

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

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**In the Matter of the Petition:  
of  
Timothy J. Young**

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**DETERMINATION  
TAT (H) 12-19 (UB)**

Murphy, C.A.L.J.:

Petitioner Timothy J. Young filed a Petition for Redetermination of a Deficiency of New York City (City) Unincorporated Business Tax (UBT) on June 27, 2012, with the City Tax Appeals Tribunal (Tribunal). The deficiency was asserted by the City Department of Finance (Department or Respondent) Notice of Determination dated December 21, 2010, for the period January 1, 2005 through December 31, 2006 (Notice). On February 25, 2011, Petitioner requested a Conciliation Conference before the Department's Conciliation Bureau. Petitioner disagreed with the Conciliator's Proposed Resolution, and on March 30, 2012, the Department issued a Conciliation Determination discontinuing the matter. The Petition protests the Conciliation Determination.

The Notice does not assert a deficiency of UBT for the January 1, 2006 through December 31, 2006 period (2006 Tax Year). Therefore, this Determination concerns only the deficiency asserted in the Notice for the period January 1, 2005 through December 31, 2005 (2005 Tax Year).

A Hearing was held on October 24, 2013, at which time exhibits were admitted and testimony was taken. Petitioner appeared by Richard Eisenberg of Eisenberg & Blau, CPAs, P.C. The Commissioner

of Finance was represented by Frances J. Henn, Esq., Senior Tax Counsel. On November 7, 2013, the Petitioner submitted additional documents to the Tribunal which were admitted into the record and the matter was then closed. Petitioner filed a Brief on February 24, 2014. Respondent filed a Reply Brief on June 6, 2014. On July 7, 2014, Petitioner filed a Reply to Respondent's Brief, and on August 4, 2014, Respondent filed a Sur Reply Brief. Amy H. Bassett, Assistant Corporation Counsel, assisted Ms. Henn on the briefs.

### **ISSUE**

Whether commission income which Petitioner Timothy J. Young received in 2005 from William J. Buckley Associates was income attributable to an unincorporated business of securities trading subject to UBT, or whether in 2005 Petitioner was solely an employee of William J. Buckley and income which he earned was not subject to UBT.

### **FINDINGS OF FACT**

William J. Buckley Associates, Inc. (Associates) was a broker-dealer member of the American Stock Exchange (Exchange) in 2005. The firm executed stock and option orders for broker-dealer clients through floor brokerage. The firm did not deal directly with the public and did not trade for its own account. William J. Buckley was a broker and Associate's sole principal. In 2002 Associates had approximately five clients. Mr. Buckley employed several individuals as clerks who took orders which he executed.

Petitioner Timothy Young began working with Associates in 2002, and his first position was as a wire clerk. During 2005 he

held the position of floor clerk.<sup>1</sup> Petitioner worked on the Exchange weekdays from 8:30 AM until 4:00 PM, without breaks. Associates obtained a floor clerk badge from the Exchange for Petitioner, and he was given a clerk's jacket which identified him as an employee of the company. Mr. Young could access the Exchange floor with the badge. Associates was responsible for registering Mr. Young and for paying the Exchange's personnel expenses, including the Floor Clerk Fee. He worked at the booth which the firm leased from the Exchange, located on the outskirts of the trading floor. The booth was equipped with telephones and computers purchased by Associates. The firm subscribed to several financial data and news services which were available for access by Associates's employees through computers located at that site. Finally, pursuant to the Supervisory Procedures established by Associates (Stipulation, exhibit 16), Petitioner attested that he was an employee subject to supervision by Mr. Buckley.

During 2005, in addition to Mr. Young, Associates employed two assistants to Petitioner, who primarily answered the telephones when there were simultaneous calls, and occasionally called in orders to Mr. Buckley. Summer interns were hired to perform administrative tasks including writing trade tickets, and a relative of Mr. Buckley did clerical work on the weekends, off-site. Generally the larger institutional orders were completed by Mr. Buckley, although Petitioner and his assistants were permitted to place "small" orders through the Exchange's electronic system.

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<sup>1</sup> Stipulation to exhibits, October 24, 2013, exhibit 17. Financial Industry Regulatory Authority (FINRA) Form U4, Uniform Application for Securities Industry Registration or Transfer, Section 12, "Employment History." Rev. Form U4 (05/2009) (U4). [www.finra.org/web/groups/industry/@ip/@comp/@regis/documents](http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents) accessed 1/26/2015. Petitioner is identified as a "floor employee" with Associates.

Petitioner's responsibilities included receiving telephone orders from Associates' clients, recording those orders in writing, and transmitting them to Mr. Buckley by headset or telephone. Mr. Buckley would then execute the orders on the Exchange floor, and give a written "ticket" of each executed trade to Petitioner or another Associates employee or intern. The employee would take the record of the order to the clearing operation of the Exchange and it would be entered into the AMEX bars machine and time-stamped. Mr. Young also entered some orders himself through the Exchange's system. He was not permitted to work on the Exchange floor without the permission of Mr. Buckley.

Associates purchased health insurance for employees through Trooper Investment Partners (Trooper). Trooper formed a "pool" (tr at 77) of small businesses to purchase insurance at a discounted rate. The insured employees received Federal Forms K-1 from Trooper which reported 'Guaranteed Payments,' 'Other Deductions' and 'Self-Employment Earnings' in amounts which were each equal to the amount of the insurance payment. Petitioner received a K-1 from Trooper for 2005. (Stipulation, exhibit 19.) Associates employees did not receive any income from Trooper. Associates also paid workers compensation insurance for Petitioner. A copy of a statement of workers' compensation insurance paid for the June 2004 through June 2005 period and signed by Mr. Buckley on July 15, 2005, listed Petitioner as an employee who "answers the phones," and stated that Mr. Buckley was "the Broker who executes the transactions." (Stipulation, exhibit 20.) Petitioner was entitled to, and received, paid vacation from Associates.

On February 25, 2005, at the recommendation of an accountant, Petitioner formed a limited liability company, TJY Brokerage LLC

(TJY). Petitioner's 2005 commission<sup>2</sup> income from Associates, \$565,000, was paid to TJY. Petitioner testified that the amounts paid to TJY included a monthly salary of \$10,000 (tr at 53), although this is not readily apparent from the evidence admitted. (Stipulation, exhibit 4.) TJY was dissolved on May 20, 2009.

Petitioner was associated with other firms during 2005. In May 2005, Mr. Young agreed to represent Raymond C. Forbes & Company (Forbes) on the Exchange floor. He did not perform any trades or other floor clerk responsibilities for Forbes, and he was not paid by Forbes for this service. Petitioner testified that the arrangement was entered into in order for Forbes to have a representation on the Exchange. (Tr at 41, 93.) Mr. Buckley agreed to Petitioner's arrangement with Forbes, which apparently lasted until September 2005.

Anticipating the formation of the partnership with Mr. Buckley, Petitioner researched potential business affiliations. In 2005, Mr. Young became interested in Lek Securities Corporation (LSC), a company which provided traders with electronic access to all stock exchanges. He spent time identifying clients which he might eventually bring to LSC. He opened an account with LSC in November 2005, and reported dividends for that year of \$774.

In November 2005 LSC and Associates consented to Mr. Young's dual employment, and filed a New York Stock Exchange Rule 346 Dual Employment Acknowledgment (Acknowledgment). Buckley Associates was identified on the Acknowledgment as the "Primary Employer" and

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<sup>2</sup> This income has been variously referred to in testimony and documents as commission or bonus income. Petitioner described the "bonus" as an addition to his base compensation for performance (tr at 24) and as a discretionary amount calculated by Mr. Buckley. (Tr at 53.) He also testified that he was paid the commissions to reflect improved skill at his job. (Tr at 54.)

LSC was identified as a "Dual Employer." Mr. Young was listed as an employee who performed the Sales/Trader function for LSC. According to a 2013 FINRA BrokerCheck Report (BrokerCheck)<sup>3</sup>, Petitioner is a FINRA-registered representative with LSC. While the initial summary of the BrokerCheck Report states he was a representative from October 6, 2005, under the section "Other Business Activities" the Report states that he was a "registered representative for LEK Securities since September 2009." Petitioner was not compensated by LSC in 2005. At some time in 2006 Petitioner became a sales trader for LSC.<sup>4</sup>

In 2005 Mr. Young set up an office in his apartment, where he could work during the evenings after he finished on the Exchange floor. He testified that he would spend time in this home office working for Associates, reviewing the day's activities and preparing for the next day. He testified that he also performed some preparatory computer research at this home office to identify potential clients which he could bring to LSC. Petitioner's 2005 Form 1040 U.S. Individual Income Tax Return (2005 Federal Income Tax Return) Schedule C (Profit or Loss from Business) (Schedule C) reflected an adjustment of business income for "office expenses."

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<sup>3</sup> See Respondent's exhibit 1. Respondent's representative obtained the BrokerCheck Report on-line on October 21, 2013. The information in a BrokerCheck report is based in part upon information supplied by the individual broker on a U4. The exhibit states that Petitioner was an approved registered representative for LSC with other exchanges ( NASDAQ as of 07/12/2006; International Securities Exchange and NYSE MKT LLC as of 01/30/2008) and that he was licensed as an Agent in New York from October 20, 2005 and Connecticut from November 9, 2011. The Report states that in 2013 Mr. Young "devote[d] 6hrs [sic] per day during trading hours" to LSC, executing orders for customers.

<sup>4</sup>Petitioner testified concerning his 2006 responsibilities with LSC. Petitioner would introduce clients to LSC. He and LSC agreed to have LSC clear trades for these clients. The clients would agree in advance to the amount of the commission to be paid on the transactions, and Petitioner would agree to pay LSC a clearance fee. The clearance fee would be subtracted from the commission and the balance would be paid to Petitioner. (Tr at 81-2.)

Petitioner testified that this adjustment represented the costs of establishing the home office. (Tr at 57-8.)

Mr. Young stated that he received a monthly salary from Associates of \$10,000, and that the balance of income received in 2005 was commission or bonus income, also received on a monthly basis. However the record reflects only salary payments of \$20,000 for a period of approximately two months. (Stipulation, exhibit 4.) Petitioner testified that he helped Associates "grow[ing] the client base" which resulted in the firm earning more money and Petitioner earning a larger bonus. (Tr at 26.)

Petitioner was responsible for entertaining Associates clients outside of his workday.<sup>5</sup> For example, in 2004 he traveled to Chicago for client development. For 2005, he reported \$4,251 in unreimbursed deductible meals and entertainment expenses on Schedule C. Mr. Young had access to a company credit card which he used for travel and entertainment expenses related to Associates clients, and Associates paid for the charges on the card.

Mr. Young passed the General Securities Representative Examination ("Series 7") in 1995, and the Uniform Securities Agent State Law Examination ("Series 63") in 2005. While the licenses allowed Petitioner to transact securities business with the public, they were not required for his work at Associates, as neither the firm, nor Mr. Young himself, dealt directly with the public. In 2005 Petitioner's Series 7 license was held by Associates, and it is presently held by LSC.

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<sup>5</sup> Petitioner's exhibit B. In support of his position that he was an employee of Associates in 2005, Petitioner submitted a copy of an American Express Business Gold Card account charges for the period 1/06/2005 -1/29/2005. The account was in the firm's name, and separate charges were listed for Petitioner.

Mr. Young filed his 2005 Federal Income Tax Return on a joint basis. Petitioner submitted a copy of a Federal Form W-2 Wage and Tax Statement from Associates for the 2005 period (Form W-2). The Form W-2 reflected the \$20,000 Petitioner reported in wages, tips and other compensation, as well as Federal Income Tax of \$3,575 withheld.<sup>6</sup> A Quickbooks schedule prepared by Associates states that from January 4, 2005 through February 28, 2005, Petitioner was issued five (5) checks by Associates for a total salary of \$16,530.35. (Stipulation, exhibit 4.)

Petitioner reported \$518,450 in net business income attributable to TJY Brokerage LLC. On Schedule C Petitioner listed \$565,160 gross profits adjusted by expenses of \$46,710 (which included office expenses, taxes and licenses, and "sundry") for a net profit of \$518,450. On Federal Income Tax Return Schedule SE (Self-Employment Tax) Petitioner calculated self-employment tax. Petitioner also adjusted his gross income by application of a deduction for contributions to a Keogh retirement plan.<sup>7</sup> Petitioner did not receive a Federal Form 1099 from Associates which would have reflected the 2005 payments to TJY.

Petitioner reported \$1,511 as partnership income from Trooper. He received a Federal Schedule K-1 1065 for 2005 from Trooper (K-1). The K-1 listed Petitioner as a partner of Trooper, and reported a "Guaranteed Payment" of \$1,511, adjusted by a "Deduction" of \$ 1,511, and "Self-Employment Earnings" of \$1,511. Petitioner testified that the distributive share reported on the

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<sup>6</sup> The Form W-2 also reported Social Security Tax of \$1,240 and Medicare Tax of \$290.

<sup>7</sup> It is noted that in 2004 Petitioner reported wages of \$292,337, from which Federal, State and City taxes were withheld. He did not report any business income. Stipulation, exhibit 26.

K-1 represented Associate's insurance payment on behalf of Petitioner. (Tr at 76-7.)

Petitioner also filed a New York State Department of Taxation and Finance Form IT-201 Resident Income Tax Return for 2005, reporting his income and that of his wife. (Stipulation, exhibit 28.) Petitioner did not amend either his Federal or his State return.

Petitioner filed Form NYC-202 Unincorporated Business Tax Return for the 2005 Tax Year for himself and TJY. He reported a net income before modifications of \$518,450, modifications of \$518,450, an exemption of \$5,000 and a taxable loss of \$5,000.<sup>8</sup> A copy of Petitioner's Schedule C was appended to the 2005 UBT Return. In explanation of the reported \$518,450 subtraction modification, in a statement appended to the UBT return, Petitioner stated:

I render services to a single entity. I am subject to their direction and control. I have made no investment in the entity to which I render services.

Based upon this, and other facts, my services are more akin to those of an employee, and as per rule sec. 28-02(e)(2), are not subject to the unincorporated business tax.

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<sup>8</sup> Petitioner also reported payments of 2005 estimated UBT of \$20,000, and requested a refund of the same amount. The record contains a copy of a Form NYC 5UBT1 Declaration of Estimated Unincorporated Business Tax for 2005 which reported that \$10,000 was being paid with the filed form, and a copy of a cancelled check made out to NYC for \$10,000, dated 10/12/2005 and deposited by the Department on '10132005.' The payments and refund request are reflected in City FairTax records (Stipulation, exhibit 15, p. 7) but are not addressed in post-hearing submissions. See Stipulation, exhibit 15, p. 33. The auditor did not apply any payments when he computed UBT liability. Stipulation, exhibit 15, pp. 31-33.

Petitioner and Mr. Buckley formed a partnership, Buckley & Young LLC, in December 2005,<sup>9</sup> and that entity continued the operations of Associates. At that time Associates had approximately sixty (60) clients. While Petitioner's position with the partnership was as sales/trader, his responsibilities did not differ materially from the activities he previously performed for Associates.

In 2009, a Tax Auditor II with Respondent Department of Finance reviewed Petitioner's 2005 and 2006 filed UBT returns. During the course of review, the auditor requested additional information to support items reported on Petitioner's 2005 UBT Return. On April 22, 2009, the auditor asked Mr. Young to submit copies of any Forms 1099 for 2005. (Stipulation, exhibit 3.) Petitioner's representative responded, on May 20, 2009, replying that he was unable to submit a Form 1099, and submitting a copy of pages from Associate's QuickBooks disbursement journal reflecting payments to TJY for commissions and profits, and a copy of Petitioner's Schedule C. (Stipulation, exhibit 4.) On May 27, 2009, the auditor requested copies of employment contract agreements. (Stipulation, exhibit 5.) Petitioner's representative replied on June 3, 2009, by a handwritten notation on a copy of the auditor's letter, indicating there were no contracts. (Stipulation, exhibit 6.)

The auditor concluded that in 2005 Petitioner was liable for UBT as an independent contractor and his business income was subject to UBT. The auditor adjusted the 2005 reported net business income by application of the reported loss (\$5,000) and a

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<sup>9</sup> Petitioner testified that the partnership was established on December 31, 2005. (Tr at 80). A copy of information from the NY Department of State Division of Corporations reflects a filing date of December 16, 2005. Stipulation, exhibit 31.

\$5,000 allowance, for a UBT taxable income of \$508,450. A UBT rate of 4% was applied to the taxable income amount, for a base UBT due of \$20,338. The Auditor made no adjustments to the 2006 Return, and noted in his Audit Comments that Petitioner had paid UBT for that period. (Stipulation, exhibit 15, p. 4.)

On August 21, 2009 Respondent issued a Notice of Proposed Tax Adjustment asserting a deficiency of UBT in the base tax amount of \$20,338. Interest on the deficiency was computed, and a 10% penalty for substantial understatement of UBT liability was applied pursuant to Administrative Code § 11-525 [j]. The basis for the proposed deficiency was stated to be that the Petitioner was not an employee and therefore his reported income was subject to the City UBT. The Proposed Notice was updated twice: on October 22, 2009, interest on the deficiency was increased, and the substantial understatement penalty and a late filing penalty were imposed; on August 4, 2010, interest was again updated, the substantial understatement penalty was reduced slightly and the late-filing penalty was not asserted.

The Notice was issued to Petitioner on December 21, 2010, asserting a base tax amount due of \$20,338.00, with interest computed to December 27, 2010 and a penalty imposed for substantial understatement of UBT liability.

#### **STATEMENT OF POSITIONS**

Petitioner argues initially that Respondent did not perform an audit and therefore the Notice of Deficiency should be dismissed as arbitrary and capricious. Petitioner also asserts that for the 2005 Tax Year he was an employee of Associates and not an

independent securities broker or trader, and therefore that he was not liable for UBT on business income earned in that period.

Respondent asserts that the December 21, 2010 Notice of Deficiency issued to Petitioner Timothy J. Young has a rational basis and is presumed correct. Respondent further asserts that in 2005 Petitioner was an independent contractor engaged in the securities business and that business income which he earned during that period is subject to the UBT.

### **CONCLUSIONS OF LAW**

The issue whether the Notice lacks a rational basis will be addressed before consideration of the parties' substantive positions with respect to whether Petitioner is liable for UBT.

A determination of tax must have a rational basis in order to be sustained upon review. (*Matter of Grecian Square, Inc. v State Tax Commission*, 119 AD2d 948 [3d Dept, 1986].) An assessment of tax is presumed correct when no evidence is presented challenging the assessment. (*Matter of Atlantic & Hudson Limited Partnership*, NYS Tax Appeals Tribunal Decision, [NY St Div of Tax Appeals DTA No.806710, January 30, 1992].) The State Tribunal noted in *Atlantic & Hudson*:

Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of the audit as described by the Division through testimony or documentation [citation omitted]; from factors underlying the audit which were developed by the petitioner at hearing [citations omitted]; or in the inability of the Division to identify the bases of the

audit methodology in response to questions posed at the hearing.

Administrative Code § 11-521 clearly establishes the authority for Respondent to review filed UBT returns and to issue notices of determination of UBT deficiency. Administrative Code § 11-521 (a).

Respondent reviewed Petitioner's 2005 UBT return. The auditor requested that Petitioner substantiate his return position by submitting additional documentation, including providing copies of federal Forms 1099 and of any employment contracts. In both instances Petitioner's representative was unable to provide the requested documents, but did offer other evidence.

The deficiency represents a single adjustment to Petitioner's 2005 reported UBT income which was based upon consideration of Petitioner's filing position which the auditor ultimately rejected. The Notice of Deficiency was properly issued and Respondent is entitled to the presumption of correctness. (*Matter of Richard Aronoff*, NYS Tax Appeals Tribunal Decision, [NY St Div of Tax Appeals DTA No. 823822, November 27, 2003].) The auditor concluded that income which Petitioner reported as exempt from UBT was taxable, and the Notice reflected this substantive determination. The auditor provided Petitioner with calculations of the UBT asserted due, and an opportunity for Petitioner to support any disagreement. The auditor issued the initial audit findings in the form of three Notices of Proposed Tax Adjustment, and did not finalize the deficiency until the December 21, 2010 Notice. Petitioner was afforded the opportunity to challenge the proposed assessment before it was finalized as a Notice, and well in advance of any requirement to file a petition. The deficiency comports with the requirements of Administrative Code § 11-521 [g].

The burden of proof is generally upon the Petitioner in an administrative proceeding before the City Tribunal. See Administrative Code § 11-529 [e], which applies to protesting UBT determinations. Respondent does not have the burden to "demonstrate the propriety of the assessment and . . . the petitioner has a heavy burden to prove the assessment erroneous . . . ." (*Matter of Hygrade Casket Corporation*, NYS Tax Appeals Tribunal Decision [NY St Div of Tax Appeals DTA No. 809681, December 16, 1993].) Taxpayers may protest notices issued by Respondent Department, within the constraints of specific time limits. (Administrative Code § 11-529 [b].) Petitioner timely protested the March 30, 2012 Conciliation Decision and a hearing was held in this matter. Accordingly, Petitioner has been given an opportunity to petition the Notice and to overcome the presumption of correctness. Petitioner's argument characterizing the audit is rejected.

The Administrative Code defines an unincorporated business as: "any trade, business, profession or occupation conducted, engaged in . . . by an individual or unincorporated entity . . . ." (Administrative Code § 11-502 [a].)

UBT is imposed on the taxable income of an unincorporated business carried on within the City. (Administrative Code § 11-503 [a].) Unincorporated business gross income is "the sum of the items of income and gain of the business . . . includible in gross income for the taxable year for federal income tax purposes . . ." with specific modifications (not at issue in this matter). (Administrative Code §§ 11-506 [a] [1], [b] - [f].) UBT taxable income is the excess of an unincorporated business's "unincorporated gross income over . . . unincorporated business

deductions" with specific adjustments. (Administrative Code § 11-505.)

UBT Rules of the City of New York (19 RCNY) § 28-02 [e] defines "employee" and addresses the employee-employer relationship. An employee is an individual "performing services for an employer under an employer-employee relationship." (19 RCNY 28-02.) The status of employee is determined by the extent of control exercised by the employer: an employer has the "right to control and direct" the individual "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." (19 RCNY 28-02 [e] [2] [i]). *Lieberman v Gallman*, 41 NY2d 774 (1977); *Matter of Sergio Schwartzman*, City Tax Appeals Tribunal TAT(E) 98-30 (UB) [City Tax Appeals Tribunal February 13, 2003].

Whether an individual is an employee or an independent contractor is a question of fact. UBT Rules (19 RCNY) § 28-02 [e] [3] states:

whether there is sufficient direction and control which results in the relationship of employer and employee will be determined upon *an examination of the pertinent facts and circumstances of each case.* [Emphasis added.]

(*Matter of Frances Frankel*, City Tax Appeals Tribunal TAT(E) 95-39 (UB), TAT(E) 95-40 (UB), TAT(E) 95-41 (UB) [City Tax Appeals Tribunal, December 19, 1997] citing *Matter of John B. Baxter, Jr.* City Tax Appeals Tribunal TAT(E) 93-957 (UB) [City Tax Appeals Tribunal October 17, 1996]). The totality of the circumstances will be considered, and no single factor is determinative. *Baxter*.

The Rule continues:

The designation and description of the relationship by the parties, whether by contract or otherwise, is not necessarily determinative of the status of the individual  
....[19 RCNY 28-02 (e) (3).]

As the Tribunal noted in *Frankel*, "form may not prevail over substance to subject one to a tax where such imposition is clearly erroneous."

UBT Rules [19 RCNY] § 28-02 suggests facts to consider in reviewing an employee-employer relationship, noting those that support a conclusion that an individual is an employee: e.g., where an employer requires the employee work stated times, provides equipment, furnishes a worksite, pays unemployment insurance, provides a fringe benefit plan, withholds income taxes from paid compensation. (19 RCNY 28-02 [e] [2] [i]; [3].)

The Rule distinguishes an independent contractor from an employee as one who is subject to another's control *only as to the result to be accomplished by his or her services, and not to the means and methods for accomplishing the result.*" (19 RCNY 28-02 [e] [2] [ii].) (Emphasis added). An independent contractor may maintain his or her own office,<sup>10</sup> hire employees or engage assistants, or incur unreimbursed expenses. (19 RCNY 28-02 [e] [3].) A broker is an independent contractor when, for example, the individual is "independent and . . . offer[s] [his/her] services to the general public." (19 RCNY 28-02 [2][ii].)

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<sup>10</sup> 19 RCNY 28-02 [3] [i] which applies to sales representatives, provides: "the use of general space in an individual's home for such limited purposes as receiving mail, preparing reports or performing clerical work relating to selling activities will not, in and of itself, constitute the maintaining of an office."

In 2005 Mr. Young was an employee of Associates. For most of his work day, he worked at the Exchange for Associates, performing the same tasks he had performed prior to 2005. He was under the direction and control of Mr. Buckley and was constrained by the terms of his employment as a floor clerk.<sup>11</sup> For example, with one limited excepted category, he generally did not execute trades<sup>12</sup>, and the tasks which he performed (e.g., writing the orders to give to Mr. Buckley, receiving the executed orders, submitting the orders to the Exchange) were accomplished off the Exchange Floor according to the specific directions of Mr. Buckley. He was required to work from 8:30 AM to 4:00 PM at an office in the Exchange which was rented and equipped by Associates. He was able to access the Exchange only through his employer's provision of a badge and jacket, and only with the permission of Mr. Buckley. Associates provided health insurance at no expense to Petitioner, and paid for unemployment compensation insurance and for vacation leave.

Although the method of paying Petitioner changed in 2005 (from a fixed salary paid directly to Petitioner, to proportionate commission payments to TJY), the facts suggest that Petitioner's responsibilities to the firm and the terms of his employment were no different in March 2005 than in January 2005 (or 2004 for that matter). He was paid a salary for the first two months of 2005, and received a Form W-2 for this. For the balance of 2005, his income was primarily from commissions which he earned from his work

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<sup>11</sup> There are no facts presented which would establish that Petitioner's job responsibilities changed in 2006 when he became Mr. Buckley's partner and he has testified that his responsibilities remained as they were in 2005. (Tr at 81.)

<sup>12</sup> Petitioner was permitted to make "small" transactions which he entered himself into the automated Exchange system.

for Associates.<sup>13</sup> It is not disputed that the amounts paid to TJY are directly attributable to his work for Associates. (See Stipulation, exhibit 4, p.4; Stipulation, exhibit 27, Schedule C.) Petitioner did not have the authority to hire or fire employees, and the individuals who were Mr. Young's assistants at the firm were hired by Mr. Buckley. Finally, the activities which Petitioner performed after the Exchange closed for the day were primarily on behalf of Associates and included contacting and entertaining the firm's clients.

For purposes of imposition of the UBT, however, an individual may be an employee and at the same time be engaged in an unincorporated business. The Code provides that "[T]he 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." Administrative Code § 11-502 [b]. [Emphasis supplied]. This has generally been referred to as a "exemption" provision: that is where the services which are performed are not part of a business regularly transacted by the individual, he or she remains an employee and the UBT does not apply. See, *Matter of Robin T. Grossman*, City Tax Appeals Tribunal TAT (E) 93-1842 (UB), TAT (E) 93-1843 (UB), TAT(E) 93-1844(UB) [City Tax Appeals Decision, July 24, 2000].

Petitioner would be liable for UBT on the commission income paid to TJY by Associates, to the extent that the activity for which he was paid a salary as an employee was nevertheless part of an overarching unincorporated business and Petitioner was an

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<sup>13</sup> Petitioner testified that he believed he received a monthly salary throughout 2005 (tr at 24, 53), although the evidence in the record only supports a conclusion that the salary payments reported on the Form W-2 were made in January and February 2005.

independent contractor with respect to all other activities. (19 RCNY 28-02 [e] [1], [e] [2] [I], [ii].)

In 2005 Petitioner was positioning himself to transact a securities trading business and looking towards a future partnership with Mr. Buckley. He established the limited liability company, TJY.<sup>14</sup> On his 2005 Federal Income Tax Return, he reported TJY's net business income of \$518,4550, identified his occupation as 'Broker', and described TJY as a 'Broker'. He entered into arrangements with two unrelated corporations, Forbes and LSC.<sup>15</sup> Further, Petitioner testified that the relationship with LSC was intended to enhance the future Buckley & Young partnership. (Tr at 42). Mr. Young created a home office to transact business related both to his work with Associates and his prospective relationship with LSC. He deducted expenses from business income for this office, as well as for meals and entertainment, on his Schedule C, and these expenses were not reimbursed by Associates. He was not, however, engaged in an unincorporated business.

Specific facts mitigate against a determination that in 2005 Petitioner was engaged in an unincorporated business.. Mr. Buckley controlled the Exchange worksite and provided Petitioner with the equipment he needed to perform his floor clerk responsibilities (e.g., telephone, headset, computer, etc). Petitioner was required to be at the Exchange daily for a specific time period. He was required to have Mr. Buckley's permission to engage in

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<sup>14</sup> This fact may not directly support an intent to establish an unincorporated business, as Petitioner testified that he formed the company at the advice of accountants for tax savings purposes. (Tr at 65-6.) It may be considered however in the overall context of Petitioner's activities.

<sup>15</sup> See Respondent's Ex 1, the BrokerCheck. The report states that he was employed by Forbes from May to September 2005, and by Buckley & Young LLC from January 2006.

relationships with any unrelated businesses. Even with that permission, Petitioner performed no activities for Forbes and the activities performed with respect to LSC were preliminary and generated no income in 2005.<sup>16</sup> All of the income which he received in 2005 was attributable to his work for Associates, and his compensation bore a direct relationship to the services he performed for the firm. (See UBT Rule 28-02 (4) which addresses services which are part of a business carried on by an individual independent contractor.) Most of the activity performed at his home office was for Associates. He did not hold himself out to the general public as an independent broker.

**ACCORDINGLY, IT IS CONCLUDED THAT** in 2005 Petitioner Timothy J. Young was an employee of Associates and was not an independent contractor. Petitioner earned commission and other salary income from Associates which was not attributable to an unincorporated business and that income is not subject to UBT.

Dated: February 4, 2015  
New York, New York

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Anne W. Murphy  
Chief Administrative Law Judge  
Administrative Law Judge

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<sup>16</sup> 19 RCNY 28-02 [e] [2] [ii] provides that where the individual "performs services for two or more persons or entities, without a clear division of time, such an individual would [be] an independent contractor." It appears that in those circumstances where Petitioner performed services for Associates and LSC, there was a stated division of time: Petitioner spent his workday hours at the Exchange working only for Associates, and only some portion of his evening hours researching for LSC. He performed no work at all for Forbes and the relationship was simply an accommodation. He did not hold himself out to public as being in the business of trading securities on an independent basis. See *Robin Grossman*.