

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
John H. Keith, Jr. :
and Muriel Keith : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Unincorporated Business Tax :
under Article 23 of the Tax Law
for the Year 1973. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of October, 1980, he served the within notice of Decision by certified mail upon John H. Keith, Jr., and Muriel Keith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John H. Keith, Jr.
and Muriel Keith
3910 Montrose Drive
Chevy Chase, MD 20015

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of October, 1980.

Deborah A. Bank

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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Unincorporated Business Tax :
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for the Year 1973. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of October, 1980, he served the within notice of Decision by certified mail upon Harold W. Rosenstrauch the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Harold W. Rosenstrauch
100 State St.
Albany, NY 12207

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of October, 1980.

Deborah A. Barker

[Signature]

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

October 14, 1980

John H. Keith, Jr.
and Muriel Keith
3910 Montrose Drive
Chevy Chase, MD 20015

Dear Mr. & Mrs. Keith:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 722 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Harold W. Rosenstrauch
100 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JOHN H. KEITH, JR. and MURIEL KEITH	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the year 1973.	:	

Petitioners, John H. Keith, Jr. and Muriel Keith, 3910 Montrose Drive, Chevy Chase, Maryland 20015, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1973 (File No. 16414).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York 12227, on September 18, 1978 at 9:15 A.M. Petitioners appeared by Harold W. Rosenstrauch, Esq. The Audit Division appeared by Peter Crotty, Esq. (J. Ellen Purcell, Esq. and Laurence E. Stevens, Esq. of counsel).

ISSUES

I. Whether the income of petitioner John H. Keith, Jr., from activities as a part-time management consultant, should not be subject to unincorporated business tax on the ground that some certified public accounting firms perform identical management consulting services but are not subject to tax by virtue of section 703(c) of the Tax Law.

II. Whether section 703(c) of the Tax Law violates both the New York and United States constitutions.

FINDINGS OF FACT

1. Petitioners, John H. Keith, Jr. and Muriel Keith, his wife, timely filed a New York State Combined Income Tax Return for 1973 (form IT-208 for

residents filing a joint Federal Return who elect to file separate New York State returns). As part of the return, petitioners filed form IT-202 for unincorporated business tax and paid, under protest, unincorporated business tax of \$260.80.

2. With their income tax return for 1973, petitioners filed a Claim for Credit or Refund of Personal Income Tax and/or Unincorporated Business Tax (form IT-113X) stating as a basis for the claim:

"There are many Accountant Partnerships and individuals whose income, in part is based upon the practice of the profession of Management Consultant. As to this aspect of income, there is no separation and no UBT is paid. The management consulting services rendered by these firms is not necessarily rendered by Certified Public Accountants and is not related to accounting practices. The nature of these services rendered is identical to those performed by me, for which I received compensation, have reported on my UBT Tax schedule, and have paid tax. This tax is paid under protest, and I seek the tax return in this application."

3. On September 10, 1976 petitioners filed a petition for redetermination of unincorporated business tax citing a notice of disallowance of their refund dated September 30, 1974. Petitioners alleged that petitioner John H. Keith Jr. had been practicing a profession, and that under section 703(c) of the Tax Law, practice of a profession is not subject to unincorporated business tax.

4. On June 6, 1978 the Appellate Division of the Supreme Court, First Department, unanimously reversed an order of Special Term, Supreme Court New York County (Gomez, J.) entered in January 23, 1978 in the case of Arthur Young & Company v. John H. and Muriel D. Keith, Jr. transferring to the Supreme Court, Albany County, the motion by Arthur Young to quash the subpoena seeking production of its tax return in an administrative proceeding brought by respondents (petitioners here) before the State Tax Commission. The Court stated:

"It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, on the facts and in the exercise of discretion, without costs and without disbursements, and appellant's motion to quash the subpoena is granted without prejudice to appropriate application by respondents to the State Tax Commission for such data concerning the issue raised by respondents as is deemed relevant and disclosable in the administrative proceeding."

5. On August 15, 1978, at the request of petitioners' representative, one dozen subpoenas in blank were issued to him by the State Tax Commission.

6. On August 23, 1978 personal service of a subpoena was made by petitioners upon a Commissioner of Taxation and Finance demanding that the State Tax Commission appear at the formal hearing at the offices of the State Tax Commission scheduled for September 18, 1978 at 9:15 A.M. to:

"...testify and give evidence under oath in a certain hearing then and there to be held in the above matter, as it relates to the Partnership Returns and Unincorporated Business Tax Returns, if any, of the following:
Arthur Anderson & Co., Arthur Young & Co., Coopers & Lybrand, Ernst & Ernst, Haskins & Sells, Peat Marwick Mitchell & Co., Price Waterhouse & Co. and Touche Ross & Co. for the year 1973."

7. On September 18, 1978 at the formal hearing on the petition of John H. Keith and Muriel Keith, the State Tax Commission appeared by attorney and refused to produce any witness to testify as to the tax returns of the firms listed in the subpoena on the ground that section 697(e) of the Tax Law (incorporated by reference by virtue of section 722) mandates secrecy for tax returns. While there are exceptions to the non-disclosure provisions of the statute, the case presented here is not one of them. The motion of the attorney for the State Tax Commission to withdraw the subpoena issued by a deputy tax commissioner at the instance and request of the attorney for petitioners was granted by the Hearing Officer.

8. Petitioner John H. Keith, Jr. was a part-time management consultant in 1973. He has a bachelor's degree in engineering and a PhD. in economics. He

testified that he taught at the University of California at Berkeley, Dartmouth College and Columbia College. The subjects taught included economics, public finance, statistics, business economics, corporate finance and econ-statistics. He testified that there is no degree program for management consultant, although most consultants have an MBA degree. Petitioners each filed a Federal income tax return for 1973 as a "teacher".

9. Petitioner John H. Keith, Jr. contends that among the functions he performs as a management consultant are executive recruitments, marketing analysis, plant layout, and product analysis; all of which are performed by "Big Eight" certified public accounting firms. Petitioners submitted a staff study prepared by the subcommittee on Reports, Accounting and Management of the Committee on Government Operations, United States Senate, entitled "The Accounting Establishment". On page 30, Table I, entitled "Summary of Certain Information Contained in Responses of the 'Big Eight' Accounting Firms to the December 19, 1975 Questionnaire" among other things, shows percentage of total revenue for services performed in the following categories:

<u>FIRM</u>	<u>AUDITING & ACCOUNTING</u>	<u>TAX SERVICE</u>	<u>MANAGEMENT ADVISORY</u>
Arthur Andersen	66	18	16
Arthur Young	69	17	14
Coopers & Lybrand	69	19	10
Ernst & Ernst	73	17	9
Haskins & Sells	74	15	5
Peat, Marwick & Mitchell	68	21	11
Price Waterhouse	76	16	6
Touche Ross	62	24	14

Petitioners emphasized that at page 35 the report stated:

"The "Big Eight" accounting firms provide a broad range of services traditionally performed by CPAs, as well as non-accounting services which are performed by management consulting firms."

10. Counsel for petitioners acknowledged and requested that judicial notice be taken of the fact that "... the courts in the State of New York have consistently ruled that a management consultant is a non-professional."

11. Petitioners adduced no evidence with respect to the payment of unincorporated business taxes by certified public accountants, whether "Big Eight" or otherwise.

CONCLUSIONS OF LAW

A. That at the level of an administrative hearing, the constitutionality of the law under which the hearing is held must be presumed. A finding that any section of the Tax Law is unconstitutional can be made only by a court of competent jurisdiction.

B. That petitioners John H. Keith, Jr. and Muriel Keith have not attempted to bring the work done by petitioner John H. Keith within the scope of section 703(c) of the Tax Law, which provides that the practice of a profession shall not be deemed to be an unincorporated business, but have sought to litigate in an administrative proceeding whether other taxpayers properly paid unincorporated business taxes on income from services they rendered which petitioners allege are identical to those John H. Keith, Jr. rendered. The hearing was necessarily limited to determining whether petitioners presented a legal basis for obtaining a refund of the unincorporated business tax paid by them for 1973. Petitioners have failed to meet the burden of proof required under sections 722 and 689(e) of the Tax Law.

C. The petition of John H. Keith, Jr. and Muriel Keith is in all respects denied, and the denial of the claim for refund dated September 3, 1974 is sustained.

DATED: Albany, New York

OCT 14 1980

STATE TAX COMMISSION

James W. Tully
PRESIDENT

Thomas H. Jr. C.
COMMISSIONER

Francis R. Koenig
COMMISSIONER