***16 T.C. 446 (1951)***

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A taxpayer is not entitled to relief from excess profits tax under Section 722(b)(4) or (b)(5) of the Internal Revenue Code if the claimed abnormality either did not impact earnings by the end of the base period or is based on events occurring after the base period.

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**Summary**

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Alexandria Amusement Corporation sought relief from excess profits tax, arguing that the opening of a new theater in 1937 and the inability to operate on Sundays until 1941 resulted in an inadequate standard of normal earnings during the base period (1936-1939). The Tax Court denied relief. The court held that the corporation had sufficient time to develop its business after opening the new theater, and the inability to operate on Sundays was an event outside the base period that could not be considered when determining a constructive average base period net income. The court emphasized that Section 722 was not intended as a broad equitable remedy, but rather a specific relief measure.

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**Facts**

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Alexandria Amusement Corporation operated two older movie theaters in Alexandria, Virginia. On April 7, 1937, the corporation opened a third, modern theater (the Reed), nearly doubling its seating capacity. Prior to March 1941, the corporation's theaters were closed on Sundays due to local interpretation of Virginia's "Blue Laws." In March 1941, the Commonwealth Attorney issued an opinion that allowed Sunday operation of amusement facilities due to increasing military personnel in the area, and the corporation then began operating its theaters seven days a week.

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**Procedural History**

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The Commissioner of Internal Revenue determined deficiencies in the corporation's excess profits tax liability for 1944 and income tax liabilities for 1943 and 1944. The Commissioner also determined that the corporation was not entitled to relief under Section 722 of the Internal Revenue Code for the years 1942, 1943, and 1944. The corporation petitioned the Tax Court, contesting the denial of relief under Section 722.

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**Issue(s)**

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1. Whether the opening of the new theater in 1937 constituted a change in the capacity of the business during the base period, entitling the corporation to relief under Section 722(b)(4) of the Internal Revenue Code.

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2. Whether the inability to operate on Sundays during the base period resulted in an inadequate standard of normal earnings, entitling the corporation to relief under Section 722(b)(5) of the Internal Revenue Code.

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**Holding**

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1. No, because the corporation had more than 2 1/2 years to develop its business after opening the third theater, and it did not prove that its earnings at the end of 1939 would have been significantly greater if the change had been made two years earlier.

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2. No, because the corporation's claim for relief under Section 722(b)(5) was inconsistent with the principles underlying Section 722, as it violated the base period concept by considering events subsequent to 1939.

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**Court's Reasoning**

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Regarding Section 722(b)(4), the court noted that the push-back rule only applies if the taxpayer hasn’t reached the earning level it would have reached by the end of the base period, had the change occurred two years earlier. Since the new theater opened in April 1937, the court reasoned that by the end of 1939, the business had sufficient time to normalize. The court also pointed out that the corporation initially stated in its application that the business *did* reach the earning level it would have reached if the change occurred two years prior. The court stated, “It cannot now advance a different theory.”

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Regarding Section 722(b)(5), the court emphasized that Section 722 is not a means of extending equitable aid to all taxpayers affected by the excess profits tax; relief is only available if specific conditions existed. The court stated that the

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