

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
Paul Simon

:  
:  
: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income & :  
UBT under Article 22 & 23 of the Tax Law for the :  
Year 1974.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Paul Simon, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Simon  
853 E. 10 St.  
Brooklyn, NY 11230

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  
9th day of April, 1982.

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STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :

of

Paul Simon :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income  
& UBT under Article 22 & 23 of the Tax Law for the:  
Year 1974.

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State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Alan M. Simon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan M. Simon  
Simon & Passman  
43 N. Madison Ave.  
Spring Valley, NY 10977

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  
9th day of April, 1982.

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

April 9, 1982

Paul Simon  
853 E. 10 St.  
Brooklyn, NY 11230

Dear Mr. Simon:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alan M. Simon  
Simon & Passman  
43 N. Madison Ave.  
Spring Valley, NY 10977  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
PAUL SIMON	:	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 year 1974.	:	

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Petitioner, Paul Simon, 853 East 10th Street, Brooklyn, New York 11230, 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 year 1974 (File No. 23132).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 2, 1981 at 10:45 A.M. Petitioner, Paul Simon, appeared with Simon & Passman (Alan M. Simon, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether a building was property employed in petitioner's unincorporated business, thereby subjecting the gain realized on the sale of said building to unincorporated business tax.

II. Whether the Notice of Deficiency is barred on the ground of laches.

FINDINGS OF FACT

1. Petitioner, Paul Simon, and his spouse, Adele Simon, timely filed separate 1974 New York State resident income tax returns on Combined Form IT-208 wherein each reported one-half of the gain realized on the sale of land and building located at 918 Quentin Road, Brooklyn, New York. An

unincorporated business tax return was filed by Paul Simon for the year 1974 wherein he reported business income of \$10,316.00 from the operation of an auto body repair shop known as Kingsway Auto Service (hereinafter "Kingsway"). Kingsway was a sole proprietorship operated by petitioner and located at 918 Quentin Road, Brooklyn, New York. No portion of the gain realized on the sale of the property at 918 Quentin Road was reported on the 1974 unincorporated business tax return.

2. On April 12, 1978 the Audit Division issued to petitioner a Notice of Deficiency asserting that for the year 1974 additional personal income and unincorporated business taxes of \$2,318.31 were due together with penalty [Tax Law section 685(b)] and interest. The Notice of Deficiency was based on a Statement of Audit Changes dated February 3, 1978 wherein the gain realized on the sale of the property located at 918 Quentin Road was considered business property and "...held reportable for unincorporated business tax purposes at 100 percent". Other adjustments were made by the Audit Division which petitioner does not contest and, accordingly, said other adjustments will not be addressed hereafter.

3. Sometime in 1956 petitioner established Kingsway in rented premises located at the 918 Quentin Road address. Said premises consisted of a garage from which the auto body repair business was conducted. In 1967 the garage and land located at 918 Quentin Road was purchased by petitioner with title to said property being held in Paul Simon's name only.

4. On December 12, 1974, petitioner dissolved his unincorporated business due to failing health and the fact that he had been a victim of two armed robberies within a two month period. Petitioner was unable to sell the auto body repair business; however, he was able to sell the land and building to a

neighboring plumbing supply house. Said sale took place on December 23, 1974 and resulted in a gain of \$37,496.00 reportable during the tax year in question.

5. The taxable business income shown on petitioner's 1974 unincorporated business tax return was computed taking into consideration deductions for depreciation, taxes and repairs on the property located at 918 Quentin Road. Said return also indicated that the business was terminated effective December 30, 1974.

6. The petition for redetermination in this matter was filed on March 14, 1978 and the administrative hearing was held on June 2, 1981. Petitioner argues that the delay in conducting the evidentiary hearing constitutes laches, which causes the State Tax Commission to lose jurisdiction over the matter.

On the merits, petitioner argues that the property in question was sold after the unincorporated business was dissolved and, therefore, the gain realized is not taxable since the property was purchased and sold for his own account [Tax Law section 703(d)] and/or that he cannot be deemed an unincorporated business solely by reason of holding, leasing or managing real property [Tax Law section 703(e)].

#### CONCLUSIONS OF LAW

A. That the building and land located at 918 Quentin Road was property employed in petitioner's unincorporated business and the gain realized on the sale of said property is therefore subject to unincorporated business tax within the meaning and intent of section 705(a) of the Tax Law and 20 NYCRR 205.1.

B. That petitioner has failed to sustain the burden of proof, pursuant to sections 722 and 689(e) of the Tax Law, to show that the property in question

was purchased and sold solely for his own account or that the income was received solely by reason of holding, leasing or managing real property within the respective meanings of sections 703(d) and 703(e) of the Tax Law.

C. That the argument to dismiss on the ground of laches is denied. "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" [Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc. (Catherwood) 31 A.D.2d 981]. Also see (G.H. Walker & Co., et al., v. State Tax Commission, 62 A.D. 2d 77).

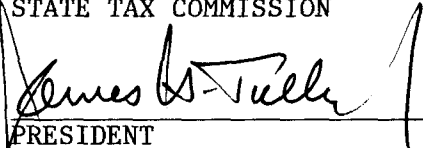
Said argument is also denied for the further reason that the record does not establish that petitioner has been damaged or prejudiced by delay.

D. That the petition of Paul Simon is denied and the Notice of Deficiency dated April 12, 1978 is sustained together with penalties and interest.


DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER