

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Phillip P. Zipes :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax & UBT :
under Article 16 & 16A of the Tax Law
for the Years 1954-1958 & 1960-1963. :

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 22nd day of February, 1980, he served the within notice of Decision by certified mail upon Phillip P. Zipes, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

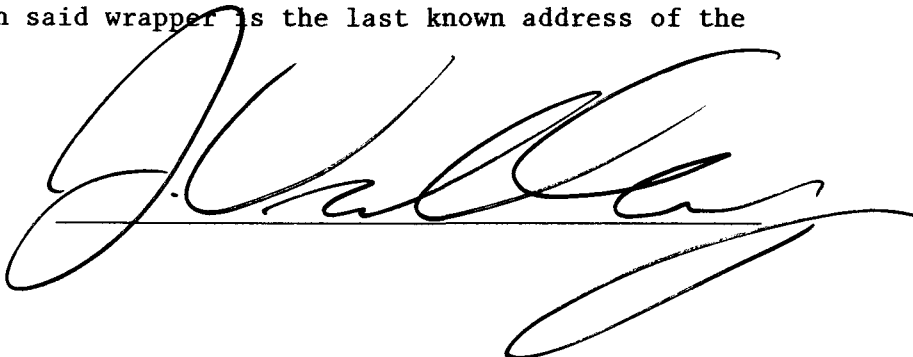
Phillip P. Zipes
2201 N.W. 23rd St.
Miami, FL 33142

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
22nd day of February, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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Personal Income Tax & UBT :
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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 22nd day of February, 1980, he served the within notice of Decision by certified mail upon William N. Segal the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

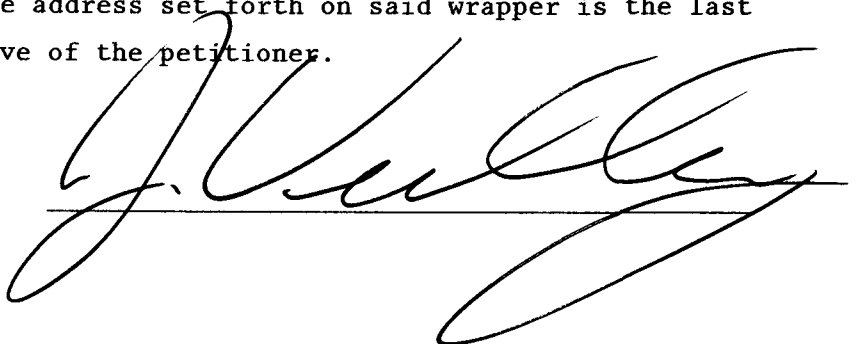
Mr. William N. Segal
William N. Segal & Co., CPA's
342 Madison Ave.
New York, NY 10017

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
22nd day of February, 1980.

Joanne Knapp



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

February 22, 1980

Phillip P. Zipes
2201 N.W. 23rd St.
Miami, FL 33142

Dear Mr. Zipes:

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) 386j & 375 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 90 days 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
William N. Segal
William N. Segal & Co., CPA's
342 Madison Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|---------------|
| In the Matter of the Applications | : | |
| of | : | |
| PHILLIP P. ZIPES | : | DETERMINATION |
| for Revision or Refund of Personal Income | : | |
| and Unincorporated Business Taxes under | : | |
| Articles 16 and 16A of the Tax Law for | : | |
| the Years 1954 through 1958. | : | |

Applicant, Phillip P. Zipes, 2201 N. W. 23rd Street, Miami, Florida 33142, filed applications for revision or refund of personal income and unincorporated business taxes under Articles 16 and 16A of the Tax Law for the years 1954 through 1958 (File No. 00496).

Formal hearings were held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 15, 1976 at 1:15 P.M. and on February 9, 1977 at 1:15 P.M. Applicant appeared by William N. Segal, CPA. The Income Tax Bureau appeared by Peter Crotty, Esq. (Irwin Levy and Richard Kaufman, Esqs., of counsel).

ISSUES

I. Whether the claims against applicant for unincorporated business taxes are barred by reason of laches.

II. Whether applicant's activities with respect to real estate constituted the carrying on of an unincorporated business.

FINDINGS OF FACT

1. Applicant, Phillip P. Zipes, filed New York State income tax resident returns for each of the years 1954, 1955, 1956, 1957 and 1958. He also filed unincorporated business tax returns for each of said years.

2. On March 28, 1962, the Income Tax Bureau issued five separate "Notices of Additional Assessment Income Tax" against said applicant, setting forth adjustments to income and tax liability that the Bureau had made for each of said years 1954 through 1958 totaling \$11,517.37, including the following amounts for unincorporated business taxes for each of said years, to wit, \$1,653.44 for 1954, \$457.48 for 1955, \$744.72 for 1956, \$2,363.89 for 1957 and \$521.32 for 1958, or a total of unincorporated business taxes for 1954 through 1958 of \$5,740.85.

3. Applicant variously described the kind of business in which he was engaged on the New York State income and unincorporated business tax returns that he filed as aforesaid as "Realty Broker" (1955), "Management and Brokerage Business" (1957), "Realty Broker and Agent" (1957) and "Real Estate" (1958).

4. During 1958 and 1959, applicant conducted the business of the Z Management Co., a partnership in relation to which applicant was a general partner. Said partnership, during the period aforesaid, was engaged in the business of buying, owning and selling parcels of developed real estate. It is conceded on behalf of applicant that with respect to the said Z Management Co., he carried on an unincorporated business.

5. (a) During 1954 to 1958 inclusive, applicant was also a partner in various partnerships in addition to Z Management Co. that also owned pieces or parcels of developed real estate, it being claimed on behalf of applicant that as to such other partnerships he did not carry on an unincorporated business, whereas the Income Tax Bureau determined as to certain of such other partnerships that applicant did carry on an unincorporated business.

(b) For example, during 1954, a representative year, applicant reported the following net income from seven of such other partnerships in his New York State Income Tax Resident Return.

| <u>NAME OF PARTNERSHIP</u> | <u>NET INCOME</u> |
|---|------------------------|
| 1. Zipes & Leepson, 391 East 149th Street | \$ 2,548.12 |
| 2. Resnick, Ziplow & Zipes, 40 Vanderbilt Avenue | 6,594.79 |
| 3. Marion Co., 391 East 149th Street | 602.83 |
| 4. Langdon Co., 391 East 149th Street | 963.71 |
| 5. Phillip P. & Mark Zipes, 391 East 149th Street | 664.68 |
| 6. Resnick & Zipes, 40 Vanderbilt Avenue | 392.82 |
| 7. Sheridan Associates, 332 East 149th Street | <u>135.41</u> |
| TOTAL PARTNERSHIP INCOME | <u>\$11,902.36</u> |

(c) The Income Tax Bureau, however, determined in relation to certain of such other partnerships, including some of the partnerships listed in subparagraph (b) above, that applicant did conduct an unincorporated business subject to unincorporated business tax for 1954 to 1958 inclusive, stating, for example, in its aforesaid Notice of Additional Assessment for the year 1954 that the audit of the applicant's New York State Income Tax Resident Return for 1954 disclosed income subject to unincorporated business tax from five partnerships as follows:

"Income from following partnerships
considered receipts of business
regularly carried on:

| | |
|---------------------|-------------------|
| Sheridan Associates | \$ 135.41 |
| Marion Company | 602.83 |
| Langdon Realty | 963.71 |
| Zipes and Zipes | 664.68 |
| Resnick and Zipes" | 392.82 |
| | <u>\$2,759.45</u> |

6. (a) Applicant was not present at the hearing held herein on October 15, 1976. In response to inquiry, it was stated by Mr. Segal, who appeared for applicant, that Mr. Zipes had been "domiciled" in Florida "since 1962 or about that time" and that "he has had serious ailments in the past, such as cirrhosis of the liver and other ailments", but it was conceded that he was not confined to bed, and no medical certificate was offered concerning the condition of his health.

The said hearing was adjourned for the purpose of giving applicant another opportunity to testify but he was again absent at the time of the adjourned hearing held herein on February 9, 1977.

(b) With respect to the taxable years at issue, there is no testimony in the record by applicant or by a witness on his behalf to support his claim that he was not carrying on an unincorporated business as determined by the Income Tax Bureau.

7. Applicant maintained an office at 391 East 149th Street in Bronx, New York which he used for the purposes of management "of the properties that he invested in with other investors" and the keeping of records relating to "all his real estate ownerships, direct and indirect".

8. With respect to properties other than those owned by Z Management Co. as to which the Income Tax Bureau determined that applicant carried on an unincorporated business subject to unincorporated business tax, applicant acted on a continuing basis during the years at issue as the finder of properties suitable for purchase and syndication, and interested potential investors in becoming investors in such properties and to participate with him as partners in their ownership and the benefits of ownership to be derived therefrom. After the purchase of such properties, applicant managed the same, including leasing and collecting rents and making repairs. He devoted his time and attention with substantial regularity to such efforts on behalf of his co-investors or partners in such syndications as well as on his own behalf.

CONCLUSIONS OF LAW

A. That the motion to dismiss on the ground of laches is denied on the authority of Matter of Jamestown Lodge 1681 Loyal Order of Moose (Catherwood) 31 AD 2d 981, where it was said that "Laches, waiver or estoppel may not

be imputed to the State in the absence of statutory authority" and that "This rule is generally applied in connection with tax matters".

Said motion is also denied for the further reason that the record does not establish that applicant has been damaged or prejudiced by delay.

B. That applicant's failure to testify leads to the inference that his testimony would not have supported his version of the case and authorizes the strongest inference that the opposing evidence supports. (Dowling v. Hastings, 211 NY 199; Isquith v. Isquith, 229 App. Div. 555; Vallee v. Vallee, 154 Misc. 620, aff'd 247 AD 874; Eraser Co. v. Kaufman, 138 NYS 2d 743.)

On the basis of the record, the inference is warranted that the role of applicant during the period 1954 through 1958 was not that of just an investor in real property as claimed by him but that he carried on the business of organizing real property syndicates and of managing the properties owned by the syndicates he had organized for the benefit of the partners therein, as well as himself, as determined by the Income Tax Bureau.

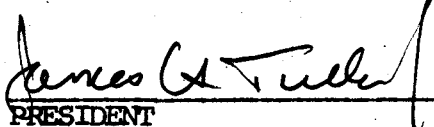
C. Additionally, insofar as the taxable years at issue are concerned, there was no testimony to support applicant's claim. Not only was applicant absent from the hearings, but the only prospective witness at the hearings on his behalf was his representative, William N. Segal, who was unable to testify as to those years because he did not become applicant's accountant until 1961. He stated, therefore, that he could not qualify as a witness and that he was relying solely on the motion made by him, as aforesaid, to dismiss this proceeding on the ground of laches.

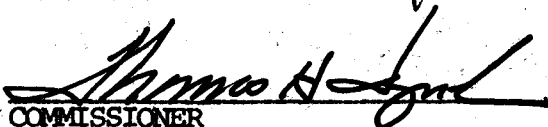
D. That the record herein establishes that applicant was engaged in carrying on an unincorporated business subject to the unincorporated business tax for each of the taxable years 1954 to 1958 inclusive.

E. That the applications of Phillip P. Zipes, with respect to the years 1954 to 1958 inclusive, are denied and the "Notice of Additional Assessment Income Tax" dated March 28, 1962 is hereby sustained.

DATED: Albany, New York

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER