

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Edwin L. Bass

AFFIDAVIT OF MAILING

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 & 1971. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Edwin L. Bass, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edwin L. Bass  
3725 S. Ocean Dr.  
Hollywood, FL 33019

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  
7th day of July, 1980.

Frederick A. Bank

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Edwin L. Bass

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for Redetermination of a Deficiency or a Revision :  
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Unincorporated Business Tax :  
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for the Years 1967 & 1971. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Jay R. Viders the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Jay R. Viders  
Mokotoff, Viders & Mondshine  
222 Station Plaza  
Mineola, NY 11501

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  
7th day of July, 1980.

Edward A. Bank

[Signature]

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

July 7, 1980

Edwin L. Bass  
3725 S. Ocean Dr.  
Hollywood, FL 33019

Dear Mr. Bass:

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  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Jay R. Viders  
Mokotoff, Viders & Mondshine  
222 Station Plaza  
Mineola, NY 11501  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
of	:	
EDWIN L. BASS	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967	:	
and 1971.	:	

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Petitioner, Edwin L. Bass, 3725 South Ocean Drive, Hollywood, Florida 33019, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1967 (File No. 00494) and a separate petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1971 (File No. 14245).

By stipulation between petitioner and the Audit Division, placed upon the record on June 16, 1977, a consolidated formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1977, at 9:30 A.M. and was continued to conclusion at the same location on July 18, 1977 and July 19, 1977. Petitioner appeared by Mokotoff, Vidars & Mondshine, Esqs. (Jay R. Vidars, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq. and Abraham Schwartz, Esq., of counsel).

ISSUE

Whether purported salary income received in 1967 and 1971 by petitioner, Edwin L. Bass, from a corporation, the shares of which are wholly-owned by said petitioner, is for services which are so integrated and interrelated to activities rendered by said petitioner for an unincorporated business as to constitute

income derived from or connected with the carrying on of the unincorporated business, thereby subjecting said salary income to the unincorporated business tax of this State.

FINDINGS OF FACT

1. Petitioner, Edwin L. Bass, filed New York State income tax resident returns for the years 1967 and 1971, listing his address at that time as 333 East 69th Street, New York, New York. Said petitioner filed unincorporated business tax returns for those years with respect to his unincorporated business, Edwin L. Bass, d/b/a Rudolf Bass Company (hereinafter "Bass Co.") but did not include income reported as salary from Holz Machinery and Tool Corporation (hereinafter "Holz Corp.").

2. On February 28, 1972, the Income Tax Bureau issued a Statement of Audit Changes and Notice of Deficiency against petitioner, Edwin L. Bass, imposing additional unincorporated business tax for the year 1967 of \$1,866.76 plus interest of \$433.33, making a total of \$2,300.09, on the ground that salary income received from Holz Corp. was income derived in connection with an unincorporated business carried on by said petitioner and thereby subject to the unincorporated business tax of this State.

3. On September 3, 1975, the Income Tax Bureau issued a Statement of Audit Changes and Notice of Deficiency against petitioner, Edwin L. Bass, imposing additional unincorporated business tax for 1971 of \$2,750.00, plus interest of \$558.58, making a total of \$3,308.58, on the ground that salary income received from Holz Corp. was income derived in connection with an unincorporated business carried on by said petitioner and thereby subject to the unincorporated business tax of this State.

4. Petitioner timely filed petitions for redetermination of the deficiency or for refund of unincorporated business tax with respect to each of the aforesaid notices of deficiency on the ground that the aforesaid salary income was received as an employee of Holz Corp. and did not constitute receipt of income from an unincorporated business within the meaning and intent of section 703(b) of the Tax Law.

5. Bass Co. was formed by petitioner's father in 1918 and was purchased by petitioner in or about 1939. Bass Co. was engaged primarily in the distribution and sale (on a non-exclusive basis within New York City and a surrounding area having an approximate radius of 200 miles) of American-manufactured new and used woodworking machines to the ultimate consumer or user which, in most instances, were furniture makers and the like. On occasion, however, Bass Co. made "accommodation" sales to its competitors when the latter were out of stock of a particular machine or made over-the-counter sales of smaller, less expensive machines to the general public.

6. Petitioner organized and formed Holz Corp. in 1957 and, during the years in question, was its sole shareholder, President and Chairman of the Board of Directors. Pursuant to written contracts, Holz Corp. would purchase and import heavy or industrial woodworking machinery manufactured in Europe and had the exclusive right to distribute such machinery under its own label, to dealers in the United States for resale to the ultimate consumer or user.

7. Petitioner expended 85-90 percent of his time and efforts on the business activities of Holz Corp., receiving compensation in the form of salary income from which taxes and Social Security contributions were deducted. Holz Corp. also paid into New York State Unemployment Insurance and a company retirement or pension fund on behalf of said petitioner and other employees. Said petitioner's expenses were reimbursed by the Holz Corp. and such expenses were not claimed by him as business expenses on his Federal or New York State personal income tax returns.

8. Petitioner expended approximately 10 to 15 percent of his time and efforts on the business activities of Bass Co., receiving compensation only from the net profit of that enterprise. Said petitioner's compensation was not subject to withholding for taxes or Social Security. While Bass Co. maintained a pension or profit sharing plan for its employees, said petitioner was not a participant.

9. Petitioner, Edwin L. Bass, also owned all of the shares of stock of Associated Woodworking, Inc. and fifty percent (50%) of the shares of George M. Mitchell Machinery Corp. Both companies had been competitors of Bass Co. and were purchased (or the assets thereof were purchased) by petitioner primarily to forestall take-overs of such companies by major competitors. Said petitioner performed no services for Associated Woodworking, Inc., and received no compensation from that company; said petitioner performed minimal consulting services for George M. Mitchell Machinery Corp. and received some compensation as wages during the years in question.

10. Holz Corp. and Bass Co. occupied space at separate locations (and paid separate rents) for the conduct of their respective businesses and the storage of machinery, except in one instance where separate space was utilized at the same location and rent was prorated on a square footage basis between the two entities. There were no written leases, possession being a month-to-month tenancy and, with one exception, rent was paid to corporate-landlords, of which petitioner, Edwin L. Bass, owned all or substantially all of the shares of stock.

11. Holz Corp. and Bass Co. maintained separate books and records at different locations; maintained separate bank accounts; carried and sold distinct lines of machinery to a clearly defined and separate category of customers in different geographical territories; advertised such lines of machinery in a totally disparate manner (Bass Co. doing minimal local advertising, relying on sales campaigns of American manufacturers, while the Holz Corp. advertised

extensively on a national basis); Bass Co. issued warranties only on used, overhauled machinery (as American manufacturers warranted the new machinery) while Holz Corp. issued warranties on all the machines it sold; Bass Co. did not maintain product liability insurance, obtaining, instead, certificates of insurance from American manufacturers, while Holz Corp. maintained its own insurance coverage; the suggested selling price of Bass Co.'s machinery was determined by American manufacturers while Holz Corp. established such price for its imported machinery; and, maintained separate telephone listings, except in 1967 where both companies prorated the cost of one central telephone system.

12. During the years in question, Holz Corp. and Bass Co. maintained a separate payroll with minimal overlap of duties between the employees (located at different locations) of the two enterprises. The bookkeeper for Bass Co. did perform concurrent services for Holz Corp. on occasion for which there was a debit/credit entry on the books and records of the respective companies. Certain officers of Holz Corp. had check authorization with respect to Bass Co. to be exercised in the absence of petitioner, Edwin L. Bass, which authorization was in fact exercised. Holz Corp. and Bass Co. each maintained a separate and distinct supervisory staff.

13. Petitioner, Edwin L. Bass, performed separate and distinct services for Holz Corp. and Bass Co. which, for the most part, were clearly divisible as to time and effort expended as to the two companies.

#### CONCLUSIONS OF LAW

A. That, pursuant to section 701(a) of the Tax Law, the State of New York imposes a tax upon the income of every unincorporated business wholly or partially carried on within the State of New York.



B. That, pursuant to section 703(a) of the Tax Law, an unincorporated business is defined as any trade, business or occupation engaged in by an individual or unincorporated entity.

C. That, pursuant to the exemption provided in section 703(b) of the Tax Law, the "performance of services by an individual as an employee or as an officer or director of a corporation... shall not be deemed an unincorporated business, unless such services constitute part of a business regularly carried on by such individual."

D. That the proviso in section 703(b) of the Tax Law "is to prevent an individual entrepreneur from sheltering from the unincorporated business tax income which derives from the conduct of his unincorporated business in the form of salaries for services as an employee or officer of the corporate entities, in a situation where the corporate entities exist primarily to advance the business purposes of the unincorporated entity and do not have an independent and unrelated business purpose." Matter of Naroff v. Tully, 55 A.D.2d 755, 389 N.Y.S.2d 453 (3rd Dept. 1976).

E. That, pursuant to sections 722 and 689(e) of the Tax Law, petitioner, Edwin L. Bass, bears the burden of proof to establish that the salary income received ostensibly as an officer and employee of a corporation, was not for services constituting part of his unincorporated business. Matter of Naroff v. Tully, Id. See also, Matter of Liberman v. Gallman, 41 N.Y.2d 774, 777 (1977).

F. That petitioner, Edwin L. Bass, has sustained his burden of establishing that he was an employee of Holz Corp. within the meaning of section 703(b) of the Tax Law. The services rendered by said petitioner as an employee and officer of the corporation did not constitute part of the unincorporated business regularly carried on by petitioner (Bass Co.).

G. That the petitions of Edwin L. Bass are granted and the notices of deficiency dated February 28, 1972 and September 3, 1975 are cancelled.

DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK  
STATE TAX COMMISSION

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Unincorporated Business Tax :  
under Article 23 of the Tax Law  
for the Years 1967 & 1971. :

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 6th day of August, 1980, he served the within notice of Decision by certified mail upon Edwin L. Bass, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edwin L. Bass  
333 East 69th St.  
New York, NY 10021

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of August, 1980.

Rectoria A Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of

Theodore Bauer

AFFIDAVIT OF MAILING

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 1968 - 1971. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon Theodore Bauer, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore Bauer  
5320 N.W. 11th St.  
Plantation, FL

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  
7th day of July, 1980.

Deborah A Bank

J. Vredenburg