

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 22 & 23 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:

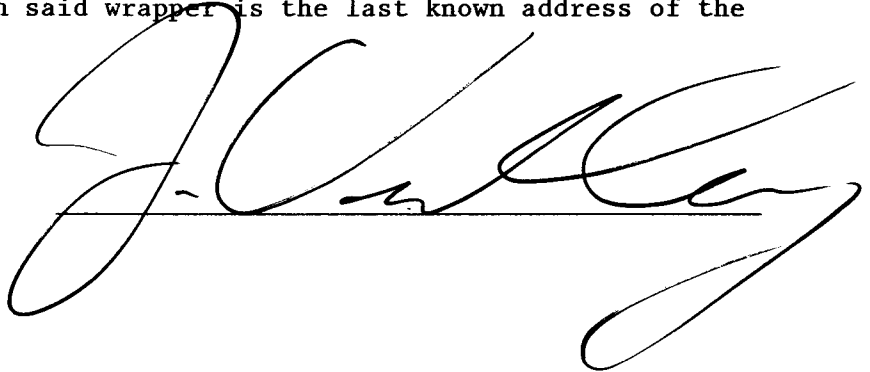
Phillip P. Zipes
2201 N.W. 23rd St.
Miami, FL 33142

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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Phillip P. Zipes :

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for Redetermination of a Deficiency or a Revision :
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Personal Income Tax & UBT :
under Article 22 & 23 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 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:

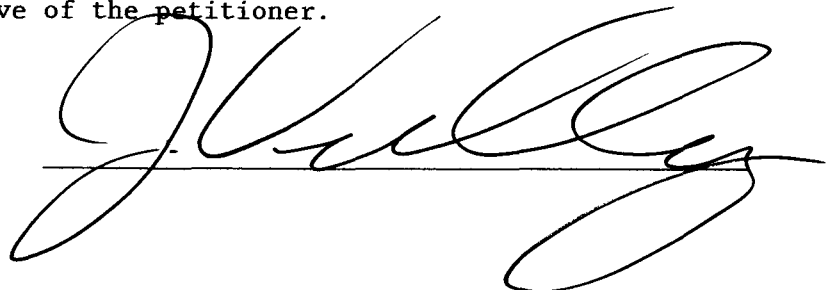
Mr. William N. Segal
William N. Segal & Co., CPA's
342 Madison Ave.
New York, NY 10017

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) 690 & 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
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 Petition	:	
of	:	
PHILLIP P. ZIPES	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Articles 22 and 23 of the Tax Law for	:	
the Years 1960 through 1963.	:	

Petitioner, Phillip P. Zipes, 2201 N. W. 23rd Street, Miami, Florida, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1960 through 1963 inclusive (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. Petitioner 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 petitioner for unincorporated business taxes are barred by reason of laches.

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

FINDINGS OF FACT

1. Petitioner, Phillip P. Zipes, and his wife, Celia Zipes, filed New York State combined income tax returns for the years 1960 and 1961, a

New York State Income Tax Nonresident Return for the year 1962 and a New York State Income Tax Resident Return for the year 1963, but did not file unincorporated business tax returns for any of the aforesaid years 1960 through 1963, except the year 1963.

2. On June 19, 1967, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, Phillip P. Zipes, stating that as a result of a field audit for the taxable years 1960 through 1963 inclusive, additional taxes were due, including the following amounts for unincorporated business taxes for each of said years, to wit, \$395.25 for the year 1960, \$7,202.68 for the year 1961, nothing for the year 1962 and \$1,293.01 for the year 1963 or a total of unincorporated business taxes for the taxable years 1960 through 1963 of \$8,890.94. Accordingly, a Notice of Deficiency was issued against petitioner on September 25, 1967 for additional personal income taxes, unincorporated business taxes and interest totaling \$13,418.88 for the years 1960 through 1963.

3. Petitioner 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 "Real Estate" (1960), "Investor and Realty Management" (1961), "Realty Management" (1962), "Realty Management, Etc." (1963) and "Management-Real Estate" (1963).

4. During 1960 through 1963, petitioner conducted the business of Z Management Co., a partnership in relation to which petitioner was a general partner. Said partnership during the period aforesaid was engaged in the business of buying, owning and selling approximately twenty-five pieces or parcels of developed real estate. It is conceded on behalf of petitioner that with respect to the said Z Management Co. he carried on an unincorporated business.

5. During 1960 through 1963 inclusive, petitioner 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 petitioner 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 petitioner did carry on an unincorporated business.

6. (a) Petitioner 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 petitioner, 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 petitioner 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 year 1960, there is no testimony in the record by petitioner or by a witness on behalf to support his claim that he was not carrying on an unincorporated business during said years as determined by the Income Tax Bureau.

(c) The sole witness appearing on behalf of petitioner with respect to the taxable years 1961, 1962 and 1963 was William N. Segal, CPA, who became petitioner's accountant in 1961, acted as his accountant during 1961 through 1963 inclusive and who also appeared as his representative at the hearings held herein.

7. Petitioner 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 petitioner carried on an unincorporated business subject to the unincorporated business tax, petitioner acted on a continuing basis during the period 1960 through 1963 inclusive, as the finder of properties suitable for purchase and syndication, and interested potential investors to become 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, petitioner managed the same, including leasing and collecting of rents and making of 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 petitioner has been damaged or prejudiced by delay.

With respect to the taxable years 1960, 1961 and 1962, the motion to dismiss for laches is also denied on the additional ground that it does not appear from the record that unincorporated business tax returns for said years were filed by petitioner.

B. That petitioner'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 petitioner during the period 1960 through 1963 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 year 1960 is concerned, there was no testimony to support petitioner's claim. Not only was petitioner absent from the hearings but the only witness at the hearings on his behalf was his representative, William N. Segal, who was unable to testify as to that year because he did not become petitioner's accountant until 1961. He stated, therefore, that he could not qualify as a witness concerning the year preceding 1961 and that with respect to it he was relying solely on the motion made by him, as aforesaid, to dismiss this proceeding on the ground of laches.

D. That petitioner failed to sustain the burden of proof with respect to the years 1961, 1962 and 1963.

E. That the record herein establishes that petitioner was engaged in carrying on an unincorporated business subject to the unincorporated business tax for each of the taxable years 1960 to 1963 inclusive, except the year 1962 as set forth by the Income Tax Bureau in its Statement of Audit Changes for the years 1960 through 1963 inclusive.

F. That the petition of Phillip P. Zipes with respect to the years 1960 through 1963 inclusive is denied and the Notice of Deficiency dated September 25, 1967 is hereby sustained.

DATED: Albany, New York

FEB 22 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER