

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Estate of James W. Maloney :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Unincorporated :  
Business Tax under Article 23 of the Tax Law for :  
the Years 1970 - 1972. :  
:

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AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 15th day of April, 1985, he served the within notice of Decision by certified mail upon Estate of James W. Maloney, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of James W. Maloney  
c/o Elizabeth H. Maloney, Executrix  
43 Walnut Ave.  
East Norwich, NY 11732

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
15th day of April, 1985.

David Parchuck

James W. Maloney  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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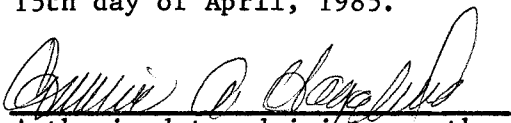
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 15th day of April, 1985, he served the within notice of Decision by certified mail upon Robert Lee Henry, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Lee Henry  
63 Underhill Ave.  
Locust Valley, NY 11560

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
15th day of April, 1985.

  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 15, 1985

Estate of James W. Maloney  
c/o Elizabeth H. Maloney, Executrix  
43 Walnut Ave.  
East Norwich, NY 11732

Dear Mrs. Maloney:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert Lee Henry  
63 Underhill Ave.  
Locust Valley, NY 11560  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JAMES W. MALONEY	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1970,	:	
1971 and 1972.	:	

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James W. Maloney (now deceased), c/o Elizabeth H. Maloney, Executrix, 43 Walnut Avenue, East Norwich, New York 11732, 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 1970, 1971 and 1972 (File No. 43700).

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 October 18, 1984 at 2:45 P.M. Petitioner appeared by Robert Lee Henry, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUES

I. Whether the income generated from petitioner's activities as a trainer of race horses was earned in the capacity of an independent contractor subject to unincorporated business tax or that of an employee exempt from said tax.

II. Whether a race horse which was partially owned by petitioner constituted a business asset, thereby subjecting the gain realized on the sale of said race horse to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner herein, James W. Maloney (now deceased), timely filed New York State resident income tax returns for 1970, 1971 and 1972, reporting thereon business income generated from his activities as a trainer of race horses. Reported business income totalled \$35,439.49 for 1970, \$26,018.98 for 1971 and \$9,347.81 for 1972. On the 1972 return, petitioner also reported a long-term capital gain of \$18,603.52 from the sale of a race horse and all three returns reported that petitioner received a salary of \$12,000.00 from W. Haggin Perry. Petitioner did not file an unincorporated business tax return for any of the years at issue.

2. The Audit Division, on June 30, 1975, issued a Statement of Audit Changes to petitioner for 1970, 1971 and 1972. On said Statement of Audit Changes, the Audit Division asserted, inter alia, that:

"The income from your activities as race horse trainer is subject to the unincorporated business tax. The gain on sale of race horse is considered a gain on sale of a business asset subject to unincorporated business tax at 100%."

The Audit Division determined that unincorporated business gross income for 1970 and 1971 was identical to the business income reported on petitioner's returns (i.e. \$35,439.49 for 1970 and \$26,018.98 for 1971). For 1972, the Audit Division computed unincorporated business gross income of \$46,554.85 in the following manner:

Business income per return	\$ 9,347.81
Gain on sale of race horse	37,207.05
Total unincorporated business gross income	<u>\$46,554.86</u>

3. The aforementioned Statement of Audit Changes computed unincorporated business tax due of \$1,399.17, \$881.04 and \$2,010.52 for 1970, 1971 and 1972, respectively. Petitioner paid the unincorporated business tax asserted due in the Statement of Audit Changes and thereafter timely filed a claim for refund.

On October 25, 1982, the Audit Division denied petitioner's claim for refund in full and a petition for refund was thereafter timely filed on June 14, 1983.

4. For the years at issue, and for some fifteen years prior thereto, petitioner performed services as a private trainer of race horses for William Haggin Perry (hereinafter "Perry"). Petitioner performed services exclusively for Perry and was prohibited from performing services for other race horse owners. In addition to being in complete charge of the training of Perry's horses, petitioner also assisted Perry in the occasional sale of said race horses. There existed no written employment agreement between petitioner and Perry.

5. Petitioner received remuneration from Perry for services performed in the following manner:

- a) an annual salary of \$12,000.00<sup>1</sup> paid on a monthly basis;
- b) a commission of 10 percent of the purse for each horse that finished a race in the first through fourth positions; and
- c) a commission of 10 percent on the sale of those horses owned by Perry.

6. Petitioner's salary of \$12,000.00 was reported on a wage and tax statement and appropriate social security taxes and withholding taxes were deducted from said salary. The commission income earned by petitioner from Perry was reported on Federal Form 1099 and there were no taxes withheld or

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1 The Audit Division did not include petitioner's salary in unincorporated business gross income.

deducted from said commissions. The following chart represents a breakdown of the commission income reported on forms 1099 for the years at issue:

	<u>1970</u>	<u>1971</u>	<u>1972</u>
Commission on purses	\$50,212.00	\$21,547.50	\$34,389.30
Commission on sale of horses	9,500.00	11,250.00	6,750.00
Total Commission	<u>\$59,712.00</u>	<u>\$32,797.50</u>	<u>\$41,139.30</u>

7. The commission income received by petitioner was reported on Federal Schedule "C", Profit (or Loss) From Business or Profession. The following chart represents a synopsis of those amounts reported on Schedule "C" for the years in dispute:

	<u>1970</u>	<u>1971</u>	<u>1972</u>
Gross receipts	\$53,712.10 <sup>2</sup>	\$39,483.80 <sup>2</sup>	\$26,699.20 <sup>2</sup>
Total expenses	18,272.61	13,464.82	17,351.39
Net profit	<u>\$35,439.49</u>	<u>\$26,018.98</u>	<u>\$ 9,347.81</u>

8. Petitioner and Perry consulted on a daily basis, either in person or via telephone, concerning the training of Perry's race horses. Petitioner received full reimbursement from Perry for certain expenses while he was away from home attending racing meets in the State of California and in Saratoga, New York (said reimbursed expenses included such items as air fare, rental of an automobile and lodging). Petitioner chose not to seek reimbursement for common and recurring expenses as he believed that his rate of remuneration was sufficient enough for him to bear these expenses and he also did not wish to

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2 Gross receipts reported on Schedule "C" differ from the commission income reported on forms 1099 due to the fact that certain amounts were included in the 1099's as paid before the close of the tax year but were actually received by petitioner in the succeeding year. As a cash basis taxpayer, petitioner reported the commission income in the year received.

maintain detailed records and receipts which would have been necessary in order to obtain reimbursement.

9. Sometime in September, 1972, petitioner and Perry severed their relationship and petitioner thereafter became a public trainer. As a public trainer, petitioner trained race horses for a multitude of owners.

10. Petitioner, for each of the years at issue, claimed as a deduction on his tax returns payments made as a self-employed person to a retirement plan.

11. Both prior to and during the years at issue, petitioner and two other individuals invested funds for the purchase of two breeding horses at most. Petitioner was not active in the breeding of said horses nor did he raise or train the offspring. No income was realized by petitioner in 1970 or 1971 from his investment in said breeding horses. In 1972, petitioner realized a gain<sup>3</sup> of \$37,207.05 from the sale of a horse. Petitioner's partial ownership of said breeding horses was not connected with his training activities for Perry. A portion of the expenses claimed by petitioner on Schedule "C" (see Finding of Fact "7", supra) pertain to petitioner's partial ownership of the aforementioned breeding horses. The record contains little evidence detailing what portion of the Schedule "C" expenses pertain to petitioner's training activities for Perry and to petitioner's partial ownership of breeding horses. However, it is apparent from an examination of the Schedule "C" filed for each of the years at

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3 For personal income tax purposes, the gain of \$37,207.05 was reported as a long-term capital gain and, pursuant to section 1202 of the Internal Revenue Code, one-half of said gain (\$18,603.53) was deducted from gross income. For unincorporated business tax purposes, the I.R.C. §1202 deduction is not applicable and, therefore, the entire gain of \$37,207.05 was included in unincorporated business gross income.



issue that, at the very least, the following expenses pertain to petitioner's ownership of breeding horses:

<u>Expense</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>
Veterinarian	\$1,689.10	-0-	-0-
Board for horses	1,135.75	-0-	-0-
Stud fees	918.75	-0-	\$2,625.00
Vanning	69.80	-0-	-0-
Total	<u>\$3,813.40</u>	<u>-0-</u>	<u>\$2,625.00</u>

CONCLUSIONS OF LAW

A. That the record herein supports the conclusion that petitioner performed services as a trainer of race horses exclusively for Perry, that he was prohibited from performing services for other owners, that he consulted with Perry on a daily basis concerning the training of Perry's horses, that he received at least partial reimbursement from Perry for expenses incurred and that a portion of his remuneration from Perry was paid in the form of wages from which appropriate taxes were withheld. Accordingly, it has been established that Perry exercised sufficient direction and control over petitioner's activities as to consider petitioner an employee exempt from unincorporated business tax within the meaning and intent of section 703(b) of the Tax Law.

B. That during the years at issue, petitioner was a partial owner of, at the most, only two breeding horses. Petitioner did not personally breed said horses nor did he raise, train or race the offspring. During the three years at issue petitioner sold only one horse. Accordingly, petitioner's partial ownership of breeding horses was an activity which lacked continuity, frequency and regularity and, therefore, cannot be considered the conduct of an unincorporated business within the meaning and intent of section 703(a) of the Tax Law. Petitioner's activities were more in the nature of a passive investment

constituting a purchase and sale for his own account as defined in section 703(d) of the Tax Law.

C. That the petition for refund of James W. Maloney (now deceased) is granted and that the Audit Division is directed to refund to petitioner the sum of \$1,399.17 for 1970, \$881.04 for 1971 and \$2,010.52 for 1972, plus any interest to which petitioner is legally entitled to receive.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985

Rodnick W. Dun  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

[Signature]  
COMMISSIONER