

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frank J. Schantz	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Unincorporated	:	
Business Tax under Article 23 of the Tax Law for	:	
the Year 1974.	:	

State of New York
County of Albany

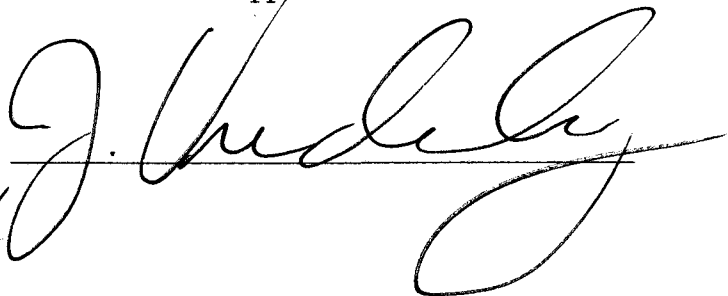
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of August, 1982, he served the within notice of Decision by certified mail upon Frank J. Schantz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank J. Schantz
4029 St. Paul Blvd.
Rochester, NY 14617

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
13th day of August, 1982.




STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Frank J. Schantz :

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 1974. :

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 13th day of August, 1982, he served the within notice of Decision by certified mail upon Kenneth Marblestone the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth Marblestone
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604

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
13th day of August, 1982.

Annice R. Haglund

J. Vredenburg

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

August 13, 1982

Frank J. Schantz
4029 St. Paul Blvd.
Rochester, NY 14617

Dear Mr. Schantz:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Kenneth Marblestone
Harter, Secrest & Emery
700 Midtown Tower
Rochester, NY 14604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
FRANK J. SCHANTZ : DECISION
for Redetermination of a Deficiency or :
for Refund of Unincorporated Business Tax :
under Article 23 of the Tax Law for the :
Year 1974. :

Petitioner, Frank J. Schantz, 4029 St. Paul Boulevard, Rochester, New York 14617, 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 1974 (File No. 22504).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on October 24, 1980 at 9:15 A.M. Petitioner, Frank J. Schantz, appeared with Kenneth Marblestone, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether monies received by petitioner, Frank J. Schantz, for a covenant not to compete is subject to unincorporated business tax.

II. Whether a consultation fee received by petitioner, is subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Frank J. Schantz, filed a New York State combined income tax return for 1974 with his wife. On said return he reported other income of \$63,550.00. Petitioner, Frank J. Schantz, filed an unincorporated business tax return and paid \$1,097.80 in unincorporated business taxes for 1974. On this

return he reported \$30,000.00 in consultation fees from Programmed Communities Inc. The consultation fees made up a portion of the \$63,550.00 reported as other income on the personal income tax return. A portion of the other income was for a covenant not to compete amounting to \$31,250.00.

2. On April 14, 1978, the Audit Division issued a Notice of Deficiency against the petitioner for 1974 on the grounds that the covenant not to compete in the amount of \$31,250.00 is subject to unincorporated business tax. Additionally, contributions were adjusted to \$3,062.50 based on correspondence between the Audit Division and petitioner. Accordingly, it imposed additional unincorporated business tax of \$1,552.51, plus interest of \$395.53, for a total due of \$1,948.04.

3. During the year at issue, petitioner, Frank J. Schantz, was an officer and shareholder of the following four corporations: (a) Schantz Development Corporation, a home developer; (b) Schantz Construction Company, a home builder; (c) Schantz Homes, a builder of high priced homes; (d) Schantz Real Estate Corporation, which sold the homes built by the building corporations.

4. In 1971, petitioner was an organizer, twenty five percent shareholder and officer (secretary-treasurer), of a corporation which did business under the name of "Programmed Communities, Inc.", (hereinafter "PCI"). PCI built apartment housing which was financed through the New York State Urban Development Corporation. During the year at issue, the petitioner carried on the duties as secretary-treasurer as employee of PCI for which he received \$30,000.00. Petitioner reported this income as consultation fees and paid unincorporated business tax on this income.

5. On July 20, 1972, petitioner, Frank J. Schantz, entered into a covenant not to compete with PCI. The agreement stated, in part, the following:

"1. From the effective date of this Agreement, and continuing for a period ending five years from the effective date of this Agreement, Schantz agrees and covenants that he shall not, directly or indirectly, whether as a principal, partner or as agent, or as an officer, director, employee or shareholder of any corporation, or through any other form or entity, or through investment in or the financing of any entity, engage in any construction business, program, development or project in which any financing or subsidy or other credit is obtained through the New York State Urban Development Corporation, within the County of Monroe, State of New York, or any contiguous county thereto.

2. In consideration for the above covenant, Communities agrees to pay to Schantz the total amount of \$125,000. Said consideration shall be paid in five installments of \$25,000 each, due and payable on January 1 in each of the years 1972-1976".

6. The covenant not to compete had no effect on the four "Schantz" corporations since they did not build apartment housing nor did the corporations receive financing through the New York State Urban Development Corporation.

CONCLUSIONS OF LAW

A. That the covenant not to engage in any construction business, program, development or project in which financing is obtained through the New York State Urban Development Corporation is not associated with an unincorporated entity described in section 703 of the Tax Law. Therefore, the income received from said covenant is not subject to the imposition of unincorporated business tax in accordance with section 701 of the Tax Law. Moreover, the income petitioner, Frank J. Schantz, received from the covenant not to compete resulted from an isolated transaction which lacked continuity, frequency and regularity of activity; accordingly, it did not constitute an unincorporated business, in accordance with the meaning and intent of section 703 of the Tax Law.

B. That the income reported as consultation fees of \$30,000.00 paid to the petitioner by Programmed Communities, Inc. was in fact payments received for duties performed as an officer-shareholder and employee of said corporation.

Therefore, said income is not subject to the unincorporated business tax in accordance with section 703(b) of the Tax Law.

C. That the Audit Division is hereby directed to cancel the Notice of Deficiency issued April 14, 1978 and to authorize a refund of \$1,097.80 which the Income Tax Bureau received from petitioner on April 15, 1975, as payment for unincorporated business tax, together with such additional interest as may be lawfully owing.

D. That the petition of Frank J. Schantz is granted to the extent indicated in Conclusion of Law "C" and that, except as so granted, is in all other respects denied.

DATED: Albany, New York

AUG 13 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER