

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ROSLYN L. WILLETT	:	DETERMINATION
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.	:	

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Petitioner, Roslyn L. Willett, 441 West End Avenue, New York, New York 10024, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1977, 1978 and 1979 (File No. 800247).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 9, 1987 at 1:30 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the income from petitioner's business activities is subject to unincorporated business tax.

II. Whether Tax Law §§ 685(a)(1), (a)(2) and (b) penalties were properly imposed for tax years 1977, 1978 and 1979.

III. Whether Tax Law § 685(c) penalty was properly imposed for 1978.

FINDINGS OF FACT

1. On January 28, 1982, the Audit Division 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 1977-5½%, 1978-5%, 1979-4½%	\$ 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 Audit 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.

2. The Statement of Unincorporated Business Tax Audit Changes and Notice of Deficiency were issued following a field audit by the Audit Division which was begun on or about March 13, 1981. As a result of the audit, the Audit 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 therefore 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.

3. 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 § 703(c).

4. In 1959, petitioner founded Roslyn Willett Associates, a public relations counselling firm which utilized petitioner's skills as an institutional dietician and 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. 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. 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.

5. The basic function of Roslyn Willett Associates was the translation of scientific, technical and financial information into a form absorbable by the public as mandated by the Securities and Exchange Commission for publicly-held companies. 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.

#### SUMMARY OF PETITIONER'S POSITION

6. Petitioner contends that she should be accorded professional status. She asserts that the Audit Division's manner of determination of professional status is arbitrary.

7. Petitioner also contends that the Audit Division did not properly respond to her petition in that it did not number paragraphs in its answer to correspond exactly to her petition.

#### CONCLUSIONS OF LAW

A. Regulation 20 NYCRR former § 601.6(a)(2)(A), (B) and (C) sets forth that the Law Bureau shall serve an answer on the petitioner which shall "contain numbered paragraphs corresponding to the perfected petition and shall fully and completely advise the petitioner and the Commission of the defense." The section also provides that the answer shall contain a specific admission or denial of each material allegation of fact contained in the petition, a statement of any additional facts to be proven by the Law Bureau either as a defense, or for affirmative relief, or to sustain any issue raised in the petition upon which the Department has the burden of proof, and the relief sought by the Department. It is clear from a reading of the answer filed in this matter that the Audit Division has, by its representative, the Law Bureau, filed an answer which was consistent with 20 NYCRR former § 601.6(a)(2). Petitioner's contention that there was no set of numbered responses specifically corresponding to each of the numbered paragraphs in the petition is without merit since the first paragraph of the answer states as follows:

"1. DENIES knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in item (10) of the Perfected Petition herein."

Since all of petitioner's allegations were contained in said paragraph 10 of the petition, the Law Bureau has complied with the provisions of the former regulation.

B. Tax Law former § 703(a) defines an unincorporated business as any trade, business or occupation conducted, engaged in or being liquidated by an individual. Regulation 20 NYCRR former § 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."

The regulation at 20 NYCRR former § 203.11(b)(1) further provides that "other professions" means:

"[A]ny 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 interests or welfare in the practice of an art 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 of 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 a specialized knowledge."

C. Petitioner's consulting services 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.

D. Petitioner's consulting services performed during the tax years 1977, 1978 and 1979 constituted the carrying on of an unincorporated business within the meaning and intent of Tax Law former § 703(a) and the income therefrom was subject to the imposition of unincorporated

business tax pursuant to Tax Law former § 701(a).

E. The facts herein are strikingly similar to those found in the State Tax Commission decision on this very issue for the same taxpayer for prior periods (Matter of Roslyn L. Willett, State Tax Commission, January 18, 1985, confirmed sub nom Willett v. Chu, 124 AD2d 375), and departure from the result arrived at therein is not warranted. Although petitioner contends that the issue herein is whether the Department acted in an arbitrary and capricious manner when determining whether or not she was a "professional" and therefore subject to an exemption from the unincorporated business tax, the Appellate Division of the Supreme Court has stated the criteria governing whether certain activities constitute the practice of a profession and those criteria have once again been applied to the circumstances herein. The Appellate Division points out four elements to 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. New York State Tax Commn., 98 AD2d 899, 900).

Petitioner has substantiated one college degree and numerous post-graduate courses along with published articles, lectures and impressive clientele. She has also established that some of the organizations she belongs to have a rather broad code of ethics. However, none of this is required for the occupation petitioner is engaged in, nor was she required to obtain a license to carry on her activities or adhere to a code of ethics. Petitioner also presented no credible evidence from which it could be concluded that a corporation may not carry on her activities other than to say that without her the business was "unsalable". For these reasons, petitioner has not established that the determination of the Audit Division was arbitrary and capricious, but was in fact supported by sufficient evidence.

F. Petitioner should not have been found liable for the penalties assessed pursuant to Tax

Law §§ 685(a)(1), 685(a)(2) and 685(b) for all three years in issue since returns for unincorporated business income tax were not filed because of a good faith belief by petitioner that she was not subject to the unincorporated business tax. Further, where, as here, petitioner's belief was substantiated by a pending case before the State Tax Commission with the identical issue, she should not be subject to the above-stated penalties for negligence. (20 NYCRR former § 102.7[b][9].)<sup>1</sup> For the year 1978, petitioner paid estimated tax of \$7,000.00 on a tax liability of \$22,960.79. This underpayment of estimated tax subjects petitioner to the Tax Law § 685(c) penalty. She does not qualify for any of the exceptions set forth in section 685(d). Petitioner did not pay 80 percent of the tax liability for the year 1978 or 100 percent of the tax liability for 1977, \$9,679.45.

G. That the petition of Roslyn L. Willett is denied and the Notice of Deficiency dated April 7, 1982, as modified by Conclusion of Law "F", is sustained.

DATED: Albany, New York  
February 11, 1988

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ADMINISTRATIVE LAW JUDGE

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<sup>1</sup>20 NYCRR former § 102.7(b)(9) was promulgated subsequent to the period at issue herein but represents the long standing policy of the former State Tax Commission.