

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

THE ESTATE OF THEODORE BENNAHUM

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Unincorporated Business :
Taxes under Article (5) 23 of the :
Tax Law for the Year(s) ~~XXXXXX~~ :
1970 and 1971

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that

she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 26th day of August, 1977, she served the within

Notice of Decision by (certified) mail upon The Estate of Theodore

Bennahum, c/o ~~XXXXXX~~ the petitioner in the within proceeding,

Hertz, Herson & Comapny

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

The Estate of Theodore Bennahum

as follows: c/o Hertz, Herson & Company

Two Park Avenue,

New York, New York 10016

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

26th day of August

, 1977.

Marsina Donnini

Janet Mack

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

THE ESTATE OF THEODORE BENNAHUM

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Unincorporated Business

Taxes under Article ~~21~~ 23 of the
Tax Law for the Year(s) ~~1970 and 1971~~
1970 and 1971

State of New York
County of Albany

Marsina Donnini, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 26th day of August, 1977, she served the within

Notice of Decision by (certified) mail upon Michael Incantalupo, CPA of

Hertz, Herson & Company (representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
Michael Incantalupo, CPA of
as follows: Hertz, Herson & Company
Two Park Avenue
New York, New York 10016

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

26th day of August, 1977.

Marsina Donnini

Janet Mack



STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227
August 26, 1977

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

**The Estate of Theodore Bennahum
c/o Hertz, Herson & Company
Two Park Avenue
New York, New York 10016**

Gentlemen:

Please take notice of the **Notice of Decision**
of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section ~~6~~ **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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**PAUL B. COBURN
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
THE ESTATE OF THEODORE BENNAHUM	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Years 1970 and 1971.	:	

Petitioner, the Estate of Theodore Bennahum, c/o Hertz, Herson & Company, Two Park Avenue, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1970 and 1971. (File No. 11520)

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 11, 1977 at 2:45 p.m. The petitioner appeared by Hertz, Herson & Company (Michael Incantalupo, CPA, of counsel). The Income Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq. of counsel).

ISSUE

Whether the services rendered by the petitioner to six inter-related corporations of which he was a stockholder, officer, and

director, and from each of which he received a salary, constituted the carrying on of a business subject to unincorporated business tax or whether they were exempt under section 703(b) of the Tax Law.

FINDINGS OF FACT

1. The decedent, Theodore Bennahum, and his wife, Muriel Bennahum, filed joint New York State resident income tax returns for 1970 and 1971. Submitted with those returns were analyses of the Federal income tax Schedule "C" filed by the decedent for his "Profit (or Loss) From Business or Profession".

2. On November 11, 1975, the New York State Income Tax Bureau issued a Statement of Audit Changes superseding a previous statement dated October 16, 1974, indicating that Theodore Bennahum was subject to unincorporated business tax on his business income in 1970 and 1971. A deficiency of \$9,580.62 for unincorporated business tax was reduced by an overpayment of \$29.80 on 1970 income tax resulting in an assessed overall deficiency of \$9,550.82. To this was added interest of \$2,324.11 for a total deficiency of \$11,874.93.

3. On February 17, 1976, the executor for the Estate of Theodore Bennahum (Richard J. L. Herson) filed a petition for redetermination of the deficiency or for refund of the alleged deficiency.

4. Petitioner, the Estate of Theodore Bennahum, stated that all of the income reported on the Federal income tax Schedule "C" had been paid to the decedent as salary for his services as officer, director and employee of six corporations, in all of which the decedent had been a stockholder and active business participant in 1970 and 1971.

5. The decedent, Theodore Bennahum, in the period 1962 to 1972, participated in the formation and development of a group of affiliated corporations in Europe, initially interested in the financial, heavy industrial and energy needs of France and French-speaking North Africa. Theodore Bennahum invested in each of these corporations, owning not more than 17% of the shareholders' equity, and was allegedly the chief developmental officer.

These companies were as follows:

Klehe & Co. - French investment banking firm - Paris.

Project Development Company - delivery and installation of steam generators and turbines in Teheran. - Fribourg, Switzerland. Theodore Bennahum was President.

Project Development Company West - Panama. Its business was similar to that of PDC except that it operated entirely in the Western hemisphere. Mr. Bennahum was president of the corporation.

Planet Oil and Mineral Corporation - United States - dealt with the development of mineral and oil resources in Mauretania, West Africa. Theodore Bennahum was one of the founding stockholders, and was an officer and director principally responsible for its development.

Reynolds - Etablissement Regnault - Paris. Theodore Bennahum was on the payroll of this corporation as a French resident employee for ten years prior to his death in 1972, and French income taxes were withheld and paid to France on his salary. Mr. Bennahum claimed credit on his Federal tax returns in the United States for these income taxes paid to France.

Marine International Corporation - a French corporation - long-term financing through a Swiss bank was arranged for Marine by Theodore Bennahum in 1971. He received 15,000 shares of common stock of the corporation, which he reported on his Federal income tax return @ \$10,000.00 income.

6. General instructions as to projects to be pursued and limitations on his authority were given to Theodore Bennahum by the Board of Directors of each of the corporations, all of which were operated largely through Klehe & Co. from its Paris headquarters. These Boards set the varying salary of Theodore Bennahum in each of the corporations, in all of which he held equal stock ownership.

7. On his United States Federal income tax returns, Schedule "C" of the Form 1040, Theodore Bennahum was denominated as "Consultant". Accountants prepared the tax returns.

8. Decedent, Theodore Bennahum, regarded himself as an employee of the corporations from which he drew salaries as an officer and director. On the advice of his certified public accountant, the decedent filed no unincorporated business tax returns.

CONCLUSIONS OF LAW

A. That the decedent for whom the petition was filed by the Estate of Theodore Bennahum was in the business of selling his unique services in the financing, operating and developing of industrial, oil and mineral resources in Teheran, North Africa, and South America in 1970 and 1971. That while the payments he received for the services rendered for each of the affiliated corporations was called salary, such payments did not result in Theodore Bennahum's being an employee within the meaning and intent of section 703(b) of the Tax Law.

Where an individual is subject to the control or direction of another merely as to the result to be accomplished, and not as to the means or methods for accomplishing the desired results, he is usually to be deemed an independent agent rather than an employee.

A fortiori

"... Where, he, however, performs services for two or more persons or entities, without a clear division of time, such an individual would ordinarily not be an employee but rather an independent contractor or agent with respect to both such persons or entities..." 20 NYCRR 203.10(b)

Neither entity could be said to actually direct or control such an individual to the extent necessary in an employer-employee relationship.

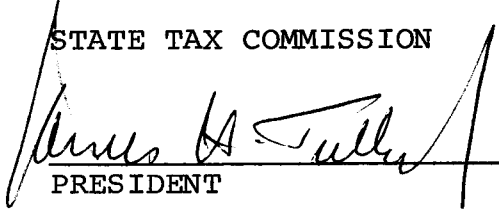
B. That the services rendered by the decedent, Theodore Bennahum, to the various corporations of which he was a stockholder, officer and director constituted his carrying on of a business subject to the unincorporated business tax for the years 1970 and 1971.

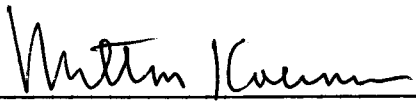
C. That the petition of the Estate of Theodore Bennahum is denied and the Notice of Deficiency dated November 24, 1975 is sustained.

DATED: Albany, New York

August 26, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER