

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

J. ELLIOTT BURCH

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :  
a Revision of a Determination or a Refund :  
of Unincorporated Business :  
Taxes under Article(s) 23 of the :  
Tax Law for the Year(s) ~~or Period(s)~~ :  
1963 and 1964

State of New York  
County of Albany

Marsina Donnini, 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 17th day of June, 1977, she served the within  
certified  
Notice of Decision by ~~(certified)~~ mail upon J. Elliott Burch

~~(representative of)~~ the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. J. Elliott Burch  
147 Oxford Boulevard  
Garden City, New York

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

17th day of June, 1977

Janet Mack

Marsina Donnini

STATE OF NEW YORK  
STATE TAX COMMISSION

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she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 17th day of June 19 77, she served the within  
Notice of Decision by ~~(certified)~~ mail upon Edward S. Fries  
(representative of) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. Edward S. Fries  
c/o Richard, Ganly, Fries & Preusch  
74 Trinity Place  
New York, NY 10006  
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  
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That deponent further says that the said addressee is the (representative  
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Marsina Donnini

Janet Mach



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

TAX APPEALS BUREAU  
STATE CAMPUS  
ALBANY, N.Y. 12227

June 17, 1977

ADDRESS YOUR REPLY TO

TELEPHONE: (518) **457-1723**

Mr. J. Elliott Burch  
147 Oxford Boulevard  
Garden City, New York

Dear Mr. Burch:

Please take notice of the **Decision**  
of the State Tax Commission enclosed herewith.

Please take further notice that pursuant to  
Section(s) **722** of the Tax Law, any  
proceeding in court to review an adverse deci-  
sion must be commenced within **4 months**  
from the date of this notice.

Inquiries concerning the computation of tax  
due or refund allowed in accordance with this  
decision or concerning any other matter relative  
hereto may be addressed to the undersigned. They  
will be referred to the proper party for reply.

Very truly yours,

**Paul B. Coburn**  
**Supervising Tax Hearing Officer**

Enc.

cc: Petitioner's Representative:

Taxing Bureau's Representative:

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
J. ELLIOTT BURCH  
for Redetermination of a Deficiency  
or for Refund of Unincorporated Business:  
Tax under Article 23 of the Tax Law for  
the Years 1963 and 1964.

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DECISION

Petitioner, J. Elliott Burch, 147 Oxford Blvd., Garden City, New York, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1963 and 1964 (File No. 00587).

A formal hearing was held before Lawrence A. Newman, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on October 30, 1969 at 10:40 A.M., and then at a continued formal hearing held before Harvey B. Baum, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 3, 1976 at 10:45 A.M. Petitioner appeared at the first hearing by John P. McElroy and Edward S. Fries, C.P.A.'s of Richards, Ganly, Fries & Preusch. At the continued hearing, petitioner appeared by Edward S. Fries, C.P.A. of the same accounting firm. The Income Tax Bureau appeared at the first hearing by Edward Best, Esq. (Albert J. Rossi, Esq., of counsel),

and at the continued hearing by Peter Crotty, Esq. (Howard Herman, Esq., of counsel).

### ISSUES

I. Whether petitioner, J. Elliott Burch's activities as a racehorse trainer during the years 1963 and 1964 constituted a "profession", and thus were exempt from the unincorporated business tax within the meaning of section 703(c) of the Tax Law.

II. Whether a portion of petitioner's income was allocable to sources outside New York State, and thus, for that allocation, exempt from the unincorporated business tax, within the meaning of section 707(a) of the Tax Law and applicable regulations thereunder.

III. Whether petitioner had reasonable cause for failing to report and pay the unincorporated business tax on income received in New York State for services as a horse trainer for the years 1963 and 1964.

### FINDINGS OF FACT

1. Petitioner, J. Elliott Burch, failed to file New York State Unincorporated Business Tax Returns (IT-202) for the years 1963 and 1964, acting on the advice of counsel.

2. On November 14, 1966, the Income Tax Bureau issued a Statement of Audit Changes against petitioner, J. Elliott Burch, imposing unincorporated business tax upon the income received by petitioner from his activities as a horse trainer during the years 1963 and 1964, in the amount of \$1,743.50. It also imposed

interest on that amount of \$206.53, plus a penalty of \$435.87. On November 14, 1966, the Income Tax Bureau issued a Notice of Deficiency against the petitioner for a total due of \$2,385.90.

3. On February 9, 1967 the petitioner, J. Elliott Burch, filed a petition with the Income Tax Bureau for redetermination of a deficiency for unincorporated business tax due for the years 1963 and 1964.

4. Petitioner presented an unsigned IT-202 Unincorporated Business Tax Return for the years 1963 and 1964 with schedules for allocation attached. Utilizing the formula prescribed by section 707(c) of the Tax Law, petitioner allocated 60% of his gross income to sources within New York State for the year 1963, and 58% of his gross income to sources within New York State for the year 1964.

5. Petitioner, J. Elliott Burch, is a trainer of thoroughbred horses, and has been in the business throughout his life. In this regard, he possesses a considerable reputation in this field, as did his father, Preston M. Burch, who wrote an authoritative text in the field called Training Thoroughbred Horses. Petitioner trained under his father, took courses in animal husbandry, and received a license in New York State as a horse trainer.

6. Petitioner's expert training enabled him to perform his services and derive a fee from horse owners. He was paid for such services as horse grooming, breeding, training horses for

racers, and advising owners on purchases and sales of race horses and breeding stock. Petitioner has a complete knowledge of such branches of science as veterinary medicine, animal husbandry and anatomy, in addition to his expertise as a trainer, all of which he contends are necessary prerequisites for performing the services for which he seeks a professional exemption.

7. In connection with the services he performed, the petitioner employs assistants who perform part of the work. However, in all instances he gives personal attention to the work of those assistants, and he personally directs their work program and methods, while assuming final responsibility for reporting, consulting and advising the horse owners for whom the services are performed.

8. Capital is not a material income-producing factor in petitioner's business, wherein capital is used merely to defray current operating expenses (e.g. salaries, office expenses). while more than 80% of petitioner's gross income for the taxable years 1963 and 1964 was derived from his business for which the professional exemption is claimed.

9. While the application for a horse trainer's license in New York State requires a written test, no formal education is required before a license is granted. What is required is three years' experience in working with horses, either as a licensed jockey or groom, two letters of recommendation from licensed horse trainers in New York, and the name of a raiser of horses

in New York who is willing to let the applicant work for him. The written test involves questions regarding the rules and regulations of the New York State Racing Commission and on horsemanship, but involves nothing pertaining to horse breeding, and no license is required to breed horses. The license must be renewed every year.

10. The major portion of the income derived by petitioner for the years 1963 and 1964, for which an exemption from tax is claimed, came from his trainer's share of the track purses of winning horses that he trained. Only a small portion of his income was derived from services performed in providing advice and consultation on horse breeding and purchases.

11. As part of the services performed for the various horse owners for whom petitioner worked, petitioner would employ assistants and watchmen, purchase stable equipment and run the stable. Part of the fees paid to petitioner were to defray these operating expenses.

12. The allocation of income for the years in issue was based upon the petitioner's showing that for three and one-half (3-1/2) months of each of these years, the petitioner operated a stable in Florida and worked for horse owners both there and in other states, where horses trained by the petitioner in Florida were shipped to such states for racing, exclusive of New York.

13. It was further shown that while working in the Florida stable for the heretofore mentioned periods in 1963 and 1964, the petitioner maintained a regular post office address at



Hialeah, Florida, maintained a phone, paid rent, kept a bank account, and received billings at that address chargeable to his business.

#### CONCLUSIONS OF LAW

A. That while the petitioner, J. Elliott Burch, possesses specialized knowledge and training for the services performed as a horse trainer, for which the professional exemption is claimed, the business conducted for the subject years cannot be characterized as a "profession" within the meaning and intent of section 703(c) of the Tax Law.

B. That the aforesaid activities of petitioner, J. Elliott Burch, while characterized by the attainment and application of a specialized knowledge, are not utilized in serving the interests of others in their attainment of the science of horse training, but merely are utilized for the furtherment of their vocation as horse owners in breeding and training racehorses to achieve winning purses. The services performed by the petitioner deal with the conduct of the business of training and racing horses alone, even though he may apply specialized knowledge to that business. Thus, such services do not constitute the practice of a "profession" as defined by the statute. (Tax Law section 707(c); Niles v Murphy 34 A.D. 2d 862, 310 N.Y.S.2d 838 (1970)).

C. That statutory definition of "other profession" as intended by the Legislature must be read in ejusdem generis, or in conjunction with the professions enumerated therein, so that the services performed must involve something more than the type of services generally performed in the broader categories of a

trade, business, or occupation. Clearly, the services performed by petitioner as a horse trainer do not fall within that category (Koner v. Procaccino, 45 A.D. 2d 551).

D. That, accordingly, the aforesaid activities of petitioner, J. Elliott Burch, during the years 1963 and 1964, constituted the carrying on of an unincorporated business, and his income derived therefrom was subject to the unincorporated business tax in accordance with the meaning and intent of section 703 of the Tax Law.

E. That petitioner, J. Elliott Burch, has sustained his burden to show that a portion of his gross income for the years 1963 and 1964 was allocable to sources outside New York State, within the meaning of section 707(a) of the Tax Law; therefore, the unincorporated business tax due by petitioner should be adjusted in accordance with the formula properly applied by petitioner to show that 60% of his 1963 income was allocable to New York State, while 58% of his 1964 income was also allocable to New York State.

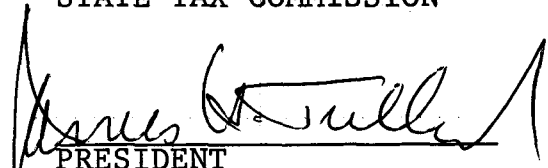
F. That petitioner, J. Elliott Burch, had reasonable cause for failing to file New York State unincorporated business tax and estimated business tax returns for the years 1963 and 1964; and, therefore, the penalties assessed pursuant to section 685(a) of the Tax Law are waived.

G. That the petition of J. Elliott Burch is granted to the extent of the allocation adjustments imposed herein, and to the extent of cancelling the penalties imposed for the years

1963 and 1964, that the Income Tax Bureau is hereby directed to accordingly modify the Notice of Deficiency heretofore issued; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York  
June 17, 1977

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER