No. _____

In The
Supreme Court of the United States

DENISE McMILLAN,

Petitioner pro se,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit Court of Appeals' memorandum conflict with its own opinions, an opinion by another Circuit Court of Appeals, and the Supreme Court?

2. Does the Internal Revenue Code allow the Internal Revenue Service to issue a Notice of Deficiency if it arises from the IRS's negligent, reckless, and intentional disregard for the provisions of the Code?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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OTHER AUTHORITIES

Denise McMillan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals appears at App. 1 in the appendix to this petition, and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided the case was May 15, 2017. A timely petition for rehearing and rehearing en banc was denied on September 21, 2017, and a copy of the order denying rehearing appears at App. 30. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 U.S.C. § 7803(a)(3) provides:

Commissioner of Internal Revenue; other officials.

EXECUTION OF DUTIES IN ACCORD WITH TAXPAYER RIGHTS. In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including –

(A) the right to be informed,

(B) the right to quality service,

(C) the right to pay no more than the correct amount of tax,

(D) the right to challenge the position of the Internal Revenue Service and be heard,

(E) the right to appeal a decision of the Internal Revenue Service in an independent forum,

(F) the right to finality,

(G) the right to privacy,

(H) the right to confidentiality,

(I) the right to retain representation, and

(J) the right to a fair and just tax system.

26 U.S.C. § 7466 provides:

> The Tax Court shall prescribe rules, consistent with the provisions of chapter 16 of title 28, United States Code, establishing procedures for the filing of complaints with respect to the conduct of any judge or special trial judge of the Tax Court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, the Tax Court shall have the powers granted to a judicial council under such chapter.

RULES FOR JUDICIAL CONDUCT AND DISABILITY PROCEEDINGS FOR THE UNITED STATES TAX COURT provides:

> 1. Scope: These Rules govern proceedings under the Judicial Conduct and Disability Act (the Act), 28 U.S.C. §§351-364, made applicable to the United States Tax Court (Tax Court) by 26 U.S.C. § 7466, to determine whether a judge or special trial judge of the Tax Court has engaged in conduct prejudicial to the effective and expeditious administration of the business of the Tax Court or is unable to discharge the duties of office because of mental or physical disability.
>
> 3. Definitions:
>
> (e) Disability. "Disability" is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the

duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

(i) Misconduct. Cognizable misconduct:

(D) treating litigants, attorneys, or others in a demonstrably egregious and hostile manner.

STATEMENT OF THE CASE

BACKGROUND

The Tax Reform Act of 1986, establishing the Internal Revenue Code of 1986, made sweeping changes to the tax system. Congress curbed losses from tax-sheltering "passive investments" with a simple rule: taxpayers could not reduce gross income with investment losses unless they materially participated in the operations of the business. If a taxpayer's involvement in the business for the year as a whole is regular, continuous and substantial, then the taxpayer has materially participated for the year. Section 162(a) allows a taxpayer to deduct all ordinary and necessary business expenses incurred during the taxable year in carrying on a trade or business. Section 183 governs activities not engaged in for profit ("hobbies"). Hobby expenses are allowed only as itemized deductions and are deductible only to the extent not exceeding the amount of hobby income for the year. Those rules apply to, among

other activities, horse breeding "if the taxpayer's motivations are recreational rather than profit-oriented." A facts and circumstances test generally applies to determine whether a particular activity constitutes a hobby. In the case of activities consisting in major part of the breeding, training, showing, or racing of horses, Section 183(d) provides a presumption the activity is engaged in for profit if it is profitable for two or more years of a consecutive seven year period. *General Explanation of the Tax Reform Act of 1986 (H.R. 3838, 99th Congress; Public Law 99-514 – May 4, 1987), prepared by the staff of the Joint Committee on Taxation*.

In 1998, the Internal Revenue Service Restructuring and Reform Act strengthened and enhanced the rights of and protections applicable to taxpayers. *Internal Revenue Service Restructuring and Reform Act of 1998*, Pillsbury Winthrop Shaw Pittman LLP Tax Page, available at http://www.pmstax.com/gen/bull9808.shtml.

In 2007, the Treasury Inspector General for Tax Administration targeted for review small business/self-employed taxpayers with total income sources of $100,000 or greater who claimed four consecutive years of business losses on Form 1040 Schedule C for activities considered to be potentially not-for-profit. The IRS' section 183 ATG audit guide lists horse breeding and racing as potentially not-for-profit activities. The guide states:

- Each taxpayer is entitled to be evaluated by a fair, impartial examiner so that a fully

reasoned determination of whether an activity is engaged in for profit can be made. (p. 4).

- An IRC § 183 issue will not be sustained in Appeals or in the courts if it has not been properly developed and documented. (p. 11).

- IRS examiners cannot use IRC section 183(d) as the sole basis for disallowing losses under IRC section 183 even if it is shown that the taxpayer has not met the presumption rule. (pp. 7-8).

- The taxpayer must devote time to the business in the honest belief that the business will sometime in the future become profitable. It is necessary for the taxpayer to show what their projected profit is expected to be. (p. 3).

- The examiner should not issue an IDR [Information Document Request] asking the taxpayer to respond to each of the nine factors [in section 183]. This should be done in person with the taxpayer present and the examiner documenting responses. Also, examiners should not request the Business Plan with the first IDR as this should be addressed at the initial interview. Subsequent IDR's should address other needed information to complete the examination. An example of an IDR with [twenty-five] possible items an examiner might request to assist in determining if [an activity] is engaged in for profit is in Appendix E. (p. 12). Item 24 in Appendix E states: "Please complete the attached 'Statement of Supplementary Examination.'" *IRC § 183:*

Activities Not Engaged in For Profit (ATG) – Audit Guide Rev. 6/09.

In 2014, the Internal Revenue Service adopted a "Taxpayer Bill of Rights" (TBOR). The TBOR took multiple existing rights in the tax code and grouped them into ten categories. In late 2015, Congress placed those rights in the Internal Revenue Code. IRC section 7803(a)(3) now requires the IRS Commissioner to ensure that IRS employees are familiar with and act in accordance with the ten fundamental rights that make up the TBOR. Taxpayer Bill of Rights, available at http://www.irs.gov/taxpayer-bill-of-rights.

THE CASE

Denise McMillan ("Petitioner") began a dressage horse business in the mid-1970's. She bought, trained, competed, and sold at a profit horses who competed in the Pan Am Games (Havana, Cuba), World Championships (Ontario, Canada), and other Olympic trials. She hired a law firm and CPA's with expertise in the horse industry to advise her, draw up partnership agreements and breeding contracts, and prepare her tax returns. Beginning in the early 1980's, she formed partnerships and sold interests in her breeding stallions. In 1981, she purchased her showing and breeding stallion Tudor for $20,000. In 1987, she sold Tudor to a Belgian dressage rider for $500,000, at the time the highest figure ever reported for a dressage horse. In 1987, she purchased her showing and breeding stallion Zooloog for $44,568. In 1992, she sold Zooloog to a

Nevada partnership for $190,000. In 1992, she purchased Goldrush I, her most promising stallion, for $35,000. In 1993, Goldrush was appraised and insured for $100,000. McMillan charged between $1,000 and $1,500 stud fees for her stallions.

From 1992 to 2000, she rode Goldrush in dressage competitions from first level through Prix St. Georges.

From 1993 through 1996, she collected and stored Goldrush's frozen semen for future breeding purposes. As a breeding stallion, Goldrush sired five premium warmblood foals, all highly approved by recognized breed registries.

McMillan also worked from home as a software programming consultant. From 2004 through 2007 she earned salaried income totaling $240,896. In 2008, after the company she worked for closed down due to mismanagement, she formed her own IT and database management startup, earning $60,000 in 2008 and $65,000 in 2009. Her clients included two large corporations: her former employer, and an east coast company headquartered in Manhattan. She spent on average a minimum of 35 hours a week working in her programming business and a minimum of 27 hours a week training Goldrush.

The IRS ("Commissioner of Internal Revenue") has audited McMillan's tax returns from the 1970's through 2010. Every audit through tax year 2006 resulted in little or no change. In its startup phase, her dressage horse business was profitable in 1983, 1984, and 1985, meeting the IRC section 183(d) presumption

rule. The IRS continued to challenge her returns for tax years 1987, 1988, 1990, 1991, and 1995. Every audit resulted in no change.

In 1996, the Los Angeles County District Attorney's office asked McMillan to testify against her former business partner, Tom Valter, a popular southern California horse trainer charged with abusing two horses in his care. She agreed to testify. At the same time, the IRS launched an audit of Valter and subpoenaed her original tax records from 1990 to 1995. She provided the records to the IRS and Valter's lawyers at a meeting in Los Angeles. In spite of her numerous requests, the records were never returned to her. After Valter was convicted of felony animal cruelty, he submitted "dozens of letters" of support from the dressage community across the country, the majority expressing a "misogynistic view" that the case was "the concoction of disgruntled females," who needed to be "roughed up." The District Attorney's office noted that Valter and his wife seemed "particularly interested in discrediting Denise McMillan." *People v. Vladimir Tom Valter*, Ca. Sup. Ct. (Los Angeles County) Case No. SA025054 (1996).

In 1997 McMillan sold an interest in Goldrush to a private investor, but apart from that, after her testimony against Valter and her lawsuit against the owners of one of the horses Valter was convicted of abusing, the dressage community turned its back on her: clients dropped out of training, canceled bookings to breed to Goldrush, other dressage trainers shunned her, and

show organizers she'd known for twenty years pointedly cut her from their mailing lists.

By 1998 she identified a slowdown in her business. She compensated by reducing her expenses (including using tax preparation software instead of her longtime CPA to file her tax returns) and focused on training and showing Goldrush. Goldrush was very successful in the show ring, winning trophies, awards, and admiring comments from the judges.

The IRS did not challenge McMillan's returns for tax years 1996 through 2003.

In 2000, she took Goldrush out of competition to remedy a ligament injury of his right hind leg. Her veterinarians recommended light work along with pharmaceuticals and nutra-ceuticals proven effective for joint and ligament support in sport-horses. She changed shoers and saddlers and lunged Goldrush to keep him in show condition. She entered him in competitions in 2006 and 2007, but each time withdrew when the warmup was unsatisfactory.

From 2004 to 2008, she reported losses of $35,865 (2004), $22,277 (2005), $33,128 (2006), $51,697 (2007), and $4,203 (2008) on Form 1040 Schedule C for her dressage horse business.

In 2005, McMillan filed a construction defect lawsuit against her homeowners association (HOA), alleging noise intrusion and toxic mold in the condominium unit where she maintained her home office. Two tests were conducted: a mold investigation and an acoustical

test of her condominium unit and the unit directly above hers. The tests revealed significant noise intrusion and the presence of toxic mold. The health hazards forced her to vacate her condominium in 2005 and 2006. From 2004 to 2007, she incurred hotel, remediation, reconstruction, and legal and professional fees totaling $143,054. The association settled the lawsuit in 2010, virtually on the eve of trial. *McMillan v. Shadow Ridge at Oak Park Homeowners Association*, Ca. Sup. Ct. (Ventura County) Case No. SC042885 (2005).

In 2006, the IRS conducted a for-profit examination of McMillan's return for tax year 2004. The IDR's required her returns for tax years 1998 through 2005 and advised her to expect to discuss the section 183 factors. She provided the IRS with everything in the IDR's, including her original records and returns for tax years 1998 through 2003, which were too voluminous for her to photocopy. In spite of her numerous requests, the records were never returned to her. All of her dressage horse business deductions were allowed. The IRS also determined that she was entitled to claim 25% of her 2004 legal and professional fees for her lawsuit against the HOA as a Schedule A business deduction related to her home office (in 2004 she used 25% of the total square footage of her condominium unit exclusively for business).

In 2007, McMillan and her partners agreed to mutually acceptable terms for standing Goldrush as a breeding stallion in Melbourne, Australia. Goldrush was a Certified Breeding Stallion in the International Sporthorse Registry (ISR), the son of a "legendary"

sport-horse sire, and the proven sire of outstanding progeny in his own right. Artificial insemination is the preferred method for warmblood horse breeding. Because Goldrush was a healthy stallion and dressage horses normally live very long lives, McMillan expected to realize a minimum of five years income by standing him at stud. Two of her partners were successful Australian horse breeders and determined $1,500 per mare was a fair stud fee to start with. She projected that, under the terms of their agreement, if Goldrush bred on the average two outside clients' mares per month at $1,500 per mare, in five years she would net $180,000. *See*, *e.g.*, *Metz v. Comm'r*, T.C. Memo. 2015-54 ("*With artificial insemination, a single collection of fresh stallion semen could inseminate as many as ten mares in a day. This could result in a single stallion's impregnating more than 200 mares in a breeding season*."). After thirty days' quarantine and testing at a USDA station in southern California, Goldrush was certified healthy and transported by air from Los Angeles to Melbourne. After two weeks' quarantine and testing in Melbourne, he was again certified healthy, released, and transported to the breeding farm.

In January 2008, Goldrush suddenly collapsed and died within an 18-hour period from IMHA/ITP, a sudden, catastrophic, massive depletion of his body's red blood cells.

In 2009, the IRS audited McMillan for tax year 2006. She objected that she was being repetitively audited for the same issues year after year. In August

2009, the examiner replied, "We researched all of your examinations 1991, 1995, 2004 and 2006 and found that you are not subject of a repetitive audit." She provided the IRS with her documentation, and all of her 2006 deductions were allowed.

From 2010 to 2012, the IRS audited McMillan four times and issued three Notices of Deficiency. Three Tax Court trials resulted. McMillan represented herself because the alleged deficiencies were $11,667 (2007/2008), $457 (2009), and $5,215 (2010), and she could not find a tax attorney who would represent her in even one of the cases for a retainer less than $50,000. This appeal challenges the assessments for 2007/2008.

In 2010, the IRS audited her twice, six months apart, for tax years 2007/2008.

On January 25, 2010, the IRS issued two Letters 3572 "notices of examination" for tax years 2007/2008. The IDR's required her returns for tax years 2006 through 2009 and noted the examination would focus on her Schedule A casualty loss, legal and professional fees, car and truck expenses, and home office deduction. The one IDR enclosed was for tax year 2008 only. McMillan phoned the IRS examiner and set up an appointment for March 24, 2010.

On February 24, 2010, the IRS issued a Letter 3573 "confirmation of appointment," and two new Letters 3572. The letters noted the examination would focus on her Schedule A casualty loss, legal and

professional fees, and home office carryover. No IDR's were enclosed.

On March 24, 2010, McMillan showed the IRS examining agent the inconsistent and incomplete Letters 3572, 3573, and one IDR for 2008. She provided the agent with documentation for everything requested. The agent did not ask for her business plan or her projected profit from standing Goldrush at stud. The agent did not discuss the nine section 183 factors with her. The agent *did* ask her to provide her tax returns from 1999 through 2005. McMillan said she would also like to have those returns, and requested that the IRS return her records from the Valter and 2004 audits. Although the appointment was scheduled to last at least four hours, the agent abruptly terminated the interview at that point, after about two hours. The agent said a follow-up examination would be scheduled, but it wasn't. The agent did not issue any "subsequent IDR's to address other needed information to complete the examination."

On September 15, 2010, a different IRS agent phoned McMillan regarding the 2007/2008 audit. McMillan told the second agent the examination had concluded six months before. The second agent asked her to come in for an informal interview, and bring the same records as before.

On September 22, 2010, McMillan provided the second agent with everything she'd provided to the first agent. She again requested that the IRS return her records from the Valter and 2004 audits. The agent

grabbed her documentation and tossed it into a pile of papers on the desk without reading or discussing it. The agent did not ask for her business plan or her projected profit from standing Goldrush at stud. The agent did not discuss the nine section 183 factors with her. The agent never requested her to complete a "Statement of Supplementary Examination," or issue any "subsequent IDR's to address other needed information to complete the examination."

On September 23, 2010, the IRS issued a C525 "letter of proposed deficiency" stating (verbatim):

> 2007 SCH-C "HORSEBREEDING ACTIVITY"
>
> WE HAVE DETERMINED THAT YOUR SCH-C HORSEBREEDING ACTIVITY IS NOT AN ACTIVITY ENGAGED IN FOR PROFIT.
>
> A. A LONG HISTORY OF NO PROFITS SENSE [*sic*] 1993
>
> B. VERY LITTLE IF ANY MATERIAL PARTICIPATION
>
> C. NO VERIFICATION OF A SYSTEM OF OPERATION THAT WOULD GENERATE PROFITS
>
> ITEMS PER SCH-C THAT WERE DISALLOWED
>
> 1. ADVERTISING
>
> 2. CAR AND TRUCK (NO VERIFICATION OF MILES)

3. CONTRACT LABOR

4. LEGAL AND PROFESSIONAL (PERSONAL IN NATURE)

5. OFFICE EXPENSE

6. OTHER EXPENSE

2007 CASAULTY [*sic*] LOSS

WE HAVE DETERMINED THAT THE INCIDENT YOU CLAIMED AS A CASAULTY [*sic*] PER SCH-A FOR TAX YEAR 2007 DOES NOT MEET THE I.R.S RULES AND REGULATIONS TO BE DETERMINED A CASAULTY [*sic*] LOSS.

2008 SCH-C "HORSE BREEDING ACTIVITY"

WE HAVE DETERMINED THAT YOUR SCH-C HORSEBREEDING ACTIVITY FOR 2008 WAS NOT ENGAGED IN FOR PROFIT.

A. YOU OWNED NO HORSE IN 2008 AND PROVIDED NO VERIFICATION OF AN UNGOING [*sic*] BUSINESS FOR PROFIT.

ITEMS ADJUSTED PER SCH-C2

1. ADVERTISING

2. CAR AND TRUCK

3. RENT OR LEASE

4. OTHER EXPENSES

ITEMS ADJUSTED PER SCH-C2

1. LEGAL AND PROFESSIONAL SERVICES (PERSONAL IN NATURE)

2. OTHER INTEREST (A MISTAKE)

On September 27, 2010, McMillan disagreed with the proposed deficiencies in writing, detailed why, and requested a follow-up audit. The IRS ignored her request and issued a Notice of Deficiency instead.

On November 23, 2010, the IRS issued a Letter 531 "Notice of Deficiency" in the amount of $11,667, plus penalties of $2,333.40, for tax years 2007/2008. The IRS disallowed McMillan's dressage horse business expenses, home office deduction, legal and professional fees, and itemized deductions based on four claims:

1) *She did not substantiate her deductions*. In every respect, the deductions the IRS claims in the Notice of Deficiency she did not substantiate are the same deductions the IRS later conceded in Tax Court she had substantiated for both years.

2) "*Because your business has not been profitable since approximately 1993, it does not qualify as a 'for profit' activity*." First, IRC section 183(d) cannot be used as the sole basis for disallowing losses under IRC section 183, even if it is shown that the taxpayer has not met the presumption rule. Second, the statement is false.

3) *She did not establish that Goldrush's death was the complete or partial destruction or loss of property resulting from an event that is (a) identifiable; (b)*

damaging to property; and (c) sudden, unexpected, or unusual in nature. Her documentation established exactly those facts.

4) *Her legal expenses were personal and therefore not deductible*. Her documentation established that the question of whether her legal and professional fees for the lawsuit against the HOA were business expenses had already been decided in tax years 2004 and 2006.

On February 25, 2011, for tax years 2007/2008, McMillan filed Tax Court case docket no. 4590-11 disputing the Notice of Deficiency.

On June 27, 2011, the IRS conducted a "correspondence audit" of McMillan for tax year 2009.

On November 7, 2011, for tax year 2009, the IRS issued a Letter 3219 (SC/CG) "Notice of Deficiency" in the amount of $457.

On February 8, 2012, for tax year 2009, McMillan filed Tax Court case docket no. 3720-12 disputing the Notice of Deficiency.

In March 2012, T.C. docket 4590-11 for tax years 2007/2008 was tried during the Tax Court's March 19, 2012 trial session in Los Angeles. The trial judge complained he was overloaded with another judge's trial calendar beside his own, yet denied McMillan's request for a continuance to allow her CPA to testify after the April 15th tax filing rush, because: a) it was too expensive (*THE COURT: "it is very expensive for the Court to send people out here to try your case"*), and b) the IRS

objected to it. The judge offered two reasons why the IRS might object to a continuance to allow her CPA to testify: her CPA's testimony wasn't going to change their view anyway, or her CPA was untruthful (*THE COURT*: *"one thing that is a little confusing to me is, and I would warn you of this, I don't understand if you have all these documents why the Respondent hasn't agreed that you are in a trade or business, and certainly while it may be a problem for the accountant to come, or he may not want to come, because of his trying to get returns prepared, I am guessing that [IRS counsel] could have reached him by phone. And I think you said that you had an affidavit from him, which the government has objected to, and I guess that motion has been granted. So it would seem that for some reasons, which I don't have the slightest idea about, the Respondent doesn't think that you have got documents that show that you were in a trade or business, if that is the cause of the dispute. And that they don't believe that your accountant has changed their view, or alternatively, they don't believe that your accountant's veracity is sustained here, or acceptable to them. So I am not sure that I understand the problem, but in my experience that would be an unusual problem because normally if you really do have the documents, you need to substantiate something, and the Respondent can reasonably verify the facts as you have proposed them or stated them or accurate, and that the Respondent will normally resolve cases . . . There was either an ongoing business or there wasn't, and if there was, there should be business records about that business, tax returns filed."*). Before, during, and after trial, McMillan

objected that the IRS refused to produce her tax records from the Valter and 2004 audits to allow her to disprove the claim that her dressage horse business had not been profitable since 1993. The IRS responded: "petitioner has not shown that respondent bears any burden to produce documents that petitioner may have provided to respondent." McMillan protested and objected that the IRS' claims in its audit reports, Notice of Deficiency, correspondence, proposed stipulations, pretrial motions, and opening statement ([*IRS COUNSEL*]: "*the record will show that the Petitioner's most recent audits for tax year [2006] and 2004 were substantiation cases, and that the issue in those notices of deficiency were not whether or not the Petitioner was operating a for profit business under Section 183, but simply whether the Petitioner could substantiate her expenses*") were false. The judge dismissed her protests and objections out of hand, ordered her to stop getting the record "badly messed up," and pointed out why the IRS was to be believed over her (*THE COURT: "Well, what is your concern? I mean, I am trying to keep the record from getting badly messed up, and I anticipate that when you try to testify that [IRS counsel] will probably object that it is not relevant . . . I am not going to hold them in contempt or something. They have to try an awful lot of cases . . . They don't like to be embarrassed by losing cases*"). He denigrated and mocked McMillan and her dressage horse business in a phone conference with IRS counsel present, and was literally asleep on the bench throughout the trial.

On April 2, 2012, for tax year 2009, the IRS alleged increased deficiencies of $7,233, plus penalties of $1,446.60. The IRS argued that for the same reasons it disallowed McMillan's dressage horse business expenses, legal and professional fees, and itemized deductions for tax years 2007 and 2008, those deductions should also be disallowed in tax year 2009.

On August 9, 2012, for tax year 2010, the IRS issued a Letter 3572 "notice of examination." The contact was the second examining agent in the 2007/2008 audit. The letter required McMillan's returns for tax years 2009 through 2011, and noted the examination would focus on her legal and professional fees and home office deduction.

On September 6, 2012, for tax year 2010, McMillan notified the examining agent in writing that her CPA would be handling the audit, and provided a signed Form 2848 power of attorney in accordance with the instructions in the Letter 3572. The IRS ignored her letter and power of attorney and, without further communication, issued a Notice of Deficiency.

On January 7, 2013, McMillan obtained through the Freedom of Information Act (FOIA) an IRS intra-departmental report titled "HISTORY OF T/P'S HORSE BREEDING ACTIVITY 2007 AND 2008" – redacted by the IRS from McMillan's administrative file during discovery – in which the two 2007/2008 audit examiners invented statements she never made and falsified over a dozen material facts that were the basis

for the 2007/2008 Notice of Deficiency. FOIA Responsive-987465.PDF.XML. For example:

- "*She stated in the 90's she Showed* [*sic*] *a net profit with her partner Tom Valter*." McMillan stated her dressage horse business was profitable during its startup phase, which had nothing to do with Tom Valter. She stated it was mostly profitable throughout the 1990's but had some unprofitable years after she testified against Valter. She requested the agents return her tax records from the Valter and 2004 audits, so she could answer their questions accurately.

- "*T/p admitted* [*sic*] *that she earned her monies through training other customer's horses, breeding and from showcasing* [*sic*] *their horses*." McMillan stated that she bought, trained, competed, and sold at a profit horses (including stallions she also used for breeding) who competed in dressage for the United States Equestrian Team at the Olympic level.

- "*T/p stated without assistance she could not do these activities by herself*." McMillan stated and documented with training schedules, show photos, dressage tests, bank statements, bills, receipts, breeding contracts, trophies, and awards that she bred, trained, and competed four horses, two of them stallions, in grand prix dressage through 1996, and her stallion Goldrush until 2000, after which she trained, cared for, and exercised Goldrush regularly to keep him in show condition.

- "*T/p stated that she did not have quality time to show her only horse Goldrush, therefore, she did not*

show him any longer." McMillan stated that in 2000 she took Goldrush out of competition due to a ligament injury, and spent a minimum of 27 hours a week training and exercising him. She stated that she entered Goldrush in competitions in 2006 and 2007, as shown on her 2006 and 2007 tax returns. She provided the agent with the tax returns, training schedules, veterinarians' invoices, and documentation for the entry fees.

- "*Per memo t/p concedes* [*sic*] *that due to the fact she has not been able to replace her deceased horse which died in 2007, she cannot predict when and if she will find a 'suitable stallion' and in the mean time she intends to maintain the business as an 'ongoing venture*'." Even after McMillan provided the agent with the attending veterinarian's letter stating that Goldrush was admitted to emergency on January 21, 2008 and died 18 hours after admittance, the agent continued to assert that Goldrush died in 2007, having "lasted 3-4 days before his demise."

On February 7, 2013, in T.C. Memo. 2013-40, the Tax Court ruled McMillan's dressage horse business was a hobby in 2007 and 2008. App. 4. The trial judge announced that he decided from the outset she should be "winding down" her dressage horse operations, not expanding into new markets. Although the IRS conceded that she substantiated all of her claimed expenses for both years, and the Tax Court did not sustain the IRS' section 6662 penalties, the trial judge was displeased with her testimony and the "voluminous" evidence she provided. He stated in his opinion:

> Petitioner . . . an avid horsewoman . . . has a long history of working with and showing horses . . . petitioner's background as a life-long horsewoman is insufficient to indicate expertise in the economics of this business and a profit objective . . . there is no indication in the record that petitioner's horse activity has ever been profitable . . . Petitioner did not argue it, but the main theme of our analysis of the above factors [Treas. Regs. §1.183-2(b)(1)-(9)] was what a reasonable winding down of petitioner's horse activity would have been.

The judge improperly interpreted Treasury Regulations to suit his "main theme." He disregarded "*or dissimilar*" in Treas. Reg. §1.183-2(b)(5) (*the success of the taxpayer in carrying on other similar or dissimilar activities*) to avoid acknowledging that in 2008 McMillan formed a successful IT startup from someone else's failed business; instead he incorrectly described her as a salaried employee for all years at issue with a "previous lack of success in carrying on a similar profitable activity" because there was "no indication in the record" her dressage horse business had ever been profitable. He misapplied Treas. Reg. §1.183-2(b)(4) (*expectation that assets used in activity may appreciate in value*) by omitting that she owned a large store of Goldrush's frozen semen. On brief, McMillan argued the burden of proof should shift to the IRS pursuant to IRC section 7491, because she had complied in every respect with its provisions: she introduced credible evidence with respect to the factual issues presented by

the IRS before trial, substantiated every item requested throughout the examination process and discovery, maintained all records in accordance with current requirements, and cooperated with IRS requests for witnesses, information, documents, meetings and interviews. The judge refused to shift the burden of proof on grounds she failed to comply with section 7491 ("Petitioner did not introduce complete credible evidence at trial. It seems that petitioner believed that she did not have to produce any evidence that respondent did not request."). He denied her motion to reopen the record to submit evidence that the IRS argued for the first time at trial was missing ("respondent conceded that petitioner substantiated all of her expenses and the additional information would have additionally substantiated those expenses"). He disallowed her previously allowed deduction for her legal and professional fees because she "never explained how the lawsuit was related to [her work for her employer in 2007]." The IRS vilified her on appeal, claiming she "lacked essential tools for sound management and planning of a true business operation."

On April 16, 2013, for tax year 2010, the IRS issued a Letter 531 "Notice of Deficiency" in the amount of $5,215, plus penalties of $1,043, without allowing McMillan or her CPA to present her records for examination. The IRS disallowed her legal and professional fees, home office deduction, and itemized deductions.

On July 15, 2013, for tax year 2010, McMillan filed Tax Court case docket no. 16203-13 disputing the IRS' Notice of Deficiency.

On September 9, 2013, for tax years 2007/2008, McMillan filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. COA docket no. 13-73139, T.C. docket no. 4590-11.

On September 13, 2013, for tax year 2010, the IRS alleged increased deficiencies of $23,882, plus penalties of $4,776.40. The IRS argued that for the same reasons it disallowed McMillan's dressage horse business expenses, home office deduction, legal and professional fees, and itemized deductions for tax years 2007, 2008, and 2009, those deductions should also be disallowed in tax year 2010. In addition, the IRS alleged the HOA's settlement for damages was taxable income, which it clearly was not. McMillan's recovery for pain and suffering was an exclusion from gross income. Internal Revenue Code 104(a)(2); *Comm'r v. Schleier*, 515 U.S. 323 (1995).

In February 2014, T.C. docket 3720-12 for tax year 2009 was tried during the Tax Court's February 3, 2014 trial session in Los Angeles. The trial judge remarked about McMillan "this isn't your first rodeo," and offered a hypothetical with a subtext suggesting that she should retire and her dressage horse business was a hobby. She called her CPA as a witness and introduced into evidence all of the early tax returns that she and her CPA could find: 1979, 1980, 1983, 1984, 1985, 1986, 1987, and 1988, which she would have provided in the

2007/2008 case had the Tax Court granted her motion to reopen the record. The IRS finally conceded in briefing McMillan's dressage horse business made a profit in three out of those eight years.

In November 2014, T.C. docket 16203-13 for tax year 2010 was tried during the Tax Court's November 17, 2014 trial session in Los Angeles. The trial judge referred to McMillan as a "Frederick's of Hollywood" scantily dressed caricature (Frederick's of Hollywood is infamous for selling sex toys and racy lingerie), among other demeaning remarks. He quashed her witness subpoenas served on the IRS' examining agents. He cut her off when she attempted to testify the IRS had violated the Internal Revenue Code to avoid conducting a proper audit.

On June 11, 2015, in T.C. Memo. 2015-109, the Tax Court ruled that, although her dressage horse business was a hobby in 2009, because McMillan trained horses as part of an ongoing business she was entitled to deduct an interest expense originating in 2007 that amounted to almost all of her 2009 horse expenses. The Tax Court also allowed her legal and professional fees as a Schedule C business deduction related to her home office, did not sustain the IRS' section 6662 penalties, and awarded McMillan her litigation costs as the substantially prevailing party under IRC section 7430(c)(4)(A)(i)(I). In applying Treas. Regs. §1.183-2(b)(1)-(9) to her dressage horse business, the trial judge derided McMillan as a failure, and derided her business model as "unrealistic for her" ("*her plan to purchase a horse and then train, show, and sell it at a*

profit of hundreds of thousands, if not millions, of dollars was unrealistic for her"), even though the record shows she had done exactly that successfully from at least 1981 through 1997. He dismissed her "success in turning a profit" in her software consulting business as irrelevant to her business acumen ("*We see little similarity between that activity and the equine activity; and her success in the IT activity does not convince us that she is generally successful in turning around business activities*"), the very opposite of the Tax Court's findings in three other cases: *Richard Miller v. Comm'r*, T.C. Memo. 2008-224 ("*Although these businesses are dissimilar to horse breeding, their growth demonstrates Mr. Miller's business acumen and ability to develop and improve businesses*"); *Henry and Christie Metz v. Comm'r*, T.C. Memo. 2015-54 ("*As the Commissioner concedes, Henry 'can be presumed to have first-hand knowledge of the importance of budgets, forecasts, profitability targets, and other devices that are regularly used to chart a successful business course' because he turned 'a business that lost about $1 million a year into one that was profitable enough to draw corporate suitors'* "); and *Merrill Roberts v. Comm'r*, T.C. Memo. 2014-74 (Mr. Roberts' "*ability to transfer skills across vastly different trades*" weighed in his favor).

On June 15, 2016, the Tax Court adopted rules for judicial conduct and complaints. The rules conform with the Rules for Judicial Conduct and Judicial Disability Proceedings promulgated by the Judicial Conference of the United States pursuant to 28 U.S.C. sections 358.

On January 30, 2017, McMillan filed a formal complaint of judicial misconduct in T.C. docket 16203-13 for tax year 2010. T.C. Judicial Conduct Complaint Docket No. TC-17-90002. As a result, the Tax Court sealed and redacted parts of the record. The case and complaint are still pending.

The IRS has not challenged McMillan's returns since tax year 2010.

On May 15, 2017, the COA issued a Memorandum affirming the Tax Court's decision. App. 1.

On June 26, 2017, McMillan filed a petition for rehearing.

On September 1, 2017, McMillan filed a reply in support of the petition for rehearing.

On September 21, 2017, the COA amended its Memorandum and denied the petition for rehearing. App. 30.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT COURT OF APPEALS' MEMORANDUM CONFLICTS WITH ITS OWN OPINIONS, AN OPINION BY ANOTHER CIRCUIT COURT OF APPEALS, AND THE SUPREME COURT.

A. The Memorandum conflicts with the COA's own opinions.

• The COA stated in *Boise Cascade v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991):

> Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.

The trial judge in this case improperly interpreted Treas. Regs. § 1.183-2(b)(1-9) in a manner that rendered provisions inconsistent, meaningless, or superfluous, yet the COA held that the Tax Court did not clearly err in its findings.

• The COA stated in *Devore v. Comm'r*, 963 F.2d 280, 282 (9th Cir. 1992):

> The facts of Devore's case constitute "extraordinary circumstances." One spouse was in a substantially weaker position with reference to the other. Devore earned a negligible income while his wife controlled a significant sum of money. Devore was unsophisticated in

> tax matters and was excluded from the financial affairs of his wife.

The COA held that the Tax Court did not abuse its discretion in denying McMillan's motion to reopen the record, citing *Devore*, *supra*; however, the record shows her case *did* constitute "extraordinary circumstances." McMillan was pro se, in a substantially weaker position than the IRS. The IRS routinely violated the Internal Revenue Code: it issued an unlawful Notice of Deficiency, withheld evidence material to her case, and lied in court and out of it. McMillan was unsophisticated in Tax Court and the IRS used that against her.

B. The Memorandum conflicts with the Seventh Circuit's decision in *Roberts v. Comm'r*.

The IRS invariably asserts, including in this case, that Treas. Reg. § 1.183-2 constitutes an "objective test" of profit motive. The Seventh Circuit stated in *Roberts v. Comm'r*, 820 F.3d 247, 250 (7th Cir. 2016):

> We mustn't be too hard on the Tax Court. It felt itself imprisoned by ***a goofy regulation*** (26 C.F.R. § 1.183-2, Treas. Reg. § 1.183-2: Activity Not Engaged in for Profit Defined; see, e.g., *Faulconer v. Commissioner*, 748 F.2d 890 (4th Cir. 1984)) that we feel bound to set forth in its full tedious length . . . [emphasis added]

Those observations are dicta, but by their use, the Seventh Circuit appears to have drawn a distinction between an "objective" regulation and one that is "goofy." *See*, *Comm'r v. Groetzinger*, 480 U.S. 23, 28

(1987). *Roberts* established two things: the taxpayer's profit motive and, contrary to the IRS' assertion, that Treas. Reg. § 1.183-2 does *not* constitute an "objective test." In fact, Congress increased the section 183(d) presumption of being engaged in for profit to three out of five consecutive years specifically because the "facts and circumstances" test was subjective:

> The Congress was concerned that the statutory presumption under prior law regarding whether an activity was being engaged in for profit may have unduly benefited some taxpayers who engaged in activities as hobbies, but who could structure their earnings and expenses so as to realize a profit in at least two out of five consecutive years . . . Even though the Internal Revenue Service could overcome the statutory presumption, some abuse nonetheless could arise, ***in light of the subjective nature of a general facts and circumstances test*** . . . Under the Act, for activities other than those consisting in major part of horse breeding, training, showing, or racing, the statutory presumption of being engaged in for profit applies only if the activity is profitable in three out of five consecutive years. [emphasis added]

General Explanation of the Tax Reform Act of 1986, *supra*, pp. 82-83.

In *Roberts*, the Seventh Circuit reversed the Tax Court's opinion because it was confusing and contradictory. In this case, the COA affirmed the Tax Court's opinion even though, in addition to being confusing

and contradictory, the trial judge impermissibly interpreted statutes, regulations, and case law from a biased viewpoint (his "main theme") and made rulings based on findings of "fact" that were non-factual. Apart from the question of whether the Treasury Regulation is "objective" or "goofy," the evidence in the record overwhelmingly favors McMillan's claim that in 2007 and 2008 her dressage horse enterprise was a business.

Factor 1: Since the 1970's, she conducted it in a businesslike way. She kept books and records that were auditable and satisfied the books and records requirement of Treas. Regs. Section 1.6001-1(a).

Factor 2: She prepared by extensive study to compete her horses at the Olympic level. She trained and studied with international level trainers in the United States and Europe. She acquired the requisite business and equestrian expertise to value, buy, train, and sell top horses at a profit. The Tax Court acknowledged her dressage horse business had "a long history" and a profitable business model.

Factor 3: She worked from home, lived less than eight miles from the indoor training facility where she kept her horses, had a flexible schedule, and became a consultant instead of an employee in 2008. The Tax Court acknowledged that she "did spend a significant amount of time taking care of Goldrush, including grooming and exercising him."

Factor 4: She expected to derive an eventual profit in the form of stud fees and the appreciation of the value of Goldrush as a breeding stallion – it's not

as if she were "a billionaire indifferent to the modest profit" she could expect from breeding, training and selling horses for Olympic dressage competition.

Factor 5: She started two successful businesses on a small scale and "grew" them to large dimensions over time, a pattern consistent with her attempting to repeat the process with her plan to stand Goldrush at stud in 2007 and 2008. And in 2008, she turned someone else's failed business into her own successful IT startup.

Factor 6: The losses she sustained were "explainable, as due to customary business risks or reverses" and "unforeseen or fortuitous circumstances" beyond her control. *See*, *e.g.*, *Engdahl v. Comm'r*, 72 T.C. (1979) ("the untimely death of two of their chief hopes for setting up their breeding herd").

Factor 7: A "substantial profit, though only occasional, would generally be indicative that an activity is engaged in for profit." She earned substantial profits from her investments in Tudor and Zooloog, and expected to repeat that success with Goldrush.

Factor 8: "The existence of other income has little weight when many other factors indicate a profit objective."

Factor 9: "A business will not be turned into a hobby merely because the owner finds it pleasurable."

C. The Memorandum conflicts with Supreme Court precedents.

• This Court stated in *In Re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

The Constitution requires that hearings take place before an impartial tribunal. Fundamental to the notion of a fair trial and tribunal is the principle that a judge shall apply the law impartially and free from the influence of any personal biases. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *In Re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The trial judge's determinative "main theme" – that if McMillan knew what was good for her (as the judge liked to say he did) she would have closed up shop and gone out of the dressage horse business years ago – violates McMillan's Fourteenth Amendment rights to due process, equal protection, and a fair trial conducted by an impartial judge. Judges who, consciously or unconsciously, perceive a female business owner with a long record of success in both her fields as a "Frederick's of Hollywood" sex object, an "unrealistic," "avid horsewoman"

with "an affinity for horses and dressage" who lacks the "tools," worth, status, or rights of *real* business*men* like Mr. Miller, Mr. Metz, or Mr. Roberts (views and language common to all three cases), will always find a way for her to lose in court. So far as McMillan can determine, only female business owners are described in Tax Court cases as "avid," "passionate," "enamored," "Frederick's of Hollywood" sex objects. For example, in *Cecelia Hylton v. Comm'r*, Docket No. 17-1776 currently pending in the Fourth Circuit COA, the Tax Court described Ms. Hylton, a business professional, as a woman consumed by a "passion" for quarter horses with an "avid and costly hobby" that she used to "further her personal pleasure." (*Hylton v. Comm'r*, T.C. Memo. 2016-234). On appeal, the IRS claims Ms. Hylton is "enamored of being in and around horse shows" because she attends horse shows and auctions as part of her quarter horse business. Mr. Miller, Mr. Metz, and Mr. Roberts also spent a significant amount of time traveling to horse shows and racetracks where they interacted with others in the industry as part of their respective horse businesses. So far as McMillan can determine, Mr. Miller, Mr. Metz, and Mr. Roberts have never been described in a Tax Court case as "avid," "passionate," "enamored," "Frederick's of Hollywood" scantily dressed sex objects.

- This Court stated in *Tait v. Western Md. Ry. Co.*, 289 U.S. 620 (1933):

> The petitioner seeks a reversal on the merits, asserting that a judgment in a suit concerning income tax for a given year cannot estop

> either of the parties in a later action touching liability for taxes of another year . . . As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status . . . The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding.

The IRS' recasting of McMillan's 2007/2008 legal and professional fees stemming from her lawsuit against the HOA as supposedly personal was an attempt to repudiate the Stipulation of Settled Issues executed on December 3, 2008, and the corresponding decision entered in Tax Court on January 26, 2009, in which the IRS affirmed she was entitled to deduct a business use percentage of her legal and professional fees for the same matter. The COA ignored *Tait* and failed to address McMillan's arguments and authorities that the IRS was "barred by their judicial admissions, and foreclosed by the doctrines of res judicata and collateral estoppel" from re-litigating the matter and, following the 2007/2008 audit, a simple adjustment in accordance with the terms of the prior decision was all that was needed.

- This Court stated in *Kornhauser v. United States*, 276 U.S. 145 (1928):

> The basis of these holdings seems to be that where a suit or action against a taxpayer is directly connected with, ***or***, as otherwise stated (Appeal of Backer, 1 B.T.A. 214, 216), ***proximately resulted from***, his business, the expense incurred is a business expense within the meaning of § 214(a), subd. (1), of the act. [emphasis added]

The COA's holding that McMillan's legal and professional fees must be ***directly*** connected with her information technology business conflicts with *Kornhauser* and is out of keeping with statutory interpretation. It also conflicts with the IRS' prior determination that McMillan was entitled to claim a business use percentage of her 2004 legal and professional fees for the lawsuit against the HOA as a Schedule A deduction for unreimbursed employee expenses related to a home office pursuant to *Test v. Comm'r*, T.C. Memo. 2000-362:

> Ordinary and necessary legal expenses are generally deductible under section 162(a) when the matter giving rise to the expenses arises from, or is proximately related to, a business activity . . . If a taxpayer's trade or business is that of being an employee, however, then the legal expenses will be treated as an itemized deduction.

See also, 26 C.F.R. § 1.162-1(a); *United States v. Gilmore*, 372 U.S. 39 (1963); *McKay v. Comm'r*, 102 T.C. 465 (1994); *O'Malley v. Comm'r*, 91 T.C. 352 (1988), *aff'd* 972 F.2d 150 (7th Cir. 1992); and *McMillan v. Comm'r*, T.C. Memo. 2015-109.

D. The Memorandum conflicts with IRC Section 165(c)(3), *Appleman v. United States*, and accepted rules of statutory interpretation.

The Seventh Circuit stated in *Appleman v. United States*, 338 F.2d 729 (7th Cir. 1964):

> Among characteristics of the specific casualties enumerated in [IRC Section 165(c)(3)] are suddenness and unforeseeability of the occurrence . . . Taxpayers' contention . . . overlooks the factor of "unexpectedness" . . . The record demonstrates that during the years involved loss of elm trees from phloem necrosis was to be expected. It was a common occurrence . . . apart from the question whether death within a month from infection is relatively "sudden" it is apparent the element of unexpectedness was entirely lacking.

First, the COA ignored that the trial judge's version of *Maher v. Comm'r*, 76 T.C. 593, 597 (1981) ("This Court and other courts do not allow 'a casualty loss deduction for losses resulting for diseases' ") omits material parts of that reference and the Tax Court's opinion in *Maher*:

> To date, no court, including this one, has allowed a casualty loss deduction for losses resulting from diseases . . . However, only the Sixth Circuit has taken the position that a disease may never translate into a casualty loss . . . we believe the better and more prevalent view is to measure the suddenness of the loss itself, *i.e.*, the lapse of time between

> the precipitating event and the loss proximately caused by that event.

Every case the trial judge included by reference ("and the cases cited thereat") lacks either the element of suddenness, or unforeseeability ("unexpectedness"), or both. The judge went even further and omitted the element of "unexpectedness" from the statute and his discussion – he cited an inapposite case involving colic in horses, but none involving IMHA/ITP. Finally, he failed to mention the one case that *is* directly on point here. In *Black v. Comm'r*, T.C. Memo. 1977-337, 36 T.C.M. (CCH) 1347, 1350 (1977), the Tax Court allowed a casualty loss deduction for the destruction of pine trees caused by a sudden onslaught of southern pine beetles:

> In our view it is immaterial whether the death of the trees resulted from the tunnels by the beetles or the fungi carried by the beetles. In either event, it is the sudden onslaught of the southern pine beetles which caused the trees to die.

Second, the COA proposed a version of *United States v. Flynn*, 481 F.2d 11, 13 (1st Cir. 1973) ("casualty losses to horses, largely due to illness or disease, were 'clearly not allowable'") that does not pass muster. The actual cite is:

> [Flynn] sought to claim at trial casualty losses to his horses, largely due to illness or disease, clearly not allowable. *See Appleman v. United States*, 7 Cir., 1964, 338 F.2d 729, 731-732, cert. denied 380 U.S. 956, 85 S.Ct.

> 1090, 13 L.Ed.2d 972; Rev. Rul. 61-216, 1961-2 Cum.Bull. 134. On this appeal defendant criticizes the instruction on casualty losses given the jury. There was no error.

No details are given about the horses' illness or disease, but because the First Circuit found no error in the jury instruction on casualty losses, and cites *Appleman*, *supra*, as precedent, it may be inferred the illness or disease lacked "suddenness and unforeseeability." It may also be inferred Flynn's horses did not die from IMHA/ITP, since that would have been noteworthy.

The record shows Goldrush died from IMHA/ITP. His death was as sudden, undesigned, unexpected, and unforeseeable as a fire, or a shipwreck, or a bolt of lightning in a storm (or a sudden onslaught of southern pine beetles).

> Immune-mediated hemolytic anemia (IMHA) and immune-mediated thrombocytopenia (ITP) are diseases in which the body's own immune system attacks its red blood cells (IMHA) or platelets (ITP). Symptoms that develop are caused by a massive, often sudden, depletion of red blood cells or platelets . . . Both IMHA and ITP can be classified as "primary" or "secondary". In primary disease, no underlying cause of the immune destruction can be found after an exhaustive clinical and laboratory evaluation. In comparison, secondary IMHA or ITP occurs when the immune system inadvertently destroys its own blood cells or platelets secondary to an immune attack directed against an underlying condition

> such as cancer, infection, a drug or toxin exposure.

TEXTBOOK OF VETERINARY INTERNAL MEDICINE, Carol Norris, DVM, DACVIM, Clinician, Veterinary Medical Teaching Hospital, School of Veterinary Medicine, UC Davis. Goldrush was certified healthy when he left LionHeart Equestrian Center; he was certified healthy thirty days later when he left USDA quarantine and departed the United States for Australia; and he was certified healthy two weeks later when he left Australian government quarantine for the stud farm. In fact, he was eating, drinking, and kicking up his heels as usual until, in January 2008, he suddenly collapsed and died within an 18-hour period. *([Petitioner]: "The next thing I knew the vet had called me and said that Goldrush had passed away. She said it was a total collapse of his immune system. It had happened suddenly . . . She said horses' bodies are dense. We x-rayed him, and we ultasounded him, but I could not find any tumors. I said can you possibly do an autopsy. She called it – she corrected me and said it is called a postmortem. I could do it, but in this case, it would cost you a thousand dollars extra, and I can in no way guarantee that it will show you the cause of death. In fact, it is my opinion that it probably wouldn't.")*

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENISE CELESTE MCMILLAN, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 13-73139 Tax Ct. No. 4590-11 MEMORANDUM* (Filed May 15, 2017)

Appeal from a Decision of the
United States Tax Court

Submitted May 11, 2017**

Before: GOODWIN, LEAVY, and SILVERMAN, Circuit Judges.

Denise Celeste McMillan appeals pro se the Tax Court's denial, after a bench trial, of her petition for redetermination of federal income tax deficiencies for tax years 2007 and 2008. We review the Tax Court's conclusions of law de novo and its factual findings for clear error. *MK Hillside Partners v. Comm'r*, 826 F.3d 1200, 1203 (9th Cir. 2016). A taxpayer claiming a deduction bears the burden of proof, and this court

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

reviews for clear error the Tax Court's factual determination "that a taxpayer has failed to produce sufficient evidence to substantiate a deduction." *Sparkman v. Comm'r*, 509 F.3d 1149, 1159 (9th Cir. 2007). We have jurisdiction under 26 U.S.C. § 7482(a)(1), and we affirm the Tax Court's judgment.

The Tax Court properly considered the factors set forth in 26 C.F.R. § 1.183- 2(b)(1)-(9) and did not clearly err in finding that McMillan did not engage in horse activity for profit in 2007 and 2008, and therefore was not entitled to take income tax deductions for expenses arising from that activity. *See* 26 U.S.C. § 183(b)(2); *Hill v. Comm'r*, 204 F.3d 1214, 1218 (9th Cir. 2000); *Wolf v. Comm'r*, 4 F.3d 709, 713 (9th Cir. 1993). The Commissioner was not bound to allow deductions permitted in prior tax years. *See Little v. Comm'r*, 106 F.3d 1445, 1453 (9th Cir. 1997).

The Tax Court did not err in disallowing a casualty loss deduction on the basis of the death of McMillan's horse from disease. *See* 26 U.S.C. § 165(c)(3); *United States v. Flynn*, 481 F.2d 11, 13 (1st Cir. 1973) (casualty losses to horses, largely due to illness or disease, were "clearly not allowable").

The Tax Court did not clearly err in finding that the expenses of a lawsuit were not directly connected with McMillan's information technology business, and therefore were not deductible as ordinary and necessary business expenses under 26 U.S.C. §§ 162(a) and 212. *See* 26 C.F.R. § 1.162-1(a); *Inland Asphalt Co. v. Comm'r*, 756 F.2d 1425, 1427 (9th Cir. 1985).

The Tax Court did not abuse its discretion in denying McMillan's post-trial motion to reopen the record. *See Devore v. Comm'r*, 963 F.2d 280, 282 (9th Cir. 1992) (per curiam).

AFFIRMED.

CLC

T.C. Memo. 2013-40

UNITED STATES TAX COURT

DENISE CELESTE MCMILLAN,
Petitioner *v.* COMMISSIONER OF
INTERNAL REVENUE, Respondent

Docket No. 4590-11. Filed February 7, 2013.

R determined deficiencies in P's 2007 and 2008 Federal income tax. P and R dispute whether P is entitled to deduct expenses in excess of the gross income from her horse activity, whether the death of P's stallion was a casualty loss, and whether P is entitled to deduct legal and professional expenses.

Held: P is not entitled to deductions for the expenses incurred in her horse activity for the 2007 and 2008 tax years.

Held further, the death of P's stallion was not a casualty loss in the 2008 tax year.

Held further, P is not is not entitled to deduct the disputed legal and professional expenses for the 2007 and 2008 tax years.

Held further, P is not liable for the I.R.C. sec. 6662(a) accuracy-related penalties for the 2007 and 2008 tax years.

Denise Celeste McMillan, pro se.

Priscilla Parrett, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WHERRY, *Judge*: This case is before the Court on a petition for redetermination of Federal income tax deficiencies that respondent determined for petitioner's 2007 and 2008 tax years of $10,107 and $1,560, respectively, and section 6662(a) accuracy-related penalties for 2007 and 2008 of $2,021.40 and $312, respectively.[1]

Respondent concedes that petitioner has substantiated all of her claimed expenses for the years at issue. The issues for decision are:

1) whether petitioner is entitled to deductions arising from her horse activity[2] claimed on her Schedules C, Profit or Loss From Business, to the extent they exceed her gross income from that activity for the 2007 and 2008 tax years. More specifically, whether petitioner was engaged in her horse activity for profit;

2) whether petitioner is entitled to a Schedule C interest expense deduction for the 2008 tax year;

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[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986 (Code), as amended and in effect for the taxable years at issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

[2] On brief petitioner criticizes respondent's use of "activity" or "horse activity". In cases with sec. 183 issues "horse activity" is a term of art and this Court generally uses it to discuss the issues because whether activities amount to a business "engaged in for profit" is a legal conclusion for the Court to determine. Therefore we refer to petitioner's horse activity as an activity until we render a conclusion regarding the sec. 183 issue.

3) whether the death of the stallion Goldrush I was a casualty loss for the 2008 tax year;[3]

4) whether petitioner is entitled to claim deductions on Schedule C for legal and professional expenses for the 2007 and 2008 tax years; and

5) whether petitioner is liable for section 6662(a) accuracy-related penalties for the 2007 and 2008 tax years.

FINDINGS OF FACT

While the parties did not file a stipulation of facts, at trial they introduced a number of exhibits, and those exhibits are hereby incorporated by reference into our findings.[4] Petitioner was single and filed Forms 1040,

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[3] The parties agree that if the Court determines that petitioner is entitled to this expense deduction, it should be claimed for the 2008 tax year, because Goldrush died in 2008.

[4] Respondent, inter alia, objects to Exhibits 22-P through 30-P, 32-P through 35-P, 37-P through 48P, and 51-P through 62-P on the grounds of relevance. Fed. R. Evid. 401 states: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." We overrule respondent's objections and hold that the exhibits tend to describe petitioner's horse activity as well as the reasonableness of her underpayment.

Petitioner filed a motion on August 30, 2012, to reopen the record to introduce additional evidence. Because introduction of new evidence after the case was submitted would prejudice respondent and the additional evidence would not have had a substantial effect on petitioner's case, we will deny the motion. *See Butler v. Commissioner*, 114 T.C. 276, 286-287 (2000). The Court notes that respondent conceded that petitioner substantiated all of her expenses and the additional information would have

U.S. Individual Income Tax Return, for the taxable years at issue. Petitioner resided in California when she filed her petition.

During the years at issue petitioner worked full time for Tony Hoffman Productions, Inc., out of her home in California. During the 2007 and 2008 tax years she earned $60,630 and $60,000, respectively, from that job.

Petitioner has an affinity for horses. She began riding ponies when she was four years old and began taking formal riding lessons when she was nine. Petitioner is an accomplished horsewoman earning, among other trophies, a number of plaques from the California Dressage Society from 1989 through 1999. During the years at issue petitioner was a member of the following organizations: California Dressage Society, United States Dressage Federation, United States Equestrian Foundation, and the United States Equestrian Team.

Petitioner began a dressage horse breeding, showing, competing, and training activity in the mid-1970s. Petitioner would also take difficult horses on consignment, retrain them, and sell them at a profit. She generally had between one and six horses. However, beginning in 1998 petitioner owned only one horse.

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additionally substantiated those expenses. The Court also notes that this evidence was always available and petitioner could and should, if she wanted it to be considered, have introduced it at trial.

On February 28, 1992, petitioner's business partner at that time, Tom Valter, wrote a check for $25,000. At trial petitioner explained that the check was written as partial payment of the purchase price for Goldrush I (Goldrush). Petitioner boarded Goldrush from 1992 through 2007 at Baronsgate Equestrian Center, the name of which was changed to Lion's Heart Ranch in 2004. Between 1992 and 1998 Goldrush sired five foals and his stud fee was $1,000 to $1,500. In 1999 petitioner testified against her former business partner in an animal abuse case and after that "no one would breed to Goldrush". After 1999 Goldrush did not sire any more foals.

From 1992 through 1999 petitioner entered Goldrush in dressage competitions. Then in 1999 Goldrush suffered from a minor lameness that "was enough to get him eliminated from dressage competition immediately by any judge". Petitioner then tried "everything" to heal Goldrush. She tried to train him through it, took him to trainers and veterinarians, fed him supplements and medications, and even tried custom saddles and shoes. Nothing worked.

From 1999 through 2008 petitioner did not compete in any dressage competitions. She was also not paid to train any horses for dressage competitions during that time, nor did she take any other horses on consignment.

In 2007 petitioner decided to transport Goldrush to Australia to stand at stud. She believed that because of his exceptional blood lines he would be "the

proverbial big frog in a small pond in Australia". She planned on setting Goldrush's stud fee at $1,500 per mare and explained, at trial, that Goldrush would not have to compete anymore. Petitioner spent over $16,000 to transport Goldrush to Australia. After spending time in quarantine both before leaving for Australia and after arriving in Australia, Goldrush was sent to a stud farm.

Sadly, just two months after he arrived on the stud farm, Goldrush was rushed to the veterinarian. He had two blood transfusions and then died from a total collapse of his immune system. After Goldrush died petitioner did not purchase another horse.

On her Schedules C attached to her 2007 and 2008 Forms 1040 petitioner listed HORSE BREEDING/SHOWING as her principal business or profession. She reported no income for the two years but claimed losses of $51,697 and $4,203, respectively.

From 2004 through 2008 petitioner reported on her Federal income tax returns the following amounts of salary income, gross income from her horse activity, expenses from her horse activity, net profit or (loss) from her horse activity, and taxable income.

Year	Salary income	Gross income from horse activity	Expenses from horse activity	Net profit or (loss) from horse activity
2004	$60,254	$588	$36,453	($35,865)
2005	59,336	-0-	22,277	(22,277)
2006	60,676	-0-	33,128	(33,128)
2007	60,630	-0-	51,697	(51,697)
2008	60,000	-0-	4,203	(4,203)
Total	300,896	588	147,758	(147,170)

The Court notes that respondent conceded that petitioner substantiated all of her expenses related to the horse activity but did not concede that she substantiated her expenses related to the casualty loss. Many of petitioner's past returns have been audited, and she has, for prior years, been able to substantiate her expenses and convince respondent that her horse activity was engaged in for profit. The main question before us is not whether petitioner was able to substantiate the expenses of the horse activity, but whether the horse activity was engaged in for profit in the years at issue.

In 2003 petitioner began to incur legal expenses related to a lawsuit she filed against her homeowners association. According to her complaint, petitioner filed this lawsuit because the homeowners association failed to respond to three of her complaints: 1) "complaints of dogs running wild, dogs barking, and dogs defecating throughout the Association's common

areas"; 2) construction defects related to the "presence of mold in her bathroom, growing between the tiles themselves and between the tile wall and the tub rim"; and 3) construction defects leading to excessive "noise intrusion".

OPINION

I. Burden of Proof

The Commissioner's determination of a taxpayer's liability for an income tax deficiency is generally presumed correct, and the taxpayer bears the burden of proving that the determination is improper. *See* Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). However, pursuant to section 7491(a)(1), the burden of proof on factual issues that affect the taxpayer's tax liability may be shifted to the Commissioner where the "taxpayer introduces credible evidence with respect to * * * such issue." The burden will shift only if the taxpayer has, inter alia, complied with substantiation requirements pursuant to the Code and "maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews". Sec. 7491(a)(2).

On brief petitioner raises the issue of whether the burden of proof should be shifted to respondent pursuant to section 7491. Although voluminous, the record is sparsely populated with credible evidence. Petitioner did not introduce complete credible evidence at trial. It seems that petitioner believed that she did not have to

produce any evidence that respondent did not request. Petitioner was responsible for providing the evidence needed for her case to be successful, from her prospective, at trial. She in fact provided only incomplete records at best; therefore the burden of proof remains on her. *See Higbee v. Commissioner*, 116 T.C. 438, 440-441 (2001).

II. Petitioner's Horse Activity

Respondent argued that the expenses related to petitioner's horse activity were not deductible in excess of the gross income because the horse activity was not engaged in for profit within the meaning of section 183. Because petitioner had no gross income from the horse activity during the years at issue, respondent disallowed all of the expenses related to that activity.

Section 183(a) generally disallows, subject to the exceptions in section 183(b), deductions attributable to activities not engaged in for profit. Section 183(c) defines an "activity not engaged in for profit" as "any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212."

The Court of Appeals for the Ninth Circuit, to which this case is appealable absent stipulation to the contrary, has held that an activity is engaged in for profit if the taxpayer's "predominant, primary or principal objective" in engaging in the activity was to realize an economic profit independent of tax savings. *Wolf v. Commissioner*, 4 F.3d 709, 713 (9th Cir. 1993), *aff'g*

T.C. Memo. 1991-212. However, if the investor's primary or principal objective is to make a profit, it is not necessary for the investor to show that his primary objective was reasonable. Sec. 1.183-2(a), Income Tax Regs.

Section 1.183-2(b), Income Tax Regs., sets forth a nonexclusive list of factors to be considered in evaluating a taxpayer's profit objective: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisers; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned from the activity; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation. No one factor is necessarily determinative in the evaluation of profit objective, nor is the number of these factors for or against the taxpayer necessarily determinative. *Golanty v. Commissioner*, 72 T.C. 411, 426 (1979), *aff'd without published opinion*, 647 F.2d 170 (9th Cir. 1981); sec. 1.183-2(b), Income Tax Regs. All facts and circumstances with respect to the activity must be taken into account. Sec. 1.183-2(b), Income Tax Regs.

A. The Manner in Which the Taxpayer Carries On the Activity

The fact that the taxpayer carries on the activity in a business like manner may indicate that the activity is engaged in for profit. Sec. 1.183-2(b)(1), Income Tax Regs. In this context we consider: (1) whether the taxpayer maintained complete and accurate books and records for the activity; (2) whether the taxpayer conducted the activity in a manner substantially similar to comparable activities that were profitable; and (3) whether the taxpayer changed operating procedures, adopted new techniques, or abandoned unprofitable methods in a manner consistent with an intent to improve profitability. *Giles v. Commissioner*, T.C. Memo. 2005-28; sec. 1.183-2(b)(1), Income Tax Regs.

The first inquiry considers whether petitioner maintained complete and accurate books and records of the activity. At trial petitioner stated that she followed recordkeeping procedures that her lawyers and accountants outlined. She also states that she maintained a separate checking account for her horse activity and kept a file for each horse. However, because of petitioner's mistaken belief that she need not present any evidence that respondent did not ask for, she failed to provide documentation to substantiate those statements. Even if petitioner did maintain those records, there is little evidence for the specific taxable years at issue that the books and records were kept for the purpose of "cutting expenses, increasing profits, and evaluating the overall performance of the operation." *See Golanty v. Commissioner*, 72 T.C. at 430.

Petitioner claims to have written a business plan. But again petitioner did not present it at trial and did not attempt to orally explain her business plan during the trial. A written business plan is not required if the "business plan was evidenced by * * * actions". *Phillips v. Commissioner*, T.C. Memo. 1997-128. However, in *Phillips* the taxpayers knew the amounts of income that would be required to cover their expenses in future years. Although petitioner may have had a business plan, there is no evidence that for the years at issue she prepared "profit plans, profit or loss statements, balance sheets, or financial break-even analyses" for her activity. *See Dodge v. Commissioner*, T.C. Memo. 1998-89, *aff'd without published opinion*, 188 F.3d 507 (6th Cir. 1999). Petitioner presented no evidence of a budget or that she knew how much she could spend to maintain Goldrush and still make a profit during the years at issue. In just four years, 2004 through 2007, petitioner's horse activity had lost $143,555. Even if Goldrush had not died in 2008, she would have had to breed him 96 times at her higher price of $1,500 per mare just to break even, even though he had sired only five foals in the entire time she had owned him before that. While semen straws might have helped, there had been historically very few of those.

As to the second inquiry, with respect to her horse activity petitioner stated that she had "at all time operated that business in accordance with standard industry practices." But her testimony was not corroborated; documentation of practices in similar

activities was not provided, and she did not introduce any other witnesses in the field to discuss or substantiate "standard industry practice".

The third inquiry asks whether petitioner changed operating procedures, adopted new techniques, or abandoned unprofitable methods in a manner consistent with an intent to improve profitability. After years of losses, petitioner did eventually decide to transport Goldrush to Australia. This was certainly a change in operating procedures and after her alleged blackballing by the American dressage community, may have been her best hope for garnering interest in Goldrush as a stud. This does seem to indicate that petitioner at least updated her operating procedure to increase income. However, petitioner did not elaborate on how this route was expected to improve profitability or, given the cost of moving the activity to Australia, how she projected the profitability of this change.

We conclude that there is simply not enough information in the record to find that petitioner carried on the horse activity in the years at issue in a businesslike manner. Therefore, this factor favors respondent.

B. The Expertise of the Taxpayer or Her Advisers

> Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance

> with such practices. * * * [Sec. 1.183-2(b)(2), Income Tax Regs.]

We have no doubt that petitioner is an accomplished horsewoman with an extensive background in riding and showing horses. She has certainly engaged in an extensive study of training, dressage, and horsemanship as evidenced by her dressage clinics and tests. However, none of the educational materials in the record relate to the economics or business aspects of profitably running a horse activity, and petitioner's background as a lifelong horsewoman is insufficient to indicate expertise in the economics of this business and a profit objective. *See Giles v. Commissioner*, T.C. Memo. 2006-15 (discounting the probative value of reference materials that do not relate to the business aspects of the horse activity); *Giles v. Commissioner*, T.C. Memo. 2005-28 (same); *McKeever v. Commissioner*, T.C. Memo. 2000-288.

The main inquiry is whether petitioner received and acted on advice from the experts as to the accepted principles and economics of profitably running a business and not merely the general advice that a horse enthusiast would seek in training and showing horses as a hobby. *See Golanty v. Commissioner*, 72 T.C. 411 (1979); *Chandler v. Commissioner*, T.C. Memo. 2010-92, *aff'd*, 481 Fed. Appx. 400 (9th Cir. 2012); *Keating v. Commissioner*, T.C. Memo. 2007-309, *aff'd*, 544 F.3d 900 (8th Cir. 2008); *Giles v. Commissioner*, T.C. Memo. 2006-15; *McKeever v. Commissioner*, T.C. Memo. 2000-288 (taxpayers received general advice on showing and promoting horses but not on how to run a profitable

horse business). Petitioner did not discuss or otherwise corroborate through evidence such as correspondence or other documentation that she received advice on the specifics of profitably running a horse activity, nor did she present any advisers at trial.

We conclude that petitioner has not established that she sought expert advice regarding the business and economic aspects of carrying on her activity for profit; therefore, this factor weighs in favor of respondent.

C. The Time and Effort Expended by the Taxpayer in Carrying on the Activity

> The fact that the taxpayer devotes much of * * * [her] personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. A taxpayer's withdrawal from another occupation to devote much of * * * [her] energies to the activity may also be evidence that the activity is engaged in for profit. * * * [Sec. 1.183-2(b)(3), Income Tax Regs.]

Petitioner did not discuss how much time per week she spent working on her horse activity. We assume that she did spend a significant amount of time taking care of Goldrush, including grooming and exercising him. However, we also assume that the activity had considerable personal and recreational aspects, even if some of the activities were mundane, arduous, or repugnant. That a business person derives pleasure from

his or her work does not necessarily show a lack of a profit objective. *See* sec. 1.183-2(b)(9), Income Tax Regs.; *see also Jackson v. Commissioner*, 59 T.C. 312, 317 (1972). However, there is no indication of what work petitioner did on her horse activity that was beyond what she would have done if the activity was a hobby. *See Giles v. Commissioner*, T.C. Memo. 2006-15. Petitioner no doubt continued to spend a significant amount of time on her horse activity during the years at issue; however, because the activity also had personal and recreational aspects, we find this factor neutral.

D. Expectation that Assets Used in the Activity May Appreciate in Value

"A taxpayer's expectation that assets such as land and other tangible property used in an activity may appreciate in value to create an overall profit may indicate that the taxpayer has a profit objective as to that activity." *Giles v. Commissioner*, T.C. Memo. 2005-28 (paraphrasing sec. 1.183-2(b)(4), Income Tax Regs.).

Petitioner argues that she believed that Goldrush would appreciate in value. However, by the first of the two years at issue, it had been more than eight years since Goldrush had competed or sired any foals. Goldrush was too lame for successful competition in any dressage competitions, which might have increased his value. Petitioner also explained that she believed she was blackballed by the dressage society and that no one would breed to Goldrush, further

diminishing his value. Petitioner did not present any evidence that Goldrush had or would appreciate in value; and because he was the only significant asset of petitioner's horse activity, we find this factor weighs in favor of respondent.

E. The Success of the Taxpayer in Carrying on Other Similar or Dissimilar Activities

"The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that [she] is engaged in the present activity for profit, even though the activity is presently unprofitable." Sec. 1.183-2(b)(5), Income Tax Regs.

Although petitioner has a long history of working with and showing horses, there is no indication in the record that petitioner's horse activity has ever been profitable. Petitioner's previous lack of success in carrying on a similar profitable activity favors respondent.

F. The Taxpayer's History of Income or Losses With Respect to the Activity

> A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status such continued losses, if not

> explainable, as due to customary business risks or reverses, may be indicative that the activity is not being engaged in for profit. If losses are sustained because of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer * * * such losses would not be an indication that the activity is not engaged in for profit. * * * [Sec. 1.183-2(b)(6), Income Tax Regs.]

See also Engdahl v. Commissioner, 72 T.C. 659, 669 (1979) (holding that horse breeding has 5- to 10-year startup stage); *Burger v. Commissioner*, T.C. Memo. 1985-523, *aff'd*, 809 F.2d 355 (7th Cir. 1987). For the two years at issue petitioner claimed a combined loss of $55,902. Petitioner does not argue and we do not find that her horse activity was in or near the startup phase. However, she contends that the losses stemmed from her testimony against her former business partner, Tom Valter, and her subsequent ostracism from the dressage community along with Goldrush's lameness and death which were unforeseen circumstances beyond her control.

Petitioner testified against Tom Valter in 1999, and Goldrush's lameness began in 1999. By the years at issue, 2007 and 2008, neither her testimony nor Goldrush's lameness was a new or unforseen circumstance. However, in 2008 Goldrush's death was an unforeseen circumstance. Accordingly, this factor is neutral.

G. The Amount of Occasional Profits, If Any, Which Are Earned From the Activity

"The amount of profits in relation to the amount of losses incurred, and in relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent." Sec. 1.183-2(b)(7), Income Tax Regs. Petitioner presented no evidence that her horse activity was ever profitable. From 2004 through 2008 the activity had a net loss of $147,170. Petitioner had not bred or shown Goldrush from at least 1999 until his death in 2008, and except for her expensive Australian venture she did not discuss any other sources of income for her horse activity. We find this factor favors respondent.

H. The Financial Status of the Taxpayer

"Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved." Sec. 1.183-2(b)(8), Income Tax Regs. Petitioner earned a modest income from Tony Hoffman Productions, Inc. During the 2007 and 2008 tax years she earned $60,630, and $60,000, respectively. Petitioner did spend a significant amount of money on her horse activity. She also claimed substantial tax benefits which would have dropped her taxable income to zero for the years at issue. *See McKeever v. Commissioner*, T.C. Memo. 2000-288.

We agree that petitioner expended more money on her horse activity than she could prudently afford. Further, by funding the activity in part with loans, the hoped-for tax savings at issue in this case, and withdrawals from her retirement accounts, she has put herself in substantial financial jeopardy. *See Helmick v. Commissioner*, T.C. Memo. 2009-220. Respondent, focusing on the substantial tax benefits and consistent history of losses, concludes it was not a for-profit activity. As was the case in *McKeever*, we believe there is some truth to both parties' assertions, but we do not fully accept either party's conclusion. We find this factor is neutral.

I. Elements of Personal Pleasure or Recreation

"The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved." Sec. 1.183-2(b)(9), Income Tax Regs. However, "We also note that a business will not be turned into a hobby merely because the owner finds it pleasurable; suffering has never been made a prerequisite to deductibility." *Jackson v. Commissioner*, 59 T.C. at 317.

Petitioner was an avid horsewoman and has ridden since she was 4 years old. "'[A]n enterprise is no less a "business" because the entrepreneur gets satisfaction from his work; however, where the possibility for profit is small (given all the other factors) and the possibility for gratification is substantial, it is clear

that the latter possibility constitutes the primary motivation for the activity.'" *Dodge v. Commissioner*, T.C. Memo. 1998-89 (quoting *Burger v. Commissioner*, T.C. Memo. 1985-523). The record is sparse on the elements of petitioner's personal pleasure related to her horse activity. Respondent therefore suggests that this factor is neutral, and we agree.

After considering all of the above factors, as applied to the unique facts and circumstances of this case, we conclude that for the specific tax years at issue petitioner's horse activity was not engaged in for profit within the meaning of section 183. Petitioner did not argue it, but the main theme of our analysis of the above factors was what a reasonable winding down of petitioner's horse activity would have been. It had been more than eight years since Goldrush had competed or sired any foals, and the above analysis shows that petitioner was no longer and had not in a long time been engaged in the horse activity for profit. Therefore petitioner is not entitled to deduct expenses related to her horse activity.

III. Schedule C Interest Expense Deduction

Petitioner deducted $6,296 of interest expense on her 2008 Schedule C for her IT and Database Management Business. At trial she explained that it should have been deducted on the Schedule C for her horse activity. Because we found *supra* that petitioner was not engaged in her horse activity for profit, she is not entitled to this Schedule C interest expense deduction.

IV. Casualty Loss

Section 165(a) allows as a deduction any loss sustained during a taxable year and not compensated for by insurance or otherwise. Section 165(c) limits the allowance of losses in the case of individuals. Section 165(c)(3) allows as a deduction to an individual certain losses commonly referred to as casualty losses. A casualty loss is allowable to a taxpayer for a loss of property not connected with a trade or business or a transaction entered into for profit if the loss results from "fire, storm, shipwreck, or other casualty, or from theft".[5] *See id.* Pursuant to section 165(h), the casualty loss deduction is allowed only to the extent that the loss from each casualty exceeds $100 and to the extent that the net casualty loss for the taxable year "exceeds 10 percent of the adjusted gross income of the individual" for that taxable year.

The amount of the casualty loss allowed under section 165 is the lesser of: (1) the fair market value of the property immediately before the casualty reduced by the fair market value of the property immediately after the casualty; or (2) "The amount of the adjusted basis prescribed" in section 1.1011-1, Income Tax Regs., "for determining the loss from the sale or other disposition of the property involved." Sec. 1.165-7(b)(1)(ii), Income Tax Regs.

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[5] We found *supra* that petitioner was not engaged in her horse activity for profit.

Petitioner deducted a casualty loss on her 2007 Federal income tax return for the death of Goldrush.[6] Respondent argues that the death of Goldrush does not qualify as a casualty. We have previously explained that "the term 'other casualty' must be restricted to mean events of the same kind or the same characteristics as those specifically enumerated in the statute. The casualties enumerated are unusual, and unexpected events which are caused by a sudden or destructive force." *Daugette v. Commissioner*, T.C. Memo. 1977-56. In *Daugette* we found the death of the taxpayers' horse from colic was not a casualty loss because "the horse's death was not due to a sudden or destructive force and the cause of death was not an unexpected or unusual occurrence in horses" but was due to the horse's own inherent "physical weakness". In the case at hand, according to the veterinary hospital that treated Goldrush, he died because of the sudden occurrence of an "immune mediated disease." This Court and other courts do not allow "a casualty loss deduction for losses resulting for diseases." *Maher v. Commissioner*, 76 T.C. 593, 597 (1981) (and the cases cited thereat), *aff'd*, 680 F.2d 91 (11th Cir. 1982). Therefore petitioner is not entitled to a casualty loss deduction for the death of Goldrush.

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[6] As noted above, Goldrush died in 2008; therefore, this expense deduction should have been claimed on petitioner's 2008 Federal income tax return.

V. Schedule C Legal and Professional Expense Deductions

Section 162(a) provides a deduction for ordinary and necessary business expenses paid or incurred during the taxable year in carrying on any trade or business. A trade or business expense is ordinary for purposes of section 162 if it is normal or customary within a particular trade, business, or industry, and is necessary if it is appropriate and helpful for the development of the business. *Commissioner v. Heininger*, 320 U.S. 467, 471 (1943); *Deputy v. du Pont*, 308 U.S. 488, 495 (1940). In contrast, "personal, living, or family expenses" are generally nondeductible. Sec. 262(a).

Petitioner incurred legal and professional fees in connection with a lawsuit against her homeowners association for failing to respond to the three complaints discussed in the facts. During the years at issue petitioner worked full time for Tony Hoffman Productions, Inc., out of her home. However, she never explained how the lawsuit was related to that work. Therefore, petitioner is not entitled to an expense deduction for the Schedule C legal and professional fees.

VI. Section 6662(a) Accuracy-Related Penalties

Respondent determined that petitioner is liable for the section 6662(a) accuracy-related penalty for 2007 and 2008 of $2,021.40 and $312, respectively. Pursuant to section 7491(c) respondent has the burden of production with respect to the accuracy-related penalty.

There is a section 6662(b)(2) "substantial understatement" of income tax for any tax year, in the case of individuals, if the amount of the understatement exceeds the greater of (1) 10% of the tax required to be shown on the return for the tax year or (2) $5,000. Sec. 6662(d)(1)(A). Section 6662(a) and (b)(1) also imposes a penalty for negligence or disregard of the rules or regulations.

For the purposes of the penalty, "'negligence' includes any failure to make a reasonable attempt to comply with the provisions of this title". Sec. 6662(c). Under caselaw, "'Negligence is a lack of due care or the failure to do what a reasonable and ordinarily prudent person would do under the circumstances.'" *Freytag v. Commissioner*, 89 T.C. 849, 887 (1987) (quoting *Marcello v. Commissioner*, 380 F.2d 499, 506 (5th Cir. 1967), *aff'g on this issue* 43 T.C. 168 (1964) and T.C. Memo. 1964-299), *aff'd*, 904 F.2d 1011 (5th Cir. 1990), *aff'd*, 501 U.S. 868 (1991).

There is an exception to the section 6662(a) penalty when a taxpayer can demonstrate (1) reasonable cause for the underpayment and (2) that the taxpayer acted in good faith with respect to the underpayment. Sec. 6664(c)(1). Regulations promulgated under section 6664(c) further provide that the determination of reasonable cause and good faith "is made on a case-by-case basis, taking into account all pertinent facts and circumstances." Sec. 1.6664-4(b)(1), Income Tax Regs.

Many of petitioner's past returns have been audited, and each time she was able to both substantiate

her expenses and show that her horse activity was for profit. Therefore we find that she acted in good fath and it was reasonable for her to continue to report her activity in that manner (including her misplaced interest expense deduction). Petitioner also acted reasonably and in good faith even if naively in attempting to ascertain the fair market value of Goldrush for her casualty loss. Petitioner has previously been able to settle the issue of her legal fees; and because she believed that result carried over, it was reasonable and she acted in good faith with respect to those fees. Therefore, we find that petitioner is not liable for either of the section 6662(a) accuracy-related penalties.

The Court has considered all of petitioner's contentions, arguments, requests, and statements. To the extent not discussed herein, we conclude that they are meritless, moot, or irrelevant.

To reflect the foregoing,

An appropriate order will be issued, and decision will be entered under Rule 155.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENISE CELESTE MCMILLAN, Petitioner-Appellant Pro Se, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 13-73139 Tax Ct. No. 4590-11 ORDER (Filed Sep. 21, 2017)

Before: GOODWIN, LEAVY, and SILVERMAN, Circuit Judges.

The memorandum disposition filed in this case on May 15, 2017, is amended by the attached amended memorandum disposition. With this amended memorandum disposition, the panel has unanimously voted to deny appellant's petition for panel rehearing and recommend denial of appellant's petition for rehearing en banc.

The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petitions for rehearing and rehearing en banc are **DENIED**. The panel will not consider any further petitions for rehearing in response to the amended memorandum disposition.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENISE CELESTE MCMILLAN, Petitioner-Appellant, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 13-73139 Tax Ct. No. 4590-11 AMENDED MEMORANDUM* (Filed Sep. 21, 2017)

Appeal from a Decision of the
United States Tax Court

Submitted September 19, 2017**

Before: GOODWIN, LEAVY, and SILVERMAN, Circuit Judges.

Denise Celeste McMillan appeals pro se the Tax Court's denial, after a bench trial, of her petition for redetermination of federal income tax deficiencies for tax years 2007 and 2008. We review the Tax Court's conclusions of law de novo and its factual findings for clear error. *MK Hillside Partners v. Comm'r*, 826 F.3d 1200, 1203 (9th Cir. 2016). The Tax Court's finding that

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

a taxpayer failed to meet her burden of proving that she was entitled to claimed deductions is reviewed for clear error. *Sparkman v. Comm'r*, 509 F.3d 1149, 1159 (9th Cir. 2007). We have jurisdiction under 26 U.S.C. § 7482(a)(1), and we affirm the Tax Court's judgment.

The Tax Court properly considered the factors set forth in 26 C.F.R. § 1.183-2(b)(1)-(9) and did not clearly err in finding that McMillan did not engage in horse activity for profit in 2007 and 2008, and therefore was not entitled to take income tax deductions for expenses arising from that activity. *See* 26 U.S.C. § 183(b)(2); *Hill v. Comm'r*, 204 F.3d 1214, 1218 (9th Cir. 2000); *Wolf v. Comm'r*, 4 F.3d 709, 713 (9th Cir. 1993). The Commissioner was not bound to allow deductions permitted in prior tax years. *See Little v. Comm'r*, 106 F.3d 1445, 1453 (9th Cir. 1997).

The Tax Court did not err in disallowing a casualty loss deduction on the basis of the death of McMillan's horse from disease. *See* 26 U.S.C. § 165(c)(3); *United States v. Flynn*, 481 F.2d 11, 13 (1st Cir. 1973) (casualty losses to horses, largely due to illness or disease, were "clearly not allowable").

The Tax Court did not clearly err in finding that the expenses of a lawsuit were not directly connected with McMillan's information technology business, and therefore were not deductible as ordinary and necessary business expenses under 26 U.S.C. §§ 162(a) and 212. *See* 26 C.F.R. § 1.162-1(a); *Inland Asphalt Co. v. Comm'r*, 756 F.2d 1425, 1427 (9th Cir. 1985).

The Tax Court did not abuse its discretion in denying McMillan's post-trial motion to reopen the record. *See Devore v. Comm'r*, 963 F.2d 280, 282 (9th Cir. 1992) (per curiam).

AFFIRMED.