

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
KARL BRUNNER	:	DECISION

for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Year 1980.

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**Petitioner, Karl Brunner, 1600 East Avenue, Rochester, New York 14610,**  
filed a petition for redetermination of a deficiency **or** for refund of unincor-  
**porated business tax under Article 23 of the Tax Law for the year 1980 (File**  
**No. 55469).**

**A hearing was held before Timothy J. Alston, Hearing Officer, at the**  
offices **of** the State Tax Commission, 259 Monroe Avenue, Rochester, New York, **on**  
September **16**, 1986 at 1:15 P.M. Petitioner appeared by Robert M. Tyle, Esq.  
The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of  
counsel).

ISSUE

Whether consulting services provided by petitioner during the year 1980  
constituted the carrying **on** of an unincorporated business within the meaning  
of Article 23 of the Tax Law as in effect during that year.

FINDINGS OF FACT

1. On June 8, 1984, the Audit Division issued a Notice of Deficiency to  
petitioner, Karl Brunner, asserting \$1,096.85 in unincorporated business tax  
due for the year 1980, together with interest thereon in the amount of \$418.93,  
for a total amount asserted due of \$1,515.78. The tax due was premised upon  
petitioner's reporting of \$37,421.25 **in** business income on his 1980 New York

State personal income tax return. The Audit Division advised petitioner in a Statement of Audit Changes issued on March 2, 1984 that the business activities which resulted in petitioner's earning \$37,421.25 in business income constituted the carrying on of an unincorporated business, thereby subjecting said income to the Unincorporated business tax imposed by Article 23 of the Tax Law.

2. Petitioner filed his New York personal income tax return for the year at issue jointly with his wife. On said return, petitioner reported \$57,780.36 in wages earned during 1980 and paid to petitioner by his employer, the University of Rochester. The business income at issue herein was earned solely by petitioner and was reported on Schedule C of his 1980 Federal income tax return. Petitioner did not file an unincorporated business tax return for the year 1980.

3. At all times during the year at issue, petitioner was a professor of economics at the Graduate School of Management of the University of Rochester. He was also the director of the graduate school's Center for Research in Government Policy and Business. In connection with his duties regarding these two positions, petitioner taught courses and organized conferences and seminars on issues related to economics, his field of expertise.

4. At all times during 1980, the University of Rochester considered petitioner to be a full-time employee.

5. Petitioner is and was during 1980 an internationally-known economist, recognized as a monetary authority and a leading proponent of monetarism. He founded and developed the "Journal of Money, Credit and Banking" and the "Journal of Monetary Economics". He has written and continues to write scholarly papers in many areas of economics.

6. As a result of petitioner's high standing in his profession, many private business entities have sought his services as a consultant. Thus,

during the year at issue, petitioner provided such consulting services to various private business entities, which services resulted in his reporting of \$37,421.25 as business income on his 1980 New York personal income tax return. The consulting services provided by petitioner varied depending upon the needs of each client, but at no time did petitioner deny that in each case his services assisted in the conduct of the business of the client. Additionally, petitioner's consulting services consisted of personal services rendered by him and capital was not a material income producing factor with respect to such services.

7. All of petitioner's consulting activities were related to his field of expertise and helped him to improve as an economics professor, enhancing his teaching abilities and aiding his scholarly research.

8. Petitioner's consulting services were encouraged and expected of him by the University of Rochester. The University believed it benefited from petitioner's outside consulting services in many ways. First, its employee's abilities as a professor were enhanced in the manner described above. Second, awareness of the University and its programs in the business community was improved. Third, the University's reputation was also enhanced. Consequently, the business community's monetary contributions to the University were increased.

9. The University's encouragement of petitioner's consulting activities ended, in theory, at the point when such activities interfered with petitioner's duties as an employee of the University. Petitioner's outside activities caused no such interference during 1980. No evidence was introduced as to the University's rights in the event petitioner's outside activities did interfere with his employment duties, but, notwithstanding the possibility of some recourse by the University, it had no power to prevent petitioner from engaging in outside consulting activities if he so chose.

10. Petitioner's compensation from the University was based upon his value to the University. Thus, since petitioner's outside consulting work resulted in increased contributions to the University and enhanced the University's reputation, petitioner took the position that his outside activities were part of his duties as an employee of the University.

11. Petitioner's clients issued Federal 1099 **forms** to him subsequent to his completion of services.

#### CONCLUSIONS OF LAW

A. That, as in effect during 1980, Article **23** of the Tax Law imposed a tax upon the "unincorporated business taxable income of every unincorporated business wholly or partly carried on within [New York]" (Tax Law § 701[a]).

B. That, while section 703(c) of the Tax Law exempted from the imposition **of** the unincorporated business tax the "practice of any...p rofession **in** which capital is not a material income producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year **is** derived from personal services actually rendered by the individual", **20** NYCRR 203.11(b)(1)(i) specifically excluded the following from the definition of the "practice of a profession":

"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. That petitioner's consulting services during the year 1980 dealt with the conduct of business itself. Accordingly, such services did not constitute the practice of a profession pursuant to section 703(c) of the Tax Law and **20** NYCRR 203.11(b) (1)(i) (~~see~~ Matter of Alfred E. Kahn and Mary S. Kahn, State Tax Commission, January 9, 1981).

D. That Tax Law section 703(b) excluded "[t]he performance of services by an individual as an employee" from the imposition of the unincorporated business tax.

E. That petitioner's outside consulting activities were not performed as part of his duties as an employee of the University of Rochester. Notwithstanding the mutual benefits derived from the consulting activities by both petitioner and the University, and the University's minimum (and indirect) constraints on the extent of petitioner's outside activities (Finding of Fact "9"), the record clearly shows that petitioner's consulting activities did not fall within the ambit of his employee-employer relationship with the university. With respect to these activities, the University did not pay petitioner for such services. Additionally, the University had no right to order and control petitioner in the performance of these services. (~~See~~ 52 N.Y. Jur 2d Employment Relations § § 41-46.) Accordingly, petitioner's activities were not performed pursuant to the performance of his duties as an employee of the University.

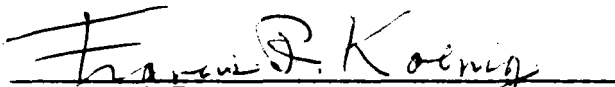
F. That the petition of Karl Brunner is in all respects denied and the Notice of Deficiency, dated June 8, 1984, is in all respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER