

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Glick Construction Corp. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the F/Y/E 3/31/71, 3/31/72, 3/31/74.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Glick Construction Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

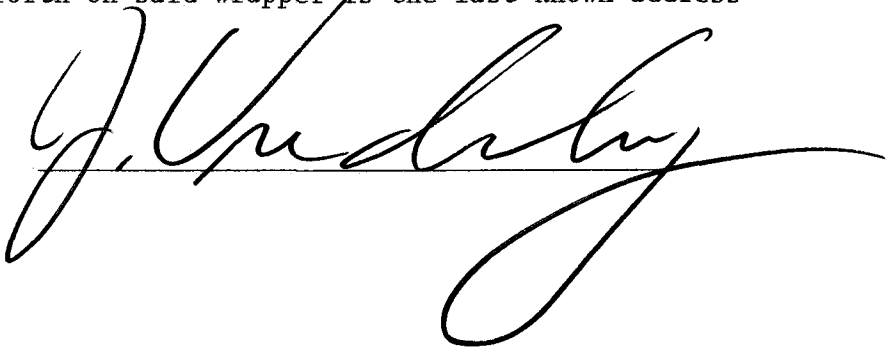
Glick Construction Corp.
3000 Marcus Ave.
Lake Success, NY 11040

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
29th day of January, 1982.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Glick Construction Corp. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law :
for the F/Y/E 3/31/71, 3/31/72, 3/31/74. :

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Isaac W. Zisselman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isaac W. Zisselman
Young, Kaplan, Edelstein, et al
277 Park Ave.
New York, NY 10017

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
29th day of January, 1982.

James A. Hageland

J. Vredenburg

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

January 29, 1982

Glick Construction Corp.
3000 Marcus Ave.
Lake Success, NY 11040

Gentlemen:

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) 1090 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
Isaac W. Zisselman
Young, Kaplan, Edelstein, et al
277 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Brightwater Towers Inc.

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation
Franchise Tax under Article 9-A of the Tax Law for :
the F/Y/E 3/31/71 - 3/31/74.

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Brightwater Towers Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Brightwater Towers Inc.
3000 Marcus Ave.
Lake Success, NY 11040

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
29th day of January, 1982.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Brightwater Towers Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the F/Y/E 3/31/71 - 3/31/74. :

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Isaac W. Zisselman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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Young, Kaplan, Edelstein, et al
277 Park Ave.
New York, NY 10017

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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
29th day of January, 1982.

Ann M. A. Hagelund

J. Vredenburg

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

January 29, 1982

Brightwater Towers Inc.
3000 Marcus Ave.
Lake Success, NY 11040

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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
Isaac W. Zisselman
Young, Kaplan, Edelstein, et al
277 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
RCI Development Corp. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the F/Y/E 3/31/72 & 73 & 12/18/73. :

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 29th day of January, 1982, he served the within notice of Decision by certified mail upon RCI Development Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

RCI Development Corp.
3000 Marcus Ave.
Lake Success, NY 11040

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
29th day of January, 1982.

Conrad A. Hagellund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of

RCI Development Corp. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation
Franchise Tax under Article 9A of the Tax Law for :
the F/Y/E 3/31/72 & 73 & 12/18/73.

State of New York
County of Albany

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Sworn to before me this
29th day of January, 1982.

Carrie J. Haglund

J. Vredenburg

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

January 29, 1982

RCI Development Corp.
3000 Marcus Ave.
Lake Success, NY 11040

Gentlemen:

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) 1090 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
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Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Isaac W. Zisselman
Young, Kaplan, Edelstein, et al
277 Park Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
GLICK CONSTRUCTION CORP. :
for Redetermination of a Deficiency or for :
Refund of Franchise Tax on Business Corporations :
under Article 9-A of the Tax Law for the Fiscal :
Years ended March 31, 1971, March 31, 1972 and :
March 31, 1974. :

In the Matter of the Petition :
of :
BRIGHTWATER TOWERS, INC. : DECISION
for Redetermination of a Deficiency or for :
Refund of Franchise Tax on Business Corporations :
under Article 9-A of the Tax Law for the Fiscal :
Year ended March 31, 1971 through the Fiscal :
Year ended March 31, 1974. :

In the Matter of the Petition :
of :
RCI DEVELOPMENT CORP. :
for Redetermination of a Deficiency or for :
Refund of Franchise Tax on Business Corporations :
under Article 9-A of the Tax Law for the Fiscal :
Years ended March 31, 1972 and March 31, 1973 :
and the Period ended December 18, 1973. :

Petitioner, Glick Construction Corp., 3000 Marcus Avenue, Lake Success,
New York 11040, filed a petition for redetermination of a deficiency or for
refund of franchise tax on business corporations under Article 9-A of the Tax
Law for the fiscal years ended March 31, 1971, March 31, 1972 and March 31,
1974 (File No. 24755).

Petitioner, Brightwater Towers, Inc., 3000 Marcus Avenue, Lake Success, New York 11040, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations for the fiscal year ended March 31, 1971 through the fiscal year ended March 31, 1974 (File No. 24756).

Petitioner, RCI Development Corp., 3000 Marcus Avenue, Lake Success, New York 11040, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the fiscal years ended March 31, 1972 and March 31, 1973 and for the period ended December 18, 1973 (File No. 24757).

A consolidated formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 11, 1981 at 9:15 A.M. Petitioners appeared by Young, Kaplan, Ziegler & Zisselman, Esqs. (Isaac W. Zisselman, Esq. and Lanny M. Sagal, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner Glick Construction Corp. and its subsidiaries, petitioners Brightwater Towers, Inc. and RCI Development Corp., should be permitted to file combined franchise tax reports for the fiscal years ended March 31, 1971 through March 31, 1974.

FINDINGS OF FACT

1. During the years in issue, petitioner Glick Construction Corp. ("Glick") owned all of the issued and outstanding stock of petitioner Brightwater Towers, Inc. ("BTI") and petitioner RCI Development Corp. ("RCI") and filed combined franchise tax reports under Article 9-A of the Tax Law with the named subsidiaries.

2. From 1964 through 1968 Glick and BTI filed combined franchise tax reports after having received the permission of the Audit Division to do so.

3. For unexplained reasons, Glick's long-time certified public accountants, who were relied upon to file all tax returns and who had access to all books and records and other relevant facts to properly prepare returns, neglected to make any Federal or New York State filings on behalf of Glick, BTI and RCI for the fiscal years ended March 31, 1969 through March 31, 1974. Until this omission came to light in 1974, Glick had no reason to doubt the competency of its accountants in such matters.

4. In October, 1974, Glick's new accountants prepared and filed franchise tax reports for Glick, BTI and RCI for each of the fiscal years 1969 through 1974. The 1969 and 1970 reports were prepared on a separate basis, while the reports for 1971 through 1974 were prepared on a combined basis.

5. The Audit Division denied Glick permission to file on a combined basis for fiscal years 1971 through 1974 and recomputed taxes on an individual basis. The Division issued to Glick three notices of deficiency, under date September 15, 1977, asserting additional franchise taxes, scheduled as follows:

<u>FYE</u>	<u>TAX</u>	<u>INTEREST</u>	<u>CREDITS APPLIED</u>	<u>BALANCE</u>
3/31/71	\$17,968.00	\$6,738.00	\$24,706.00	-0-
3/31/72	29,784.00	9,381.96	14,169.63	\$24,996.33
3/31/74	6,964.00	1,697.48	-0-	8,661.48

On the same ground, the Audit Division issued to BTI four notices of deficiency, under date September 15, 1977, asserting additional franchise taxes, scheduled as follows:

<u>FYE</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
3/31/71	\$4,152.00	\$1,557.00	\$5,709.00
3/31/72	4,507.00	1,419.71	5,926.71
3/31/73	4,282.00	1,364.89	5,646.89
3/31/74	4,098.00	998.89	5,096.89

On September 15, 1977, the Audit Division issued to RCI three notices of deficiency asserting additional franchise taxes due, scheduled as follows:

<u>FYE</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
3/31/72	\$14,542.00	\$ 4,580.73	\$19,122.73
3/31/73	32,638.00	10,403.36	43,041.36
12/18/73	460.00	129.38	589.38

6. In the course of its construction business, Glick was approached by Local 365 of the Automotive Workers Union (the "Union") to act as general contractor for a nonprofit rental housing project for the elderly sponsored by the Union, to be called "Roy Reuther Houses" (the "Project"). The Project is located on Seagirt Avenue in Far Rockaway, New York.

7. The Project consists of one reinforced concrete building containing four wings of 13, 17, 21 and 25 stories, respectively, and contains 917 dwelling units. The cost of the Project was to be financed by a 95 percent mortgage loan of the New York Housing Finance Agency ("HFA") and the balance of the funds was to be represented by equity contributed by the Union.

8. The Union requested Glick to act as consultant/developer for the Project. Accordingly, Glick formed RCI in April of 1970 to perform this function, since these services are normally performed by a separate, albeit related, entity. Since Glick's general contracting business usually requires payment and performance bonds to be furnished to the institutional lenders, it was imperative to keep Glick's financial statements solely on the basis of its construction activities.

9. When the Union found that it was unable to provide the equity required for development of the project, the New York State Division of Housing and Community Renewal ("DHCR") authorized a change of concept to a limited profit project that would be owned by a housing partnership to be formed by RCI, that

is, Seagirt Houses Associates. It was agreed that Seagirt Houses Associates would purchase the land from the Union at the date of the closing of the HFA mortgage loan for the development of the Project.

10. At the loan closing, which was held on June 30, 1972, Seagirt Houses Associates received an HFA mortgage loan not to exceed \$25,845,000.00 which represented 94.42 percent of the estimated project cost of \$27,372,000.00 recognized by DHCR in computing the HFA mortgage loan. The required equity of \$1,527,000.00 deposited by Seagirt Houses Associates at the loan closing (representing 5.58 percent of the estimated project cost) was principally obtained by admitting investor-limited partners into Seagirt Houses Associates for a 50 percent interest in the partnership. RCI retained a 5 percent interest as a general partner in the partnership.

11. The financial estimates for the Project reflected a construction fee (\$1,179,803.00) to be paid to Glick as general contractor of the Project and a developer's fee (\$300,000.00) to be paid to RCI as developer of the Project, for their respective services in regard to the Project.

12. All of RCI's gross receipts in the years 1971 through 1973, inclusive, represented developer's fees earned on the Roy Reuther Houses project built by Glick.

13. In December, 1973, Glick merged RCI into itself because the development work on the Roy Reuther project had been completed and Glick had no foreseeable housing project on the drawing board which would require the development services of RCI.

14. BTI is a limited profit housing company ("LPHC") organized under Article II of the New York Private Housing Finance Law. BTI is also under the supervision of DHCR.

15. BTI owns and operates a low and moderate income housing project consisting of two high-rise buildings which contain a total of 736 apartments ("Brightwater Towers"). Brightwater Towers is located at 501/601 Surf Avenue, in the Brighton Beach section of Brooklyn, New York.

16. Brightwater Towers was constructed by Glick as general contractor for BTI. The construction was completed on or about November 1, 1965.

17. BTI's development of Brightwater Towers was financed by:

(a) a mortgage loan made to BTI by HFA on February 11, 1964, under Articles II and III of the Private Housing Finance Law, in the final principal amount of \$14,161,000.00, and

(b) capital contributed to BTI by its sole shareholder, Glick, as follows:

(i) \$370,407.00 in cash (\$165,000.00 for capital stock and \$205,407.00 for debentures), and

(ii) \$1,270,593.00 by Glick accepting debentures of BTI in payment of a portion of Glick's fees as builder/developer for BTI.

18. BTI had to be formed as an entity separate from Glick to comply with the Private Housing Finance Law. However, it was always recognized by New York and by the Federal government that the primary incentive in regard to the ownership of such projects was the ability to utilize the tax losses generated, which was accomplished in this case by the filing of consolidated returns with the LPHC's parent (Glick).

19. The Internal Revenue Service found that the late filing of the Federal corporate tax returns in the years 1969 through 1974 was due to reasonable cause.

CONCLUSIONS OF LAW

A. That subdivision 4 of section 211 of the Tax Law authorizes the State Tax Commission, in its discretion, to require or permit a parent corporation

and its wholly-owned subsidiary to make a report on a combined basis. However, no combined report covering a foreign corporation not doing business in New York may be required, unless the Commission deems such a report necessary because of intercompany transactions or some agreement, understanding, arrangement or transaction which distorts income or capital, in order to properly reflect tax liabilities.

B. That during the periods in issue, the Tax Commission provided, by regulation, that in determining whether the tax would be computed on a combined basis, it would consider various factors, including the following:

- (1) Whether the corporations were engaged in the same or related lines of business;
- (2) Whether any of the corporations were in substance merely departments of a unitary business conducted by the entire group;
- (3) Whether the products of any of the corporations were sold to or used by any of the other corporations;
- (4) Whether any of the corporations performed services for, or loaned money to, or otherwise financed or assisted in the operations of any of the other corporations;
- (5) Whether there were other substantial intercompany transactions among the constituent corporations. Former 20 NYCRR 5.28(b).

The essential elements of these factors have been carried over into the current regulations which were effective for taxable years beginning on or after January 1, 1976, and which provide in pertinent part:

"In deciding whether to permit or require combined reports the following two (2) broad factors must be met:

- (1) the corporations are in substance parts of a unitary business conducted by the entire group of corporations, and
- (2) there are substantial intercorporate transactions among the corporations." 20 NYCRR 6-2.3(a)

The mandatory language of the current regulations takes cognizance of those elements which the Tax Commission has consistently deemed to be the key factors in determining whether combination should be permitted or required, i.e., the unitary nature of the business conducted by the corporations, and whether there were substantial intercorporate transactions among the corporations. Matter of Annel Holding Corp. et al., State Tax Commission, August 2, 1973, determination confirmed, Annel Holding Corp. v. Procaccino, 77 Misc. 2d 886 (Sup. Ct. Albany Co. 1974); Matter of N. K. Winston Corp. et al., State Tax Commission, August 21, 1974; Matter of Alpha Computer Service Corporation et al., State Tax Commission, September 28, 1979; Matter of Montauk Improvement, Inc. and Montauk Country Club, Inc., State Tax Commission, September 28, 1979. These factors must be given particular emphasis, although all five factors of former 20 NYCRR 5.28(b) must be considered.

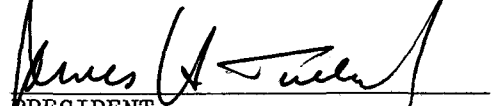
C. That the Audit Division properly denied petitioners leave to file combined franchise tax reports. RCI was the consultant/developer for the Roy Reuther Houses, a limited profit project owned by Seagirt Houses Associates, in which RCI held a five percent interest as general partner. Its income was entirely attributable to its own business endeavors and not to intercompany transactions with its parent or sister corporation. BTI owns and operates the Brightwater Towers housing project; its profit or loss is primarily the result of operation of that specific property, instead of being due to intercompany transactions. Annel Holding Corp., supra; Matter of Starrett Housing Corporation, State Tax Commission, June 20, 1974.

D. That the petitions of Glick Construction Corp., Brightwater Towers, Inc. and RCI Development Corp. are hereby denied and the notices of deficiency issued September 15, 1977 are sustained in full.

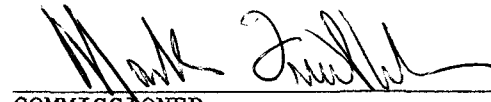
DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER