

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Fannie R. Zeamon :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1973. :

State of New York

County of Albany

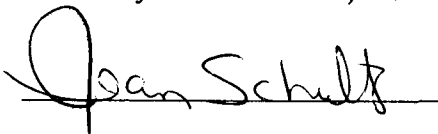
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Fannie R. Zeamon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

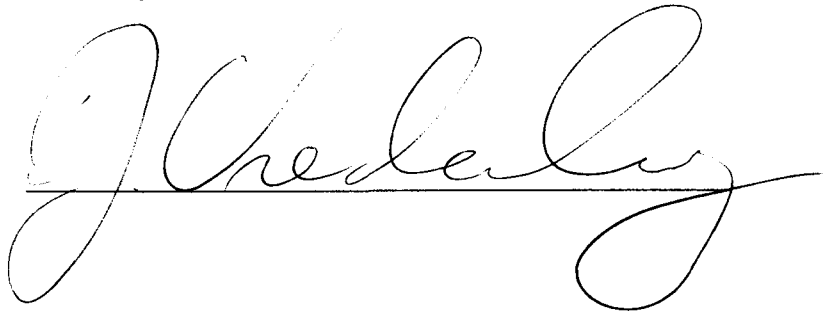
Fannie R. Zeamon
106 Crawford Ave.
Syracuse, NY 13224

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
12th day of December, 1980.





STATE OF NEW YORK
STATE TAX COMMISSION

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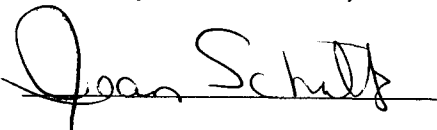
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon James P. Burns, III the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

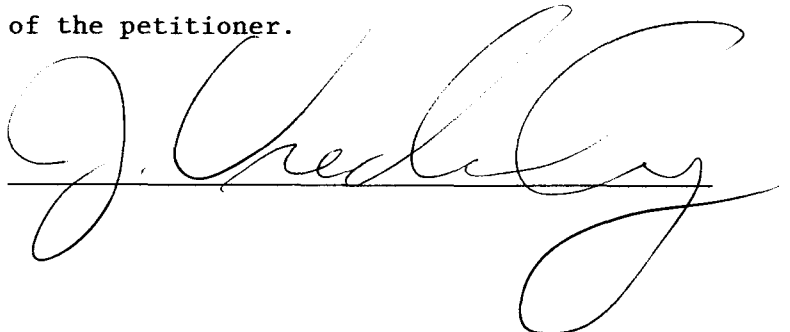
Mr. James P. Burns, III
1400 Mony Plaza
Syracuse, NY 13202

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
12th day of December, 1980.


Joan Schultz


Jay Vredenburg

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

December 12, 1980

Fannie R. Zeamon
106 Crawford Ave.
Syracuse, NY 13224

Dear Ms. Zeamon:

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) 690 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
James P. Burns, III
1400 Mony Plaza
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FANNIE R. ZEAMON	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1973.	:	

Petitioner, Fannie R. Zeamon, 106 Crawford Avenue, Syracuse, New York 13224, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1973 (File No. 18875).

A formal hearing was held before David Evans, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York, on February 7, 1980 at 3:30 P.M. Petitioner appeared by Hancock, Estabrook, Ryan, Shove & Hust, Esqs. (James P. Burns, 3rd, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the appropriation award by the Court of Claims to the estate of the decedent property owner was taxable as income in respect of a decedent pursuant to section 691 of the Internal Revenue Code, or constituted proceeds earned by the estate which qualified for a stepped-up basis pursuant to section 1014 of the Code.

II. Whether attorney fees which, in accordance with the retainer agreement, were computed as a percentage of principal of an appropriation award plus a percentage of interest accrued thereon, may be attributed to said principal and to said interest, or must the total fees be capitalized against principal.

FINDINGS OF FACT

1. On February 28, 1977, the Audit Division issued a Notice of Deficiency to Fannie R. Zeamon, asserting additional personal income taxes for the year 1973 in the amount of \$8,888.53, with interest thereon of \$1,915.83, for a total of \$10,804.36.

2. Jack Zeamon (the "decendent") owned real property located at 256 James Street, Syracuse, New York, which was appropriated by New York State pursuant to the laws of eminent domain on September 30, 1965, in connection with the construction of Interstate 690. The State's offer to decedent for the property was \$113,000.00, and a partial payment of \$67,800.00, comprising sixty percent of the total offer, was made by the State to decedent in 1966. Decedent and Fannie R. Zeamon, petitioner herein, reported the received appropriation proceeds in their 1966 income tax return, resulting in a capital gain of \$62,732.50. On August 31, 1966, decedent filed in the Court of Claims a claim against New York State for a greater amount of compensation for the State's appropriation of said property.

3. Jack Zeamon died on June 22, 1967. Paul B. Zeamon (decedent's brother, who subsequently died in January, 1969), petitioner, Fannie R. Zeamon (decedent's wife) and Beverly Zeamon Shapero (decedent's daughter) were named executor and executrices of the Estate. Petitioner was, in addition, the residual legatee.

4. In 1967, the Estate filed an estate tax return, listing the claim against New York State on Schedule F, entitled "Miscellaneous Property". The estimated net value of said claim was returned at \$85,000.00.

5. Mrs. Shapero, as co-executrix of the Estate, functioned as decision-maker with regard to certain courses of action taken in the prosecution of the claim against New York State. She was unaccepting of the first appraisal made of

the property. Consequently, she made inquiries as to other awards the State had paid and sought out another appraiser, whose appraisal was ultimately filed in the case. She demanded a change in trial counsel: she disagreed with counsel's opinion that she accept a second, higher offer made by the State prior to trial; and she demanded that Mr. Varney of the same firm handle the claim because of his reputed ability in this area of the law. Further, by her election to litigate, she exposed the Estate to the possibility that the Court might set the value of the property below, rather than above, the State's initial offer.

6. In 1972, the case was tried in the Court of Claims, and the Estate was awarded a principal amount of \$178,097.03, plus interest thereon in the sum of \$45,150.22. The legal fee for representation in this matter, as agreed to by the parties, was 33 1/3 percent of the excess awarded over the State's offer, plus interest on that portion in excess of the offer, that is, \$27,839.62 in regard to principal, plus \$8,931.79 in regard to interest.

7. The appropriation award was reported by petitioner on her 1973 income tax resident return. The basis used against the award of principal was the estate stepped-up basis of \$85,000.00, plus the attorney fees earned against principal. The accrued interest from the award was reported, less attorney fees applicable thereto, as abovementioned.

8. The position of the Audit Division was that the compensation received from the State in connection with its taking of the property constituted income in respect of a decedent, thereby disqualifying petitioner from the tax benefits of a stepped-up basis. The Division further maintained that attorney fees could not be applied against interest received, but must be capitalized against principal.

9. The Internal Revenue Service accepted petitioner's 1973 Federal return as filed.

CONCLUSIONS OF LAW

A. That the New York adjusted gross income of a resident individual is defined by section 612 of the Tax Law as such individual's Federal adjusted gross income for the taxable year, with certain New York modifications not herein at issue.

B. That section 691 of the Internal Revenue Code sets forth the general rule for inclusion in gross income of items of income in respect of a decedent, as follows:

"(a)(1) The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period...shall be included in the gross income, for the taxable year when received, of:

(A)the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

(B)the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or

(C)the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right."

Treasury Regulation section 1.691(a)-1(b) furnishes a general definition for the term "income in respect of a decedent":

"...those amounts to which a decedent was entitled as gross income but which were not properly includible in computing his taxable income for the taxable year ending with the date of his death or for a previous taxable year under the method of accounting employed by the decedent... Thus, the term includes --

(1) All accrued income of a decedent who reported his income by use of the cash receipts and disbursements method;

(2) Income accrued solely by reason of the decedent's death in case of a decedent who reports his income by use of an accrual method of accounting; and

(3) Income to which the decedent had a contingent claim at the time of his death."

C. That upon the filing of the appropriation map by the State in the office of the county clerk of the county wherein the property was situated, title to the property vested in the State of New York. Eminent Domain Procedure Law Section 402. T. Jack Foster, 25 T.C. Memo. 1390, 1425 (1966). Title thus passed and decedent received sixty percent of the State's compensation offer prior to the date of his death.

D. That case law has distinguished the following two situations: (1) Decedent sold property prior to his death, but the proceeds of the sale were received by his estate. (2) The economic activities in connection with a sale occurred during decedent's lifetime, but the sale was not consummated until after his death. The courts have deemed it pertinent to inquire whether the income received after death was attributable to the economic activities and efforts of decedent during his lifetime, but the crucial question is whether the status of the transaction giving rise to the income was such at the date of death that decedent had a right to the income at that time. Absent such a right, no matter how extensive were decedent's economic activities prior to his death, the income is not income in respect of a decedent; conversely, where such right came into being prior to the date of death, the income constitutes income in respect of a decedent. Keck v. Commissioner, 415 F.2d 531 (6th Cir. 1969), rev'g, 49 T.C. 313 (1967); Trust Co. of Georgia v. Ross, 392 F.2d 694 (5th Cir. 1967), aff'g, 262 F. Supp. 900 (N.D. Ga. 1966); Rev. Rul. 78-32, 1978-1 C.B. 198. Accord, Commissioner v. Linde, 213 F.2d 1 (9th Cir.), cert. denied, 348 U.S. 871 (1954); Estate of Harry B. Sidles, 65 T.C. 873, aff'd 8th Cir., in unpublished opinion, January 14, 1977.

E. That the appropriation award by the Court of Claims comprised income in respect of a decedent and was taxable as such. Decedent's right to compensation for the State's taking of his real estate came into being prior to his death; he was entitled, at a minimum, to the amount of the State's initial offer.

Petitioner elected to litigate the question of the value of the property, thereby undertaking to perform some aspects of the total transaction, but these aspects were "...not of such scope as would negate the right which was [decedent's]...". Trust Co. of Georgia, supra at 696.

Hence, petitioner was not entitled to take advantage of the stepped-up basis provision of section 1014 of the Internal Revenue Code.

F. That the accrued interest from the appropriation award was taxable in the year awarded as ordinary income. Such interest is included in the award to compensate the property owner for the experienced delay in payment. Kieselbach v. Commissioner, 317 U.S. 399 (1943); Isaac G. Johnson & Co. v. United States, 149 F.2d 851 (2d Cir. 1945).

G. That the expenses incurred by the taxpayer in connection with the litigation undertaken to increase the amount of the award were capital expenditures and deductible solely from the condemnation award. Casalina Corp. v. Commissioner, 60 T.C. 694, aff'd mem., 511 F.2d 1162 (4th Cir. 1975); William Justin Petit, 8 T.C. 228 (1947). There is no basis in law for attribution of a portion of the attorney fees to the accrued interest.

"The attorney fees which petitioner paid ... were for their entire services in the condemnation proceeding and there is no basis for allocating \$8,878.36 of the fee to the collection of interest. The entire amount paid the attorneys for their services must be treated as capital expenditures." William Justin Petit, supra at 236-37.

H. That the petition of Fannie R. Zeamon is denied, and the Notice of Deficiency issued February 28, 1977 is sustained in full.

DATED: Albany, New York

DEC 12 1980

STATE TAX COMMISSION

James W. Tuller
PRESIDENT

Thomas H. Smith
COMMISSIONER

Francis P. Koenig
COMMISSIONER