

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MOSTAFA HAMSHO</b>	:	DECISION
for Redetermination of Deficiencies or for	:	
Refunds of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and City of	:	
New York Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1981 through 1984.	:	

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Petitioner Mostafa Hamsho, 15 McKay Place, Brooklyn, New York 11209, filed an exception to the determination of the Administrative Law Judge issued on February 8, 1990 with respect to his petition for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 of the Tax Law and City of New York personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 through 1984 (File No. 805419). Petitioner appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner did not file a brief on exception, but requested oral argument. The Division submitted a letter stating it would not submit a brief but would rely on oral argument to present its position. The requests for oral argument were denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

I. Whether the Division of Taxation properly attributed to petitioner income earned by petitioner from his boxing performances in the year at issue.

II. Whether petitioner is entitled to a deduction for expenses incurred while engaged in the business of professional boxing where petitioner provided no evidence upon which a reasonable estimate of these expenses may be based.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and make additional findings of fact as indicated below.

Pursuant to an audit which commenced on October 15, 1984, the Division of Taxation, on August 6, 1987, issued statements of personal income tax audit changes to petitioner Mostafa Hamsho for each of the years 1981 and 1982 which contained the following explanation:

"Based on a New York State Tax audit, you have been deemed a New York State and New York City resident.

A resident credit is allowed only when a New York State resident, files a nonresident return in another State for income taxes imposed on income earned in that other State. Therefore, your request for Resident Tax Credit is disallowed."

Pursuant to the aforesaid, personal income tax deficiencies were asserted against petitioner as follows:

	<u>1981</u>		<u>1982</u>	
	<u>State</u>	<u>City</u>	<u>State</u>	<u>City</u>
Add'l Tax Due	\$4,301.00	\$1,828.00	\$3,163.00	\$1,297.00
Penalties				
685(a)(1)	968.00	411.00	712.00	292.00
685(a)(2)	1,075.00	457.00	791.00	324.00
685(b)	215.00	91.00	158.00	65.00
Interest	<u>2,804.00</u>	<u>1,192.00</u>	<u>1,481.00</u>	<u>607.00</u>
Total	\$9,363.00	\$3,979.00	\$6,305.00	\$2,585.00

The 1981 and 1982 deficiencies were based upon net income adjustments in the amounts of \$51,815.00 and \$38,025.00, respectively. These net adjustments were calculated from information obtained from petitioner's Federal income tax returns. Petitioner filed no State and City returns for 1981 or 1982.

On February 23, 1988, the Division of Taxation issued notices of deficiency to petitioner as follows:

	<u>1981</u>	<u>1982</u>
Add'l Tax Due	\$ 6,129.00	\$4,460.00
Penalty	3,280.98	2,342.00
Interest	<u>4,327.50</u>	<u>2,302.39</u>
Total	\$13,737.48	\$9,104.39

At the hearing held herein, petitioner conceded that, if it is determined that he was a resident taxpayer for the years 1981 and 1982, the amounts contained on the aforesaid notices of deficiency are correct and are, therefore, due and owing.

With respect to 1983, the Division of Taxation again obtained information from petitioner's Federal return for said year (petitioner did not file a State or City return for 1983) and, as a result thereof, determined additional tax due of \$4,514.45 (\$3,158.00 State tax and \$1,356.45 City tax). In addition, penalties pursuant to Tax Law § 685(a)(1), (2) and (b) were imposed together with interest for a total amount due of \$8,379.84 for 1983 as of December 3, 1987.<sup>1</sup> As was the case for the years 1981 and 1982, petitioner conceded at the hearing that, if it is determined that he was a resident taxpayer for 1983, the deficiency of tax asserted against him by the Division of Taxation for 1983 is correct and is, therefore, due and owing.

For 1984, petitioner timely filed (pursuant to a valid extension) a New York State and City Nonresident Income Tax Return on which he reported Federal wage income of \$85,000.00, \$65,000.00 of which he attributed to New York sources. He also reported dividends of \$80.00 which he claimed were not taxable to New York. The Division of Taxation, in the Statement of Personal Income Tax Audit Changes, deemed the \$20,000.00 wage income and \$80.00 dividend income as New York source income and included as additional income the sum of \$450,000.00 which petitioner received from a boxing contest held in New York City pursuant to an Exclusive Promotional Rights Agreement (hereinafter "Agreement") entered into between petitioner and Top Rank, Inc. Corrected taxable income for 1984 was, therefore, determined to be \$522,980.00 with additional State tax due thereon in the amount of \$46,442.00 and

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<sup>1</sup>A Statement of Personal Income Tax Audit Changes was issued to petitioner on December 3, 1987 which included both the years 1983 and 1984.

additional City tax due thereon in the amount of \$22,899.55 (total tax due of \$69,341.55). Penalty pursuant to Tax Law § 685(b) was imposed along with interest for a total amount due (as of the date of issuance of the Statement of Personal Income Tax Audit Changes) of \$89,189.23.

On February 23, 1988, a Notice of Deficiency was issued to petitioner in the amount of \$73,856.00 plus penalty and interest for a total amount due of \$98,807.15 for the years 1983 and 1984.

For each of the years at issue herein, petitioner was a pugilist. He came to the United States as an illegal alien from Syria in late 1974. Upon his arrival from Syria on a freight ship, he lived with friends in Paterson, New Jersey and in New York City. Subsequently, he rented a room located at 140 Atlantic Avenue, Brooklyn. In 1977, he moved to an apartment at 244 96th Street, Brooklyn. In 1981, due to marital difficulties, petitioner moved from this apartment. Between 1981 and late 1984, petitioner resided with a friend in a one-family house (petitioner lived in the basement) at 175 Oakland Road, Clifton, New Jersey and at his manager's house (petitioner had a room in this house) at 1259 Paterson Plank Road, Secaucus, New Jersey.

Soon after the separation, petitioner's wife moved from the Brooklyn apartment and began living in Bayonne, New Jersey. However, because of rent control, petitioner continued to rent the apartment on 96th Street in Brooklyn. Petitioner stated that, during the period when he lived in Clifton and Secaucus in New Jersey, he would stay in his Brooklyn apartment approximately once or twice per month.

The auditor initially attempted to contact petitioner by sending a letter to 140 Atlantic Avenue, Brooklyn, New York. This letter was returned since the forwarding order had expired. From petitioner's Federal return for 1981, the auditor obtained the 1259 Paterson Plank Road, Secaucus, New Jersey address whereupon he sent a letter to this address. As a result thereof, petitioner's accountant, Alan Epstein, contacted the auditor to set up an appointment to conduct the audit at Mr. Epstein's office.

Pursuant to the Agreement, petitioner was to engage in a middleweight boxing contest with an opponent to be selected by the promoter (Top Rank, Inc.), such contest to be held during March or April 1984.<sup>2</sup> In the event that petitioner was the winner of such bout, he was to fight the winner of a championship bout between Marvin Hagler and Juan Roldan (scheduled for March 30, 1984), such bout to be held in 1984 on a date and at a site to be selected by the promoter. Petitioner fought Marvin Hagler on October 19, 1984 at Madison Square Garden in New York City.

The terms of the Agreement set forth the following financial terms relative to petitioner:

(a) Petitioner was to receive \$25,000.00 upon the signing of the Agreement, such payment to constitute an advance against the total purse to be paid to him for the championship bout (the agreement set forth certain conditions upon which petitioner would be required to refund this money; however, based upon the facts produced herein, none of these conditions occurred);

(b) Petitioner was to receive \$50,000.00 upon completion of the first bout (the bout to be held in March or April 1984);

(c) Petitioner was to receive \$450,000.00 for the championship bout if the opponent was Marvin Hagler and \$350,000.00 if the opponent was Juan Roldan (petitioner's opponent was Marvin Hagler). Petitioner was to receive \$25,000.00 upon the signing of the Agreement, \$25,000.00 not later than 10 days after the conclusion of the Hagler v. Roldan bout and the balance (\$400,000.00 because the opponent was Hagler) upon completion of the championship bout. On the agreement, petitioner's address was listed as 1259 Paterson Plank Road, Secaucus, New Jersey.

In addition to the facts found by the Administrative Law Judge, we find the following:

Petitioner is referred to in the contract as "MUSTAPHA HAMSHO [sic]." The contract was signed by petitioner's

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<sup>2</sup>While the record is devoid of the details of this bout, it is apparent that petitioner engaged in and won such bout since it is uncontroverted that he subsequently fought Marvin Hagler in a world middleweight championship contest.

manager under the typed caption at the end of the contract, "Al Certo, Licensed Manger [sic] for Mustapha Hamsho." Petitioner did not sign the contract (Exhibit J). Petitioner testified at hearing that he did not read English (Tr. p. 51).

Petitioner initially applied for a boxing license from the New York State Athletic Commission in 1976. The address set forth on such application was 140 Atlantic Avenue, Brooklyn, New York. Petitioner's license was updated in 1979 at which time he indicated that his address was 244 96th Street, Brooklyn, New York. As of October 1984, when the auditor visited the offices of the State Athletic Commission, petitioner had not filed an address change with such Commission.

During the course of the audit, the auditor contacted petitioner's accountant, Alan Epstein (whose office was the site of the audit) to advise him that petitioner was subject to the estimated tax filing and payment requirements of the New York State Tax Law. On December 18, 1984, the Division of Taxation received from petitioner an estimated tax payment of \$5,000.00.<sup>3</sup> The payment voucher indicated petitioner's address as 244 96th Street, Brooklyn New York. The check accompanying said voucher was drawn on petitioner's account at Manufacturers Hanover Trust Company, 7510 Fifth Avenue, Brooklyn, New York.

For the tax year 1984, petitioner received a Form W-2, Wage and Tax Statement from Hamcer, Inc., 1259 Paterson Plank Road, Secaucus, New Jersey which listed wages, tips or other compensation in the amount of \$85,000.00 with State (New Jersey) wages of \$20,000.00 (\$1,200.00 was withheld for State income tax). Petitioner's address, set forth on this W-2 form, was 244 96th Street, Brooklyn, New York.

After the Hagler fight (October 19, 1984), petitioner went to Syria for a time. When he returned to the United States (in late 1984 or early 1985), he moved back to Brooklyn. His current address is 15 McKay Place, Brooklyn, New York. During all of the years at issue, petitioner had a New York State driver's license. While he became a United States citizen in approximately 1979, petitioner neither registered nor voted in any state.

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<sup>3</sup>It should be noted that the deficiency asserted against petitioner for the year 1984 is net of such payment, i.e., petitioner was credited with having paid this amount.

For the years 1982 and 1983, petitioner filed resident New Jersey tax returns. While New Jersey returns for 1981 and 1984 were not produced, W-2 forms issued to petitioner by Hamcer, Inc. indicate that State (New Jersey) income taxes were withheld for such years.

Hamcer, Inc. did not file a New York State Corporation Franchise Tax Report for 1984 despite the fact that income (proceeds from petitioner's bouts per the Agreement) was earned from New York sources for that year.

In addition to the facts found by the Administrative Law Judge, we find the following:

Petitioner testified at hearing that the income earned from the 1984 fights was received by Hamcer, Inc. He stated that his manager, trainer, and publicity man were paid from these proceeds. At hearing, petitioner requested additional time to submit documentation to corroborate this testimony. This request was granted by the Administrative Law Judge. However, no further evidence was subsequently submitted by petitioner.

### ***OPINION***

In the determination below, the Administrative Law Judge found (a) petitioner was a domiciliary of the State of New York and City of New York and thereby a resident individual for purposes of such State and City personal income taxes; (b) the Division of Taxation erred in calculating petitioner's additional income for the year 1984; and (c) the Division improperly imposed penalties in connection with petitioner's personal income tax deficiencies.

On exception, petitioner contends that the \$500,000.00 generated by his two 1984 fights represents income attributable for tax purposes to his wholly-owned corporation, Hamcer, Inc. (hereinafter "the corporation"). He claims that the fight proceeds were ultimately received by the corporation. Of this amount, he argues that the basis for his individual tax liability is limited to the \$85,000.00 which was paid to him by the corporation as earned wages. Alternatively, petitioner argues that even if the \$500,000.00 was properly attributed to him as an individual, the determination disregarded the impact of the various expenses and costs incurred in the earning process which represent legitimate deductions. Petitioner has not taken exception to the Administrative Law Judge's conclusion that petitioner was domiciled in New York State during the years 1981 through 1984.

The Division requested oral argument before the Tribunal to present its position on this matter but was denied. As no further correspondence was submitted subsequent to this denial, we assume the Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge and reject the contentions petitioner sets forth on exception.

We will first address the issue of whether the Division correctly attributed all of the income from the two fights in 1984 to petitioner. Petitioner appears to claim that he assigned this income to his corporation and, thus, it is not taxable to him as an individual. This position is based on his allegation that the income from the fights was paid by Top Rank to the corporation which, in turn, paid petitioner a salary as well as covering all expenses associated with the fights (Tr. p. 51).

We find this argument to be without merit.

The adjusted gross income of a resident individual is his Federal adjusted gross income as defined in the laws of the United States for the taxable year with certain modifications not applicable here (Tax Law § 612[a]). Federal adjusted gross income is defined as all income from whatever source derived, minus any pertinent deductions (IRC §§ 61[a] and 62[a]). "It is a principle of Federal income tax law that income is to be taxed to the person who has earned it. If that person assigns his income to another, it nevertheless is the income of the assignor and is taxable to him" (REP Sales v. United States, 86-1 USTC ¶ 9387, at 83,850, citing, Lucas v. Earl, 281 US 111, 2 USTC ¶ 496, at 2189; Helvering v. Horst, 311 US 112, 40-2 USTC ¶ 9787, at 989). Thus, petitioner's argument that the \$500,000.00 was not income to him because he assigned it to his corporation, or it was paid directly to petitioner, who then passed it on to the corporation, ignores this fundamental principle. Tax may not be escaped by the earner through the use of "anticipatory arrangements and contracts however skillfully devised" to prevent income when paid from vesting in him (Lucas v. Earl, supra, 2 USTC ¶ 496, at 2189).



In light of this governing principle that income will be taxed to the earner, an attempt to remove the tax burden from petitioner would require a finding that the corporation controlled the earning of the income at issue. This would require both a showing that the corporation had a right to control the activities of petitioner and that this control was recognized and accepted by Top Rank (see, Johnson v. United States, 698 F2d 372, 83-1 USTC ¶ 9120, at 86,081). The only evidence provided which addresses this factual question is the "Exclusive Promotional Rights Agreement" (Exhibit J). It is not disputed by petitioner that this contract governs all the rights and obligations of the parties associated with the earning of the \$500,000.00. Under this contract, petitioner is named specifically as a party, and is referred to throughout as "fighter". Although the contract is not signed by petitioner, it is signed by his manager, under the typed caption, "Al Certo, Licensed Manager for Mustapha Hamsho". Further, the contract completely fails to mention the corporation, or grant to it any collateral rights resulting from the petitioner's performance. Based on this evidence, we find that petitioner was a party to the contract in his individual capacity. We find, therefore, that petitioner possessed the sole right to the income under the contract, and thus, the tax burden was properly attributed to him.

We will now address the issue of whether petitioner is entitled to deduct expenses which he claims were incurred in the course of earning the fight proceeds. Petitioner, on exception, makes the argument that if the income earned from these boxing matches is properly taxable to him as an individual, he is entitled to deduct certain expenses he alleges were incurred in the process of earning this income. The Internal Revenue Code states that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" (IRC § 162[a]), "if such trade or business does not consist of the performance of services by the taxpayer as an employee" (IRC § 62[a][1]). Petitioner testified at hearing that his manager, trainer, and publicity man were paid by the corporation with the proceeds from the fights (Tr. p. 51). We do not deny that expenses such as these are "ordinary and necessary" costs of engaging in the business of professional boxing. A boxer's employment of support staff or "handlers" is seemingly part and parcel of the boxing industry,

especially given the high level of competition at which petitioner performed during the year at issue. However, an assertion that the expenses were ordinary and necessary business expenses alone is not determinative of petitioner's entitlement to a deduction. Rather, the critical issue at hand is whether petitioner has provided sufficient evidence to establish his entitlement to such a deduction.

It has been held that once a taxpayer has proved his entitlement to some amount of deduction, it is appropriate to estimate the deductible amount allowed even though the exact amount has not been proved (Cohan v. Commr., 39 F2d 540). Upon the approximation of the deduction the court may bear heavily upon the taxpayer whose inexactitude is of his own making (Cohan v. Commr., supra). This is commonly known as the Cohan rule. However, recent decisions have held that a mere finding that a taxpayer has incurred some amount of deductible expense, which under the general principle ascribed in Cohan entitles him to some deduction, does not alone guarantee that a deduction in some degree will be allowed. Where the taxpayer has provided no basis upon which the court may make a reasonable estimate, the deduction has been denied altogether (see, Lerch v. Commr., 877 F2d 624, 89-1 USTC ¶ 9388, at 88,101; Pfluger v. Commr., 840 F2d 1379, 88-1 USTC ¶ 9221, at 83,438, cert denied 487 US 1237, 101 L Ed 2d 938; Matter of Schneier, Tax Appeals Tribunal, November 9, 1989). The Pfluger case dealt with a dentist who undoubtedly spent substantial sums of money on materials but completely failed to cooperate with the Tax Court in substantiating claimed deductions. The United States Court of Appeals for the Seventh Circuit held that there was no obligation to make an estimate under the Cohan rule (Pfluger v. Commr., supra). The court reasoned that the Commissioner and the Tax Court were not forced to resort to averages to estimate an allowable deduction, as the use of estimates could often result in allowance of more deductions than the taxpayer was actually entitled to take (id.).

In this case, petitioner failed to produce any evidence to aid in determining the proper amount of deduction for business. This lack of evidence is illustrated by petitioner's uncorroborated testimony which simply states, "I pay my manager, my trainer, my publicity

man" (Tr. p. 51). This naked assertion fails to state even the amounts of these expenses, the names of those who provided these services, or the method by which these alleged expenses were determined. Petitioner failed to present affidavits or other evidence supplied from the providers of these support services to ascertain the cost of these services. An opportunity was afforded at the close of the hearing by the Administrative Law Judge to petitioner to submit further evidence into the record (Tr. p. 64). Petitioner did not submit any further evidence and offered no reasons for his failure to do so. Thus, petitioner has provided us with absolutely no basis to determine his expenses. "We cannot simply guess as to the amount he could have deducted. He chose his uncooperative path; the fact that he paid more tax than if he had been more forthright should not cause us to bend the law in his favor" (Pfluger v. Commr., supra, 88-1 USTC ¶ 9221, at 83,443). Petitioner, therefore, is denied his request for a business expense deduction.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of petitioner Mostafa Hamsho is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Mostafa Hamsho is granted to the extent indicated in conclusions of law "F", "G" and "H" of the Administrative Law Judge's determination but is otherwise denied; and

4. The Division of Taxation shall modify the notices of deficiency dated February 23, 1988 in accordance with paragraph (3) above but such notices are otherwise sustained.

DATED: Troy, New York  
October 25, 1990

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner