

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROSLYN L. WILLETT</b>	:	<b>DECISION</b>
for Redetermination of a Deficiency or for	:	<b>DTA NO. 800247</b>
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1977,	:	
1978 and 1979.	:	

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Petitioner, Roslyn L. Willett, 441 West End Avenue, New York, New York 10024, filed an exception to the determination of the Administrative Law Judge issued on March 3, 1988 with respect to her petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1977, 1978 and 1979 (File No. 800247). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in opposition. Petitioner's request for oral argument was denied and oral argument was therefore not heard.

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

***ISSUES***

I. Whether the Administrative Law Judge made certain errors in the conduct of the hearing.

II. Whether the income from the business activities of petitioner Roslyn Willett is subject to unincorporated business tax because such activities are not within the exemption provided by section 703(c) of the Tax Law for the practice of a profession.

III. Whether the Administrative Law Judge's manner of determining the professional status was arbitrary and capricious.

***FINDINGS OF FACT***

Findings of Fact "4" and "5" of the Administrative Law Judge's determination are modified by this opinion as hereinafter indicated. All of the remaining facts found by the Administrative Law Judge are adopted by the Tribunal and summarized and supplemented as follows.

On January 28, 1982, the Division of Taxation issued to petitioner, Roslyn L. Willett, a Statement of Unincorporated Business Tax Audit Changes setting forth the following explanation:

	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>TOTAL</u>
As a result of Field Audit the only adjustments are for State Issues Only:				
Income from Schedule C	\$34,597.00	\$95,668.00	\$94,703.00	
Less: Contributions	<u>614.00</u>	<u>1,226.00</u>	<u>1,114.00</u>	
Balance	\$33,983.00	\$94,442.00	\$93,589.00	
Allowance for Taxpayer Services	<u>5,000.00</u>	<u>5,000.00</u>	<u>5,000.00</u>	
	\$28,983.00	\$89,442.00	\$88,589.00	
Exemption	<u>5,000.00</u>	<u>5,000.00</u>	<u>4,168.00</u>	
Taxable Business Income	\$23,983.00	\$84,442.00	\$84,421.00	
Tax 1977-5 1/2%, 1978-5%, 1979-4 1/2%				
	\$ 1,319.07	\$ 4,222.10	\$ 3,798.94	
Corrected Unincorporated Business Tax Due				
	\$ 1,319.07	\$ 4,222.10	\$ 3,798.94	
Unincorporated Business Tax Previously Computed				
	0	0	0	
Total Additional Tax Due	\$ 1,319.07	\$ 4,222.10	\$ 3,798.94	\$ 9,340.11
Penalties: 685(a)(1)	296.78	949.96	854.76	2,101.50
685(a)(2)	303.37	717.74	417.99	1,439.10
685(b)	65.95	211.10	189.95	467.00
685(c)		191.34		191.34
Interest	<u>458.42</u>	<u>1,108.43</u>	<u>674.43</u>	<u>2,241.28</u>
Total	\$ 2,443.59	\$7,400.67	\$ 5,936.07	\$15,780.33

On April 7, 1982, the Division issued to petitioner a Notice of Deficiency setting forth additional tax due of \$9,340.11, penalty of \$4,292.34 and interest of \$2,459.46, for a total amount due of \$16,091.91.

The Statement of Unincorporated Business Tax Audit Changes and Notice of Deficiency were issued following a field audit by the Division which was begun on or about March 13, 1981. As a result of the audit, the Division found that petitioner had not reported any unincorporated business income on her 1977, 1978 and 1979 New York State income tax resident returns. On each of said returns, petitioner described her occupation as consultant; however, it was established that part of petitioner's income was from teaching and

was therefor exempt from the unincorporated business tax. The figures recited in the Statement of Unincorporated Business Tax Audit Changes do not reflect income from teaching. It is also noted that petitioner paid estimated tax of \$7,000.00 on a corrected tax liability of \$22,960.79 for the year 1978. The corrected tax liability for 1977 was \$9,679.45.

On or about November 4, 1980, petitioner executed a consent fixing the period of limitation upon assessment of personal income and unincorporated business taxes allowing assessment for the taxable year 1977 at any time on or before April 15, 1982. However, it should be noted that petitioner did not file the required Form IT-202, New York State Unincorporated Business Tax Return, because she believed that her work was not subject to unincorporated business tax pursuant to Tax Law former section 703(c).

We modify finding of fact 11411 of the Administrative Law Judge's determination to read as follows:

In 1959, petitioner founded Roslyn Willett Associates, a public relations counseling firm. Petitioner is also an institutional dietician and a food chemist. Petitioner holds a Bachelor of Arts in foods and nutrition from Hunter College of the City University of New York. Her subsequent education included courses in institution management and purchasing, public relations, food science and technology, political economy, writing, foreign languages, anthropology and psychology. Petitioner has taught at several institutions of higher learning, corporations and associations. She has lectured on food, nutrition and health before various other organizations. Prior to founding Roslyn Willett Associates in 1959, petitioner pursued careers as a dietician, a technical and patents librarian, a food technologist, various editorial jobs, consulting jobs and public relations counsel. Petitioner has published many articles for newsletters, technical booklets, trade publications and general magazines. Petitioner is listed in "Who's Who of American Women", "The International Dictionary of Biography", "Who's Who in the East", "Who's Who in Public Relations" and the "Food Service Consultants Society International Directory". Petitioner is listed as a professional in the latter directory and also in the Food Technologists Directory, the Home Economics Association and the Public Relations Society of America. It should be noted that the latter has an enforceable standard of ethics which implements

disciplinary measures and expulsions where necessary. Petitioner is a member of the Women's Economic Roundtable, the board of the Will Institute and the World Future Society. Some of the organizations to which petitioner belongs have standards of ethics, such as the American Home Economics Association, the Institute of Food Technologists and the Foodservice Consultants Society International. Petitioner holds no license in any of the related food service activities, although she was eligible for certification from the American Dietetics Association if she had chosen to apply.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

The basic function of Roslyn Willett Associates was the translation of scientific and technical information into a form absorbable by the public. This required research, development of communication strategy and ideas, a strong knowledge of many media of communications and an awareness of social change and forces. When asked to describe her relationship with a typical client during the period in question, she described a service rendered which included help in the preparation of an annual report and the development of a policy for managers to handle inquiries about nutrition. Petitioner's business employed several college graduates and secretarial staff. Petitioner handled all client contacts, devised and developed programs, supervised the work and prepared reports for clients.

### ***OPINION***

The Administrative Law Judge determined that petitioner Roslyn Willett was not practicing a profession and therefore was not entitled to the exemption from the unincorporated business tax detailed in section 703(c) of the Tax Law. However, it was also determined that because petitioner filed with a good faith belief that she was not subject to the unincorporated business tax, she is not liable for the penalties assessed pursuant to Tax Law sections 685(a)(1), 685(a)(2) and 685(b) for the years at issue.

The Administrative Law Judge further noted that contrary to the contention of the petitioner, the Law Bureau filed an answer consistent with 20 NYCRR former section 601(a)(2).

On exception, petitioner alleges that the State Tax Commission followed a pattern of arbitrary and capricious administration of the former unincorporated business tax and, in particular, was arbitrary and capricious in its determination that petitioner was not entitled to the professional exemption so provided by section 703(c) of the Tax Law. In addition, petitioner demands that the following exceptions to the course of the proceedings in general be addressed. Petitioner claims:

1. that in March of 1982, a hearing concerning another matter was conducted and that at such hearing the attorney representing the Division of Taxation stipulated that petitioner indeed practiced a profession. Petitioner now asserts that the stipulation should have had binding effect at the hearing held on June 9, 1987,

2. that at the hearing held on June 9, 1987, the Administrative Law Judge did not properly address the issues, in that he (a) failed to afford sufficient weight to the evidence, (b) refused to allow petitioner to impeach a witness and (c) excluded relevant evidence,

3. that prior to commencement of these proceedings, the Tax Commission failed to respond to petitioner's inquiries concerning the unincorporated business tax, claiming that no list of professions existed when in fact, a list of professions was introduced at the hearing, and

4. that the State auditor's opinion was not relevant in determining whether or not petitioner practiced a profession.

We affirm the determination of the Administrative Law Judge.  
The State Tax Commission Rules of Practice and Procedure rule, former 20 NYCRR 601.7(e), (see also, 20 NYCRR 3000.7[a][2][e] for the relevant Tax Appeals Tribunal rule) governing the binding effect of stipulations states "A stipulation and the admissions therein shall be binding and have effect only in the pending proceeding and not for any other purpose, and

cannot be used against any of the parties thereto in any other proceeding." Thus petitioner's contention that the stipulation in question was binding is unsupportable.

We again turn to the regulations and find that the Administrative Law Judge may rule upon questions of evidence (former 20 NYCRR 601.9[d][1], see, also, 20 NYCRR 3000.10[b][4]). Petitioner attempted to impeach a witness with the transcript from the hearing dated March 1982. The Administrative Law Judge properly ruled the transcript inadmissible because it was relevant only to the issues considered at the March 1982 hearing. Therefore, the Administrative Law Judge also properly disallowed impeachment of the witness through the use of the transcript. There is also no support within the record for a finding that the Administrative Law Judge excluded relevant evidence or that he failed to afford sufficient weight to the evidence.

Petitioner's claim that the Tax Commission failed to respond to her inquiries concerning the unincorporated business tax is not accurate. The record (petitioner's brief, p. 9) indicates that a letter from former Commissioner James H. Tully, Jr. was sent to Senator Marino, who had inquired at petitioner's request, which explained the professional exemption under the unincorporated business tax and which also cited to the regulations which listed eighteen professions recognized by the Commission. The letter states that no list had been compiled by the State Tax Commission. The list submitted by petitioner (petitioner's brief, p. 16) was not compiled by the State Tax Commission, but was instead prepared by the Audit Division as an instruction to auditors. This list, which was obtainable under the Freedom of Information Law, is primarily a summary of court and State Tax Commission decisions on the professional exemption from the unincorporated business tax.

With respect to the admissibility of the auditor's opinion as to whether or not petitioner's activities constituted the practice of a profession, the regulations (former 20 NYCRR 601.9[d], see also, 20 NYCRR 3000.10[5][d][1]) state that at a hearing the technical rules of evidence do not apply. Therefore, it is within the Administrative Law Judge's discretion to admit opinion evidence into the hearing. We find no basis in the record to support a finding that the Administrative Law Judge acted erroneously in admitting the auditor's opinion testimony.

Turning to the substantive issue of the applicability of the professional exemption to petitioner's activities, Article 23 of the Tax Law, former section 703(a), defines an unincorporated business as:

"(a) General.--An unincorporated business means any trade, business or occupation conducted, engaged in or being liquidated by an individual or unincorporated entity. . . ."

Regulation 20 NYCRR former section 203.11 provides, in pertinent part, as follows:

"Professions. (a) General. Notwithstanding the provisions of section 203.1 of this Part, the practice of the professions of law, medicine, dentistry or architecture is not deemed to constitute an unincorporated business. In addition, the practice of any other profession is not deemed to constitute an unincorporated business if, in such practice,

- (1) capital is not a material income producing factor and,
- (2) more than 80 percent of the gross income for the taxable year computed in accordance with Part 205 of this Title (pertaining to the computation of unincorporated business gross income) is derived from or directly attributable to personal services actually rendered by an individual or by members of a partnership or other entity who are engaged in the practice of the profession involved.

Regulation 20 NYCRR former section 203.11(b)(1) also provides that "other professions" means:

"Any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interest or welfare in



the practice of an act or science founded on it. The word profession implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself (including the promotion and sales or services of such business and consulting services) does not constitute the practice of a profession even though the services involve the application of specialized knowledge.”

The Administrative Law Judge determined that petitioner’s consulting services performed during the tax years 1977, 1978, 1979 constituted the carrying on of an unincorporated business within the meaning and intent of Tax Law section 703(a) and the income therefrom was subject to the imposition of unincorporated business tax pursuant to Tax Law former section 701(a). We agree with this determination.

As indicated by the record and asserted by the petitioner, the function of Roslyn Willett Associates was the translation of scientific and tell information into a form absorbable by the public. On each of the returns for the years at issue, petitioner described her occupation noted by the Administrative Law Judge in conclusion of law “C”, “petitioner’s consulting service dealt with the conduct of business itself, drawing upon her impressive educational background publications and experience to help or advise companies, persons or partnerships in the operation of their businesses.”

The Administrative Law Judge looked to 20 NYCRR former section 203.11(b)(1) and determined that the exception to the definition of "other professions" was applicable to the petitioner. The exception applies if the activity in question deals with “the conduct of business itself”, and we agree with the conclusion that petitioner's activities are within the exception.

Roslyn Willett Associates, Inc. undertook consulting for many organizations and businesses and rendered advice on methods for achieving the goals of the clientele. Petitioner's business was engaged in the processing of information, the evaluation of acquired knowledge and expertise and the formation and development of long-range plans, all for the purpose of problem solving. Such activity deals with the conduct of business itself. Businesses and organizations retained Roslyn Willett Associates, Inc. in the hopes of enhancing their productivity and achieving an overall improvement in performance. This, of course, requires an evaluation of how a business or organization conducts itself, and thus places Roslyn Willett Associates, Inc. within the exception so mandated by the regulation.

Petitioner claims she is engaged in the practice of a profession and therefore exempt from paying the unincorporated business tax according to former section 703(c) of the Tax Law which reads as follows:

"(c) Professions.--The practice of law, medicine, dentistry or architecture, and the practice of any other profession in which capital is not a material income producing factor and in which more than eighty percentum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual or the members of the partnership or other entity, shall not be deemed an unincorporated business."

The Court of Appeals firmly established that where the taxpayer claims the benefit of a statute providing an exemption from taxation it is the taxpayer who must bear the burden of proof (see, Koner v. Procaccino, 39 NY2d 258, 262; citing, Matter of Grace v. State Tax Commn., 37 NY2d 193). Petitioner has failed to sustain this burden.

The Administrative Law Judge also based his determination on an Appellate Division decision which articulates four elements which may be considered in determining whether activities constitute the practice of a profession:

"(1) The long-term educational background required for a degree prior to engaging in the occupation; (2) a license requirement indicating qualifications have been met for engaging in the occupation; (3) control of the occupation by standards of conduct, ethics and malpractice liability; and (4) whether a corporation may carry on the occupation." (Matter of Cissley v. State Tax Commn., 98 AD2d 899, 900.)

Petitioner received her bachelor's degree in foods and nutrition from Hunter College in 1944. Since that time petitioner's educational background has spanned more than four decades including completion of numerous and varied post-graduate courses. Petitioner's resume is replete with references to published articles, lectures and other scholarly endeavors. However, while petitioner has effectively enhanced her own personal wealth of knowledge, there exists no occupational requirement that she do so. A bachelor's degree does not constitute the "long-term educational background" so embraced by the Court of Appeals, nor was the ensuing course work required in order for petitioner to engage in her occupation (see, Matter of Cissley v. State Tax Commn., supra).

Petitioner has also failed to demonstrate that any licensing requirements for public relations consultants, institutional dieticians or food chemists exist. Petitioner refers to membership in the Public Relations Society of America and the American Home Economics Association and refers to their certification programs in an attempt to show that "a license requirement indicating qualifications" has been met (see, Matter of Cissley v. State Tax Commn., supra). However, petitioner joined these organizations voluntarily and certification from these organizations is not a prerequisite to working within the field.

In addition to the aforementioned organizations, petitioner also belongs to the Foodservice Consultants Society International and the Institute of Food Technologists. Each of the four promulgate and enforce their own code of ethics. As per the issue of certification, however, petitioner has voluntarily joined these organizations and breach of the ethical codes involved means only expulsion from membership. None of these groups overtly control the occupation in that any non-members remain wholly autonomous.

The assertion by the petitioner that Roslyn Willett Associates, Inc. was unable to be sold or marketed without her presence and influence does not constitute proof that a corporation could not carry on her activities (see, Matter of Cissley v. State Tax Commn., supra).

In light of the above and the decision for prior periods in Matter of Roslyn L. Willett (State Tax Commn., January 18, 1985, confirmed sub nom. Willett v. Chu, 124 AD2d 375), it is clear that petitioner's consulting service is not tantamount to a profession for purposes of invoking the exception to the unincorporated business tax pursuant to Tax Law former section 701(a).

Petitioner contends that the State Tax Commission followed a pattern of arbitrary and capricious administration of the former unincorporated business tax and, in particular, was arbitrary and capricious in its determination that petitioner was not entitled to the professional exemption so provided by section 703(a) of the Tax Law. We find this contention to be completely unfounded.

On December 31, 1982, the unincorporated business tax was repealed. Petitioner relies on this to support her claim that the State Tax Commission was arbitrary and capricious in its administration of the tax. Petitioner reasons that examination of the history behind the statute

reveals inconsistent interpretations of what constitutes a profession, and such inconsistency is the result of arbitrary and capricious reasoning on the part of the State Tax Commission. According to the petitioner, it therefore follows that the Administrative Law Judge's determination that Roslyn Willett Associates, Inc. was not engaged in the practice of a profession was an arbitrary and capricious determination. Petitioner's proposed remedy is for the Commission to retroactively consider the unincorporated business tax repealed for the years at issue, and thus relieve petitioner's burden of proof.

Application of the unincorporated business tax is circumstantially dependent upon the facts set forth before the State Tax Commission and/or the Administrative Law Judge. We find nothing in the record to indicate that either the Commission or the Administrative Law Judge acted in an arbitrary and capricious manner with regard to their determinations. We also find no indication that the Legislature intended the repeal of the statute to act retroactively and thus render obsolete the present controversy (see, Art. 23; Unincorporated Business Tax History Add L 1960, ch 564, repealed L 1978, ch. 69, § 7, eff December 31, 1982).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Roslyn L. Willett is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Roslyn L. Willett is granted to the extent indicated in conclusion of law 'F' of the Administrative Law Judge's determination, but except as so granted is in all other respects denied, and the Notice of Deficiency dated April 7, 1982 as modified by such determination is sustained.

Dated: Albany, New York

December 08, 1988

/s/ John P. Dugan

President

/s/ Francis R. Koenig

Commissioner