

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Emanuel Moss

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 1973 & 1974. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Emanuel Moss, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

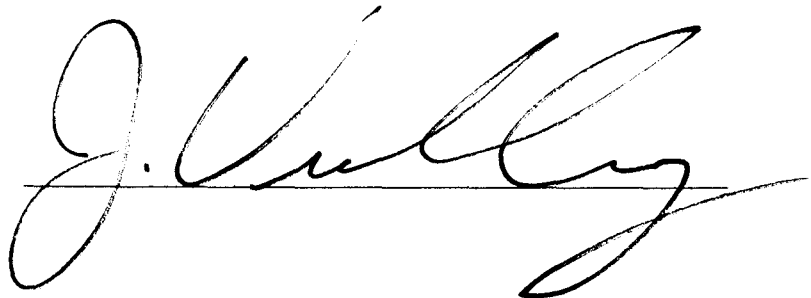
Emanuel Moss
640 Ft. Washington Ave., Apt. #3-L
N.Y., NY 10040

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
23rd day of May, 1980.

Joanne Knapp



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

May 23, 1980

Emanuel Moss
640 Ft. Washington Ave., Apt. #3-L
N.Y., NY 10040

Dear Mr. Moss:

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

Taxing Bureau's Representative

STATE TAX COMMISSION

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 13, 1979 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether interest income earned during 1973 and 1974 is subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Emanuel Moss, and Berta Moss, his wife, filed New York State combined income tax returns for 1973 and 1974 on which they reported interest income from savings accounts and United States treasury bills. Petitioner, Emanuel Moss, filed New York State unincorporated business tax returns for 1973 and 1974 on which he reported income and expenses from his business activities as a textile converter.

2. On December 13, 1976, the Audit Division issued a Statement of Audit Changes in the sum of \$437.89 for 1973 and 1974, based on a field audit conducted by them, on which it was determined that interest income from savings accounts reported on the personal returns was also subject to unincorporated business tax. On December 21, 1976, the Audit Division received a remittance of \$345.67 in partial payment of the total amount due.

3. On April 11, 1977, the Audit Division issued a revised Statement of Audit Changes to reflect the previous remittance and updated interest. On April 14, 1977, the Audit Division issued a Notice of Deficiency, based on the aforementioned revised Statement of Audit Changes. On April 22, 1977, the Audit Division received a remittance of \$94.00 in full payment of the balance due, which included updated interest.

4. Petitioner, Emanuel Moss, filed an Application for Refund for 1973 and 1974. On November 28, 1977, the Income Tax Bureau disallowed in full petitioner's claim for refund of unincorporated business tax of \$369.61.

5. On January 9, 1978, the Audit Division received a petition for refund of unincorporated business tax of \$369.61 for 1973 and 1974.

6. Petitioner, Emanuel Moss, was the sole proprietor of an unincorporated business located at 1133 Broadway in New York City. Petitioner had a business checking account, which he utilized to pay both business and personal expenses. During 1973 and 1974, petitioner transferred funds from his savings accounts to his business checking account for the purpose of purchasing United States treasury bills. Ledger books submitted for examination indicated that the savings accounts, the treasury bills and the interest earned therefrom were recorded in his business books, clearly segregated from his normal business transactions and marked "Private Accounts".

7. The Audit Division conducted an audit and examined all of petitioner's books and records for 1973 and 1974; however, the audit worksheets were not available for examination.

CONCLUSIONS OF LAW

A. That petitioner, Emanuel Moss, has sustained the burden of proof as required by section 689(e) of the Tax Law in establishing, by a fair preponderance of the evidence, that the savings accounts and interest income derived therefrom were personal assets, separate and distinct from his unincorporated business assets.

B. That interest income from personal savings accounts is not includable in unincorporated business gross income within the meaning and intent of section 705(a) of the Tax Law.

C. That the petition of Emanuel Moss is granted and the Audit Division is hereby directed to authorize a refund of \$369.61, together with such interest as may be lawfully owing.

DATED: Albany, New York
MAY 23 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER