company product was not available, transacting such sales through an unrelated broker. Company policy generally required agents to submit life insurance business first to the Company, although this restriction was not contained in the Contract. If the Company declined a specific sale, the agent was then permitted to sell the policies of other insurers.

21. From 1992 through 1994, Petitioner had an office on the 20th floor of the Empire State Building. The Company's General Office was on the 21st floor of that building and was connected to the 20th floor by an internal staircase. In 1994, Petitioner moved to an office on the 58th floor of that building, and the Company's General Offices were relocated to the 59th Floor of that building. Petitioner was required to have the Company's name on a sign on the door of his office, as well as on letterhead and business cards. Petitioner leased the premises from the Company and, on the occasion of the office move to the 58th Floor, the Company paid for his office renovation. Petitioner was listed in the Company telephone directory. Petitioner treated the costs of renting his office as an expense of his life insurance business on the Schedules C of his federal income tax returns.

22. During the Tax Years, Petitioner employed between two and four secretaries and clerical assistants and a receptionist to assist him in his life insurance business. He paid their wages and salaries and provided them with certain employee benefits, including covering the costs of their participation in Company health insurance programs.⁶ Petitioner treated these employee costs as an expense of his life insurance business on the Schedules C of his federal income tax returns. During the Tax Years, Petitioner also employed an insurance broker to assist him.⁷

23. Petitioner transacted a significant amount of life insurance business abroad and traveled frequently to London to accomplish such sales. Petitioner treated the costs of travel as expenses of his life insurance business on the Schedules C of his federal income tax returns.

24. In 1980, Petitioner established Samuel D. Friedman Associates, Inc., D/B/A Friedman Associates ("Associates"), a federal Subchapter S corporation engaged in the brokerage of property and casualty insurance. The address of Associates is 350 Fifth Avenue, and the corporation's business is transacted at the same premises from which Petitioner transacts his Company business. A sign for Associates is located near the entrance to Petitioner's office. During the Tax Years, Associates had five employees in addition to Petitioner, including one individual who was a licensed insurance broker. Petitioner primarily furnished leads to

⁶ In a December 15, 1998 Affidavit, Petitioner stated that he hired employees "at [Company] expense." However, the testimony at the Hearing contradicts this statement. T. 109-112. See, e.g., T. 110, when Petitioner, after being asked whether the Company paid the wages of his secretaries, responded: "No, they don't."

⁷ Petitioner testified that he hired a broker along with other "office help." T. 131.

Associates, generally from his Company customer base, in exchange for which he was paid a salary.

25. Petitioner was a fifty-one percent shareholder of SDF 1991 Limited, a corporation engaged in the business of selling group health insurance and other group policies. Petitioner's role with respect to SDF 1991 Ltd. was to provide leads from his Company customer base.

26. During the Tax Years, Petitioner also participated in certain partnerships which held interests in real property.

27. Petitioner was compensated by the Company in the form of commissions and allowances based on the amount of the policies sold, and "persistency bonuses" based on the length of time during which a policy was maintained by a customer. Petitioner was remunerated by the Company on a monthly basis by a single check which represented the amount of sales commissions and bonuses, less certain expenses.

28. Based on his sales performance, Petitioner participated in the Company benefit programs, including a group-term life insurance plan, a group health insurance plan and a deferred compensation plan.⁸

29. Petitioner was liable for the payment of all expenses incurred in the sale of Company products, including advertising,

⁸ The deferred compensation plan provided that additional commissions would be paid in future years based on current sales. After twenty years of service, this compensation became "vested" and was guaranteed regardless of any continued association with the Company. After twenty years of service, the amount of compensation to which an agent was entitled was increased, in increments of five years of subsequent service, depending upon the agent's productivity.

employee wages and benefits, travel, commissions/fees, and rent. The Company provided Petitioner with an "umbrella expenses reimbursement," the amount of which was not necessarily tied to actual expenses, but rather depended upon his production and the nature of the business transacted.⁹ The amounts of the umbrella expenses reimbursement were included in income which the Company reported on the Forms W-2 issued to Petitioner.

30. During the Tax Years, Petitioner made "payments to outside contractors" to remunerate individuals who provided him with referrals for obtaining "substantial policies" from wealthy individuals.

31. For each of the Tax Years, Petitioner received a Form W-2 from the Company reporting payments made to him (the "Forms W-2"). The Forms W-2 indicated that the Company did not withhold federal, state or local income tax for each of the Tax Years, but that it did withhold Social Security and Medicare Tax.

32. The Forms W-2 indicate that Petitioner received the following income from the Company: \$1,660,546.44 for 1993; \$1,408,834.30 for 1994; \$1,701,829.01 for 1995; \$2,439,118.57 for 1996; \$2,161,319.14 for 1997; \$1,617,273.57 for 1998; \$969,856.22 for 1999; and \$1,063,189.88 for 2000.¹⁰

⁹ Petitioner testified that for the earlier of the Tax Years, the amount was computed as a percentage of the amount of commissions earned, while for the later of the Tax Years it was a flat sum. T. 112-114.

¹⁰ The record does not contain a 1992 federal Form W-2 for Petitioner. His UBT return reported \$1,053,726 of business income for that period.

33. Petitioner filed Forms 1040, U.S. Individual Income Tax returns, for the Tax Years, on a joint basis with his wife.¹¹ These returns recited various incomes which Petitioner received during the Tax Years, including "wage income"¹² and "business income." The federal returns included Schedules C, "Profit or Loss from Business." Petitioner identified the Schedule C business to be that of an "insurance agent" or "insurance agencies and brokerages" and the business name to be "Samuel Friedman." The income which Petitioner received from the Company was included on Schedules C as Gross Receipts or Sales from Business, was initially adjusted for cost of goods sold, and that net income amount was then adjusted by deduction of certain listed expenses to arrive at net profit from the identified business.

34. Petitioner reported the following amounts as Gross Receipts or Sales on line 1 of his Tax Years' Schedules C: \$1,832,415 for 1993; \$1,408,834.30 for 1994; \$1,701,829.01 for 1995; \$2,439,118.57 for 1996; \$2,161,319.14 for 1997; \$1,698,954 for 1998; \$1,025,669 for 1999; and \$1,063,190 for 2000. These amounts primarily represented commission and bonus income from the Company, although a small percentage was from Petitioner's other business enterprises and/or investments.

35. For the years 1995 through 2000, cost of goods sold was reported in the following amounts: \$607,425 for 1995; \$813,237 for

¹¹ The record does not contain a 1992 federal Form 1040 for Petitioner. During the proceedings, Petitioner relied upon the UBT return filed for that period for business income information.

¹² Petitioner did not report "wage income" for 1993 through 1995. Subsequent returns reported the following wage income: \$138,000 for 1996; \$108,075 for 1997; \$105,030 for 1998; \$134,788 for 1999; and \$151,788 for 2000. For 1996, this income was identified on an attached worksheet as income from "Friedman Associates;" for 1997, a Form W-2 for Friedman Associates was included which indicated this amount of income, but otherwise, the reported income was not identified.

1996; \$987,564 for 1997; \$789,322 for 1998; \$344,500 for 1999; and \$270,000 for 2000. For most years, Petitioner indicated that the cost of goods sold was equal to or included an amount which was identified as a "Subcontracting Fee."

36. The percentage of Gross Receipts or Sales reported on Petitioner's Tax Years Schedules C that is attributable to the amount reported on the Forms W-2 issued by the Company for each year is: 90.62% for 1993; 100% for 1994 through 1997 and 2000; 95.19% for 1998; and 94.56% for 1999.

37. For the Tax Years, Petitioner reported the following amounts as Total Expenses on Schedules C, lines 28 of his federal income tax returns: \$785,934 for 1993; \$534,305 for 1994; \$480,300 for 1995; \$299,759 for 1996; \$267,716 for 1997; \$208,606 for 1998; \$266,296 for 1999; and \$286,381 for 2000. The reported expenses included but were not limited to: rent, advertising, employee benefit programs, insurance, legal and professional services, office expenses, rental expenses, supplies, taxes, travel, meals and entertainment, and commissions.¹³

38. Petitioner only occasionally computed and reported self-employment tax, and only infrequently was it computed against business income.¹⁴

¹³ Petitioner testified that "commission expense" is monies paid to other agents or "centers of influence," or money to help other Company agents close deals. T. 123-4.

¹⁴ For example, in 1996, the tax was computed against income from Associates, whereas for 1997 and 1999, it was computed against Petitioner's Schedule C business income.

39. For 1992 and 1993, Petitioner timely filed City UBT returns. While UBT liability was computed as \$43,985 for 1992 and \$42,986 for 1993, no payments of UBT were made with those returns. On February 22, 1995, Petitioner filed City Forms NYC 113 Unincorporated Business Tax Amended Return and/or Claim for Refund ("Forms NYC 113"), amending the 1992 and 1993 UBT Returns and stating that he was not subject to UBT.

40. On December 5, 2000 and on March 14, 2001, the City Department of Finance served Income Executions on the Company with respect to the Company's payments to Petitioner for 1992 and 1993. The Department asserted \$147,931.98 as being due for 1992 (representing UBT plus interest and penalties computed thereon) and \$133,115.08 as being due for 1993 (representing UBT plus interest and penalties computed thereon).

41. On December 13, 2002, Petitioner filed City Forms NYC 113 for 1992 and 1993, requesting a refund of the amounts collected pursuant to the income executions in the amount of \$86,971 of UBT plus interest and penalties. The refund claims are deemed to have been disallowed pursuant to Code §11-529(c).

42. On May 30, 2003, Respondent issued a Notice of Determination of UBT due for the years 1994 through 1997, asserting a UBT deficiency of \$281,202.08, \$188,491.72 of interest (computed to June 20, 2003), and \$98,420.72 of late-filing and substantial understatement penalties. Respondent also issued on that date a Notice of Determination of UBT due for the years 1998 through 2000, asserting a UBT deficiency of \$120,147.64, \$33,877.98 of interest (computed to June 20, 2003), and \$42,051.67 of late-filing and substantial understatement penalties.

STATEMENT OF POSITIONS

Petitioner asserts that he was an employee of the Company for the Tax Years and therefore is not liable for UBT on income received from the Company for his sale of Company insurance. Respondent argues that Petitioner was engaged in the unincorporated business of the sale of life insurance as an independent contractor and, therefore, the income he received from the Company was subject to the UBT.

CONCLUSIONS OF LAW

An unincorporated business is "any trade, business, profession or occupation conducted, engaged in . . . by an individual or unincorporated entity. . ." Code §11-502(a). Code §11-502(b) provides that the "performance of services by an individual as an employee . . . shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual." Income which an individual earns from an unincorporated business wholly or partly carried on in the City is subject to the UBT; this "unincorporated business taxable income" is "the excess of [the business'] unincorporated business gross income over its unincorporated business deductions, allocated to the city, less [certain deductions]." Code §11-505.

UBT Rules define an "employee" as "an individual performing services for an employer under an employer-employee relationship." 19 RCNY §28-02(e)(2). The relationship exists where:

the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also as to the details and means by which that

result is to be accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but as to how it shall be done. He will usually be required to work during stated days and hours and be subject to company-established production standards. Other factors characteristic of employment, but not necessarily required or present in every case, are the providing of equipment and the furnishing of a place to work to the individual who performs the services. 19 RCNY §28-02(e)(2)(i).

Whether the relationship is one of employer-employee or whether the individual is considered an independent contractor is generally determined following "an examination of all the pertinent facts and circumstances." 19 RCNY §28-02(e)(3). Rule §28-02(e)(2)(ii) states:

If an individual is subject to the control or direction of another merely as to the result to be accomplished by the services and not as to the means and methods for accomplishing the result, he usually is an independent contractor or an independent agent rather than an employee.

See, also, Schwartzman v. Tax Appeals Tribunal, 7 A.D.3d 449 (1st Dept. 2004).

New York courts have applied a similar analysis to determine whether an individual insurance agent is an employee or an independent contractor pursuant to former New York State unincorporated business tax provisions. As the Court of Appeals noted in *Liberman v. Gallman*, 42 N.Y.2d 774 (1977), the inquiry concerns "the degree of control and direction exercised by the employer" 42 N.Y.2d 774. *See, also, Matter of Tinkler v. Chu*, 111 A.D.2d 491 (3rd Dept. 1985); *Matter of Howes v. Chu*, 107

A.D.2d 874 (3rd Dept. 1985); *Matter of Kent v. State Tax Commission*, 55 A.D.2d 727 (3rd Dept. 1976); *Matter of Greene v. Gallman*, 39 A.D.2d 270 (3rd Dept. 1972). See, also, *Matter of Frances Frankel*, TAT(E) 95-39(UB), et al. (NYC Tax Appeals Tribunal, December 19, 1997); *Matter of Robert L. Mazzeo*, FHD(265) (March 5, 1990).

The Code and Rules specifically address the UBT status of "sales representatives," a category which includes insurance salesmen. Code 11-502(e); 19 RCNY §§28-02(e)(2); (i). The Rules identify four principal criteria to consider: (1) whether the individual maintains an office;¹⁵ (2) whether he or she engages his or her own assistants;¹⁶ (3) whether he or she hires his or her own employees;¹⁷ and (4) whether he or she incurs expenses "without reimbursement." *Id.*¹⁸ Other criteria include: the Federal income tax filing status; which individual or entity pays unemployment insurance; whether the individual participates in the fringe benefit plans of the entity for which the services are performed; and whether or not the individual is a member of an association or

¹⁵ See, e.g., 19 RCNY §28-02(i)(2)(i): "An individual maintains an office . . . when, in connection with his selling activities, he occupies, has, uses or operates an office or desk room the expenses of which are borne by the individual without substantial reimbursement by any of his principals." Reimbursement over 80% is "substantial" and indicates that the cost of "such items are being absorbed by the principal."

¹⁶ See, e.g., 19 RCNY §28-02(i)(3): to determine whether an individual is "employing assistants" the following circumstances are considered: whether there is an employer-employee relationship between the individual and the assistants; whether the employment is more permanent than temporary; and whether there is an arrangement with the individual's principal for the individual to pay the assistants. If there are indices of the principal's control (e.g., right to terminate and right to fix the terms of employment), the individual will not be considered to be "employing assistants."

¹⁷ See, e.g., 19 RCNY §28-02(i)(1): "[T]he employment of clerical and secretarial assistance shall not be deemed the employment of assistants."

¹⁸ See, e.g., 19 RCNY 28-02(i)(2)(ii): "substantial reimbursement" is reimbursement of over 80% of expenses. An expense allowance which does not bear a "clear relationship" to actual expenses, or an "extra commission allowance" is not considered reimbursement.

union. See, 19 RCNY §28-02(e)(3)(i) through (iv). The Rules also provide that although performing services for several persons or entities "without a clear division of time" suggests that the individual is an independent contractor, an individual who performs services for only one person or entity may be an independent contractor. See, 19 RCNY §28-02(e)(2)(ii), which also notes that "[g]enerally, agents . . . brokers . . . and other individuals engaged in performing services who are independent and who offer their services to the general public are not employees." However, Code §11-502(e) provides that a sales representative who is "**other than** [an individual] who maintains an office or who employs one or more assistants or who otherwise regularly carries on a business, shall not be deemed engaged in an unincorporated business solely by reason of selling . . . insurance for more than one enterprise." [Emphasis supplied.] Finally, the Rules require that "[W]here a doubt as to the status of an activity exists, all the relevant facts and circumstances must be considered in determining whether the activity constitutes an [unincorporated business]." 19 RCNY §28-02(a)(5).¹⁹

¹⁹ Similar inquiries are made for purposes of of FICA, FUTA and Federal income tax withholding. Rev. Rul.87-41; 1987-1 C.B. 296 (January 1987). Revenue Ruling 87-41 addresses whether individuals are involved in an "employment relationship," stating that: "an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done." The Ruling identifies twenty factors to take into consideration: (1) whether compliance with other persons' instructions is required; (2) the nature of any required training; (3) integration if the individual's services into the overall business; (4) whether services are rendered personally; (5) the hiring, supervision and payment of assistants; (6) whether the relationship between the individual and the principal is continuing; (7) whether there are set hours of work; (8) whether the individual is required to work full-time; (9) whether the work is performed on the employer's premises; (10) whether the person for whom the services are performed directs the order or sequence set in which the work is to be performed; (11) whether the individual is required to submit reports; (12) whether payment is by the hour/week/ month or by commission; (13) who pays business or traveling expenses; (14) who furnishes tools and materials; (15) whether there is "significant" investment in the facilities; (16) whether there is the realization of profit or loss; (17) whether the individual worked for more than one firm at the same time; (18) whether the person's services are available to the general public; (19) whether the service recipient has the right to discharge the worker; and (20) whether the worker has the right to terminate the work relationship.

The determination whether Petitioner was an independent contractor or an employee of the Company depends upon the consideration of the totality of the circumstances of his relationship with the Company and no single factor is determinative. *Matter of John B. Baxter, Jr.*, TAT(E) 93-957 (UB) (NYC Tax Appeals Tribunal, October 17, 1996). Where courts have examined the relationship between an insurance agent and a life insurance company, the "resolution of [the issue] rests largely on the control which the company exercised over the taxpayer." *Kent, supra* at 727. Considering all the facts presented, it is concluded that, during the Tax Years, Petitioner was an independent contractor engaged in the unincorporated business of the sale of insurance. Therefore, the income he received from this unincorporated business was subject to the UBT.

Petitioner was not subject to the Company's direction and control with respect to the means by which he accomplished the sale of insurance and insurance products. In fact, Petitioner was accorded significant latitude with respect to all of the circumstances of his sales activities, including the amount of time spent and the location of the sales activities.

Petitioner sold life insurance, primarily for the Company, for over twenty-five years, working as a Company Agent pursuant to the Contract. At the same time, Petitioner had ownership interests, and participated in the business of, two corporations, Associates and SDF 1991, which sold other types of insurance products to customers gleaned from Petitioner's life insurance contact base.

The Contract specified that Petitioner was "free to exercise his own discretion and judgment with respect to . . . the time, place, method and manner of solicitation and performance" of the Contract. (See, Contract ¶5). The terms of the Contract provided

for termination by either party on notice. An individual's UBT status does not depend upon the parties' description of the relationship, either in a contract or otherwise. 19 RCNY §28-02(e)(3). *Matter of Baxter, supra*. Nor do the findings of other federal, state or local administrative agencies bind the City in its determination. See, Rules §28-02(e)(3) which notes that "[T]he weight, if any, to be given to such fact will depend upon the law under which the status was determined and the nature and purpose of such law." However, the express provision in the Contract that Petitioner is an independent contractor is one factor for review.

Petitioner always met and exceeded the Company's minimum sales requirements and frequently was a lead salesman. His income during the Tax Years was primarily from commissions and bonuses received based on sales of Company life insurance, although he also received some income from the two corporations. Participation in the Company's fringe benefits programs was not a guaranteed condition of his relationship with the Company but, rather, depended upon the volume of his insurance sales. See, *Matter of Daniel G. Luxenberg*, TSB-H-86(55)-I (NYS Tax Commission, February 18, 1986).

Although Petitioner was subject to some Company direction and control with respect to the results he was to achieve (*i.e.*, he was expected to sell Company product), he was not restricted in the methods he could employ to achieve them. Petitioner's day-to-day sales activity was not monitored by the Company and he was not required to work set hours. He was expected to comply with certain standards with respect to his sales representations; nevertheless, the Company was result-oriented and generally did not interfere with the methods or means Petitioner employed to obtain the sales. See, *Matter of Sidney Gothelf*, TSB-H-85(172)-I (NYS Tax Commission, April 1, 1986); *Matter of William Kronethal*, TSB-H-86(84)-I (NYS Tax Commission, April 28, 1986). Petitioner's work was reviewed by

managers who infrequently examined his files and rarely accompanied him on sales calls. During the Tax Years, Petitioner was disciplined only once with respect to certain representations he made regarding the nature of life insurance products. As was any agent affiliated with the Company, Petitioner participated in mandatory company meetings and training sessions, which fulfilled regulatory (not Company) requirements. Finally, his attendance at special Company "councils" was by invitation, not mandate, as a direct result of his high volume of sales. See, *Howes, supra* at 875. It cannot be concluded, therefore, that the Company controlled Petitioner's means of production in any meaningful way.

Petitioner maintained his own office at a space which he leased from the Company, and it is not controlling that this office was located near other Company offices. See, *Howes, supra*. He transacted Company business, and the business of his related corporations, in the field as well as from this location. His name was listed in the Company directory; his office door bore his name and that of the Company; and the name of one of the other corporations was located near, but not on the door to his offices. While Petitioner used Company letterhead and stationery and Company illustrations in the sale of Company life insurance products, his form letters were generally approved by the Company and the form of his transactions was not otherwise circumscribed. Although much of Petitioner's business was conducted from the City base, he also traveled extensively to sell life insurance, principally in London.

During the Tax Years, Petitioner employed several individuals to assist him in life insurance sales, including two to four secretaries and clerical assistants, and one broker. He paid their wages and employee benefits and covered the costs of their participation in Company health insurance plans. See, *Liberman, supra* at 779.

Petitioner incurred significant expenses in transacting his life insurance business, including but not limited to office rent, the cost of hiring employees and their attendant expenses, the costs of supplies, and certain travel expenses; and was not directly reimbursed for these expenses. See, *Lieberman, supra*. Rather, Petitioner received a lump sum "umbrella reimbursement" from the Company which was unrelated to, and did not approximate the cost of, his actual expenses. Nor did the Company require that he substantiate any underlying expenses to receive this reimbursement.

Petitioner stated on Schedules C, Profit and Loss from Business, attached to his Tax Years' federal income tax returns, that he was engaged in the business of insurance brokerage. He reported Company commission and bonus income, and the amounts of his "umbrella reimbursement," as gross business receipts on those schedules. Petitioner applied expenses incurred in the business against business receipts to arrive at net profit. The Company included the business receipts amounts in compensation reported on the Forms W-2 issued to Petitioner, but did not withhold income tax on these amounts.

The totality of the relevant facts and circumstances presented in this matter establish that Samuel Friedman was an independent contractor and was not an employee of the Company during the Tax Years. The Company did not exercise the requisite direction and control of the means by which Petitioner conducted his business of the sale of life insurance. See, *Greene, Kent, supra*. Petitioner met most of the criteria of an independent contractor articulated in Rules Section 28-02(c): he maintained his own office, employed an assistant, hired clerical and secretarial employees, and incurred expenses which generally were not reimbursed. 19 RCNY §28-02(e)(3); (i)(1) through (3). Petitioner's participation in Company benefit plans was dependent upon his sales efforts and was not a specific

condition of employment. He performed similar services for more than one company by virtue of his work for Associates and SDF 1991.²⁰ Moreover, Petitioner's Federal income tax filings support a determination that he was engaged in the unincorporated business of the sale of life insurance. Therefore, the income which Petitioner earned from the Company was income earned in the unincorporated business of the sale of insurance and was subject to City UBT.

ACCORDINGLY, IT IS CONCLUDED THAT Petitioner was an independent contractor and is liable for UBT computed against income from the unincorporated business of the sale of Company life insurance. As Respondent correctly denied Petitioner's requests for refund for 1992 and 1993, such denials are sustained. The Notices of Determination, dated May 30, 2003, in the base tax amounts of \$281,202.08 for the years 1994 through 1997, and \$120,147.64 for the years 1998 through 2000, with interest and penalties thereon, are also sustained.

DATED: June 8, 2006
New York, New York

ANNE W. MURPHY
Administrative Law Judge

²⁰ Petitioner also would be considered an independent contractor under the indices articulated in Revenue Ruling 87-41. Petitioner was not subject to detailed instructions as to the method or means of performing his sales work, he was required to attend meetings and training sessions only infrequently (and often in order to comply with regulatory requirements as opposed to Company directives); he hired and supervised employees and assistants; he was not required to work set hours; he performed his work from his own office or in the field; he was remunerated in the form of commissions and bonuses and not wages; he paid for most of his expenses without reimbursement; his services were made available to the general public; and the termination of the relationship with the Company required notice.