OPINION NO. 903

DISTRICT OF COLUMBIA TAX COURT

FILED

DEC 13 1956

District of Columbia Tax Court

LEA G. WILLSON and EDMUND J. FLYNN COMPANY, Petitioners,	)	
vs.	)	DOCKET NO. 1493
DISTRICT OF COLUMBIA, Respondent.	)	

FINDINGS OF FACT AND OPINION

The Assessor assessed a franchise tax against the petitioners on the determination that their activities constituted an "unincorporated business" within the meaning of the District of Columbia Income and Franchise Tax Act of 1947 (Chapter 15 of Title 47, D. C. Code, 1951 Ed.). The petitioners here appeal from such assessment claiming that they engaged in a joint venture, which as an entity was not an unincorporated business.

Findings of Fact

1(a) The petitioner, Lea G. Willson, is an individual residing in Montgomery County, Maryland.

(b) The petitioner, Edmund J. Flynn Company, is a partnership, with the following partners: Edmund J. Flynn, Elsie C. Flynn, Edmund C. Flynn, all of whom reside in the District of Columbia, and Paul S. Clohan, who resides in Montgomery County, Maryland.

2(a) The petitioner, Lea G. Willson, is engaged in the business of building houses and stores in Maryland and Virginia. He maintains an office at 1612 Eye Street, Northwest, Washington, D. C. He has no employees, but does employ secretarial and telephone answering services. He has not purchased any real estate in the District of Columbia for purposes of resale for at least 10 years prior to the transaction here involved; and has never purchased real estate upon option prior to such transaction.

(b) The petitioner, Edmund J. Flynn Company, is primarily engaged, on behalf of owners of apartment buildings, in the promotion and conversion

of such buildings into cooperative apartment buildings. It maintains an office in the Washington Building, Washington, D. C. It has never built on, purchased by option or otherwise, any real estate in the District of Columbia for its own account.

3. Sometime in the early part of January, 1953 the petitioner, Willson, had a conversation or conversations with the President of Ontario Apartment House Company, which was the owner of an apartment house building in Washington, known as the Ontario Apartments, and which will hereinafter be referred to as "the Ontario". From such conversation or conversations the petitioner Willson, learned that the owner was anxious to sell the Ontario for approximately $900,000.00 and was willing to give the petitioner option to purchase same on or before a date certain for the sum of $10,000.

4(a) On January 15, 1953, the petitioners entered into the agreement following:

> "MADE this 15th day of January, 1953, by and between Lea G. Willson, hereinafter referred to as Willson, and the Edmund J. Flynn Co., a partnership organized for the purposes of selling, managing, and renting real estate, hereinafter referred to as Flynn Co., Witnesseth That:
>
> "WHEREAS Willson has, by agreement dated January 15, 1953, purchased for the sum of $10,000.00 from the Ontario Apartments, Inc., an option to buy that certain property and improvements known as the Ontario Apartment House, Ontario Road and 18th Streets, N. W., Washington, D. C., together with fixtures, furnishings and appurtenances therein contained belonging to the owner, the term of said option being from January 15, 1953, through September 30, 1953, and
>
> "WHEREAS Willson is desirous of exercising said option upon the terms and conditions stated in said agreement and of reselling said apartment house on a cooperative plan, and
>
> "WHEREAS Flynn Co. is experienced in the selling of real estate on a cooperative plan and is familiar with the terms of the aforesaid option agreement,
>
> "NOW, THEREFORE, in consideration of the mutual covenants and conditions herein contained, and the mutual interests and profits to be derived therefrom, the parties hereto associated themselves as joint venturers for the purpose of purchasing the said Ontario Apartment House and of reselling the same for profit upon a cooperative plan, upon the following terms and conditions:
>
> "1. Willson hereby assigns to Flynn Co. a one-half interest in and to all his right, title and interest in the aforesaid option agreement with the Ontario Apartments, Inc.
>
> "2. Flynn Co. hereby pays to Willson $5,000. representing Flynn Co.'s share of the cost of the said option, and Willson by his execution of this agreement acknowledges receipt of the same.
>
> "3. The joint venture shall commence as of the date of this agreement and shall last until the purposes thereof shall be consummated, namely, until the last apartment unit shall have been sold upon a cooperative basis, or, if the option hereinbefore referred to shall not be exercised, then, after all expenses of the joint venture and loses, if any, shall have been paid, this agreement shall cease and determine and be of no further force and effect.

"4. Both parties hereto agree that they will diligently apply themselves to the business of the joint venture and that they will carry on the same for the greatest mutual advantage.

"5. All profits of the joint venture shall be distributed equally between the parties hereto, and all expenses, and losses if any, shall be borne equally.

"6. Neither party hereto shall be entitled to receive any commissions by reason of effecting the lease or sale of any of said apartment units, nor shall either party receive any salary for services rendered to the joint venture.

"7. The parties shall have equal rights in the management of the business of the joint venture. Neither party, without the consent of the other, shall on behalf of the joint venture borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the joint venture.

"8. Neither party hereto shall assign, mortgage or sell his share in the joint venture or in any of its assets.

"9. This agreement shall be alike binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, and successors.

"In Witness Whereof Lea G. Willson has set his hand and affixed his seal and Edmund J. Flynn Co. has caused its partnership name to be subscribed hereto by its duly authorized agent, all as of the day and year first hereinbefore written, this agreement being executed in duplicate."

"Witness:

/s/ Paul S. Clobel	/s/ Lea G. Willson (SEAL) Lea G. Willson
	EDMUND J. FLYNN CO.
/s/ Eleanora M. Shelton	By /s/ Edmund J. Flynn (SEAL) Edmund J. Flynn"

(b) The recited premise in the above quoted agreement to the effect that the petitioner Willson had acquired for $10,000 an option to purchase the Ontario by an agreement dated January 15, 1953, was incorrect. Such option was acquired later as will hereinafter appear.

5. On February 10, 1953, the petitioner Willson entered into a written agreement with the Ontario Apartment House Company under which that petitioner paid the sum of $10,000 and received an option to purchase the Ontario for $900,000, on or before September 30, 1953. If the option was to be exercised the $10,000 was to be considered as a part payment of the purchase price.

6. Immediately after the acquisition by the petitioner Willson of the aforesaid option the petitioners offered the apartments for sale on a cooperative basis to the public under agreements, whereby the petitioners could cancel the agreements and return the cash deposits made by the cooperative purchasers under the conditions following:

"FIFTH, this subscription is made subject to its acceptance by the seller and to the approval of the purchaser by a provisional committee, composed of the proposed original officers of the co-operative corporation, said acceptance and approval to be endorsed hereon in the spaces hereinafter provided for such purposes, and this subscription is also subject to the formation of the said 'The Ontario Owners, Inc.'; and the acknowledgement of the receipt of the aforementioned deposit by the Agent is not to be construed as either acceptance by the seller or approval by the provisional committee. Should the seller not accept this subscription, or should the said provisional committee fail to endorse approval herein, or should said 'The Ontario Owners, Inc.' not be formed, the right is given to the Agent to cancel this subscription at any time within eight (8) months from the date hereof by mailing a valid check in full refund of said deposit to the subscriber at the address of the subscriber given below, and the mailing and the proof thereof, of a valid check as so provided, shall fully discharge the said Agent, the said Seller and the said Provisional Committee from all liability that might otherwise arise out of this agreement, it being expressly understood and agreed to by the undersigned that the Agent, the Seller and the Provisional Committee, as aforesaid, will not be held to have any liability or responsibility of any nature or description under this agreement except for the proper application or return of said deposit."

7. On May 12, 1953, the petitioner, Willson, and the Ontario Apartment House Company entered into a supplemental agreement relating to the purchase of the Ontario which, in addition to some changes affecting the deeds of trust to be executed by the purchaser, contained a provision requiring that petitioner to expend not less than the sum of $15,000 on repairs to the Ontario, subject to reimbursement by the Ontario Apartment House Company to the extent of the sum of $7,500.

8(a) After the petitioners had sold a sufficient number of apartments in the Ontario on the tentative or unilateral plan outlined above to convince them that all of the apartments could be successfully and profitably sold, they caused to be organized a cooperative corporation, The Ontario Owners, Inc., with Edmund C. Flynn, President and Paul S. Clohan, Secretary.

(b) On May 26, 1953, the petitioners and The Ontario Owners, Inc., executed the document following:

"CONTRACT OF SALE

"MADE THIS 26th day of May, 1953, by and between Lea G. Willson and the Edmund J. Flynn Co., a partnership, parties of the first part, hereinafter referred to as the 'Sellers', and The Ontario Owners, Inc., a corporation organized and existing under the laws of the State of Delaware, party of the second part, hereinafter referred to as the 'Corporation', Witnesseth That:

"WHEREAS, Willson, by the terms of a certain Option and Sales Agreement dated February 10, 1953, modified by Supplemental Agreement dated May 12, 1953, secured an option from The Ontario Apartment House Company to purchase its corporate property known as The Ontario, being Lots 200 and 469 in Square 2586, improved by premises commonly described as 2853 Ontario Road, N. W., Washington, D. C., upon the certain terms and conditions contained in said agreements; and

"WHEREAS, Willson and the Edmund J. Flynn Co. did enter into a joint venture for the purpose of purchasing the said Ontario pursuant to Willson's option and of reselling the same upon a cooperative apartment basis, and Willson, as one condition of said joint venture agreement, did assign, unto Edmund J. Flynn Co. a one-half interest in and to all of his right, title and interest in the aforesaid option agreement; and

"WHEREAS, Willson and Edmund J. Flynn Co. have notified The Ontario Apartment House Company of their intention to exercise said option and have scheduled settlement for the purchase by them of the said Ontario, and the Corporation is desirous of purchasing from them said premises;

"NOW, THEREFORE, in consideration of the mutual covenants and conditions herein contained, the parties hereto agree as follows:

"1. The Sellers shall convey, transfer and assign the aforesaid premises, together with all tangible personal property and fixtures thereon belonging to the same, unto the Corporation.

"2. The Corporation shall issue to Lea G. Willson and Edmund J. Flynn Co. a separate 'Cooperative Apartment Ownership Contract', duly executed by the Corporation, for each of the one hundred and twenty (120) apartment units in said premises.

"3. The Corporation shall further execute and place a first deed of trust, secured on the aforesaid premises, in the amount of $377,523.34, said first deed of trust to be payable at the rate of $6.77 per month per $1,000., inclusive of interest at the rate of 4½% per annum (said payments to be credited first to interest and the remainder thereof to principal), and to contain privileges of prepayment, and to run for ten years.

"4. The Corporation shall further execute and place a second deed of trust, secured on the aforesaid premises, in the amount of $188,761.66, bearing interest at the rate of 4½% per annum payable monthly or quarterly, to be due and payable in ten years, with privileges of prepayment upon any interest date, and to contain the further right that the holder of the second trust, at any time prior to its ten-year maturity, may pay off the existing balances of the first and second trusts and refinance the same, provided that said refinancing shall be entirely at the cost of the second trustholder (including any bonus required to pay off the first deed of trust) and that the replacement financing shall not bear a greater rate of interest than 4½% per annum, shall not run for a lesser period of time, shall be payable in monthly installments at the rate of 7% per annum inclusive of interest (with each payment credited first to interest and the balance thereof to principal), and shall contain like privileges and rights, including those of prepayments, as contained in the aforesaid first and second deeds of trust, and the Corporation agrees to execute, without cost to itself, the papers necessary to carry out such refinancing.

"5. The Corporation further agrees that all payments made by purchasers of individual apartment units on their allocated proportion of mortgage indebtedness in excess of the monthly amortization payments required of them shall be paid over to the first and second trust holders as prepayments upon the same in accordance with the prepayment privileges of said trusts, save only, however, that all such prepayments shall be divided and credited in the proportion of two-thirds to the first trust loan and one-third to the second trust loan. Recognizing that the total of the amortization payments required of purchasers of individual apartment units is somewhat in excess of the payments required to be made under the aforesaid first and second deeds of trust, the Corporation further agrees that it will apply all such excess (where not occasioned by actual prepayment by purchasers of individual units) as a monthly curtail on the second deed of trust loan.

"6. The Corporation further agrees that the net proceeds of the aforesaid first and second deed of trust loans shall be paid over by the Title Company making settlement to the Sellers to enable them to fulfill their obligations under the aforesaid option agreements to the Ontario Apartment House Company.

"7. The Sellers agree to pay to the Corporation, at the time of settlement, the sum of $14,000. for the purpose of an initial reserve operating fund.

"8. The Sellers acknowledge that they have agreed to undertake, at their own expense, various repairs and renovations of the aforesaid premises, including the installation of an elevator in the west wing, and, when required by the Corporation, they agree to deposit with the Corporation sufficient funds to guarantee their obligations in such respects.

"9. Taxes, general and special, are to be adjusted as of May 31, 1953, according to the Certificate of Taxes issued by the Collector of Taxes of the District of Columbia. Water rent is to be similarly adjusted as of May 31, 1953. Adjustment for all other items, such as fuel, utilities, rents and prepaid insurance shall likewise be adjusted as of said date, but settlement therefor and adjustment thereof shall be between the Sellers and the Corporation and need not be made by the Title Company making settlement.

"10. Settlement is to be made at the office of the Real Estate and Columbia Title Insurance Companies. Examination of title, tax certificate, conveyancing, notary fees, revenue stamps and all recording charges, including those for the aforesaid deeds of trust to be executed and placed by the Corporation, are to be at the cost of the Sellers.

"11. The Sellers shall execute the usual special warranty deed. The property is conveyed subject to existing tenancies.

"12. The aforesaid real and personal property is to be sold free of encumbrances, and title is to be good of record, subject, however, to covenants, conditions and restrictions of record, if any; otherwise, the sale is to be declared off and this contract and all of its provisions shall be and become null and void, unless the defects are of such character that they may be readily remedied by legal action, but the Sellers are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken by the Sellers promptly at their own expense.

"13. This contract shall be alike binding upon the parties hereto, their heirs, executors, administrators and assigns.

"IN WITNESS WHEREOF the parties hereunto have set their hands and affixed their seals, the Corporation acting therein by and through its President, the seal of the Corporation being affixed and attested by its Secretary, as of the day and year first hereinbefore mentioned, this contract being executed in triplicate."

"/s/ Eleanora M. Shelton Witness	/s/ Lea G. Willson Lea G. Willson
	EDMUND J. FLYNN CO.
/s/ Elsie C. Flynn Witness	By /s/ Edmund J. Flynn
	SELLERS
Attest: /s/ Paul S. Clohan Secretary (SEAL)	THE ONTARIO OWNERS, INC. By /s/ Edmund C. Flynn President CORPORATION"

9. After the execution of the aforesaid document entitled "Contract of Sale" the purchasers of individual apartments made settlement with the petitioners by paying the petitioners the balance of cash due under their respective subscription agreements.

10. The petitioners informed the Ontario Apartment House Company that they intended to exercise the option to purchase the Ontario theretofore given to the petitioner, Willson, and partially assigned to the

petitioner, Edmund J. Flynn Company. The settlement of transfer of title to the Ontario took place at the office of the Real Estate and Columbia Title Insurance Companies, Washington, D. C. Such transfer was effected by a deed from Ontario Apartment House Company to the petitioners and a deed from the petitioners to the cooperative, The Ontario Owners, Inc. The purchase price consisted of the original deposit of $10,000, proceeds of two deeds of trust executed by The Ontario Owners, Inc. and part of the cash which the petitioners received from the purchasers of the apartments, which The Ontario Owners, Inc., had transferred to them in accordance with clause number 2 in the agreement of May 26, 1953

11. The transfer of ownership of apartments to the purchasers thereof was effected by the issuance to the petitioners of a separate document, entitled "Cooperative Apartment Ownership Contract" for each apartment in the Ontario, granting "the right of perpetual use and enjoyment" thereof, and an assignment by the petitioners to the purchasers thereof, respectively. The petitioners sold 105 apartments during the fiscal period here involved and received therefor the sum of $997,900. The part of such sum not used as a part of the purchase price as above stated, less expenses, etc., represented profit to the petitioners.

12. During the fiscal period here involved, namely, a period beginning on February 10, 1953, and ending on January 31, 1954, the net income to the petitioners from the joint venture here involved was the sum of $154,412.78, correctly computed in the tax return filed by the petitioners under protest as follows:

"LEA G. WILLSON AND EDMUND J. FLYNN CO.
ONTARIO VENTURE
STATEMENT OF ASSETS, LIABILITIES, AND CAPITAL
AS OF JANUARY 31, 1954

ASSETS:		
Funds held by Edmund J. Flynn Co.:		
On trustee settlement account	$ 2,897.31	
On trustee settlement account for resale of apartment 401	6,799.95	
On general ledger account	2,848.30	
On rent collections	389.99	
On note collections	2,921.10	$ 15,856.65
Collateral notes receivable		24,124.07
Allocated share of cost of apartment contracts not sold having original sales value of $142,600.00		120,011.82
Working capital assessments paid on apartment contracts not sold		1,426.00

Furniture and furnishings for sample apartment - salvage value			$ 100.00
Total Assets			$161,518.54
LIABILITY:			
Balances due on allocated share of mortgage on apartment contracts not sold			$ 77,105.76
VENTURE CAPITAL			
Lea G. Willson:			
Capital contributed	$ 9,500.00		
Share of net income per Exhibit B	77,206.39		
Less:	$86,706.39		
Withdrawals	44,500.00		
Balance January 31, 1954		$42,206.39	
Edmund J. Flynn Co.:			
Capital contributed	$ 9,500.00		
Share of net income per Exhibit B	77,206.39		
Less:	$86,706.39		
Withdrawals	44,500.00		
Balance January 31, 1954		$42,206.39	
Total Venture Capital			84,412.78
Total Liabilities and Venture Capital			$161,518.54*

* * * * *

***LEA G. WILLSON AND EDMUND J. FLYNN CO.**
ONTARIO VENTURE
STATEMENT OF INCOME AND EXPENSES
FOR PERIOD FEBRUARY 10, 1953 TO JANUARY 31, 1954

INCOME:		
Sales of 105 Cooperative Ownership Contracts (Original sales value $997,400.00, ownership contract on apartment 401 resold for $500.00 in excess of original sales value)		$997,900.00
Cost of Contracts Sold - Schedule B-I:		
Total cost of 120 contracts, including improvements	$959,421.20	
Less: Cost of 15 contracts not sold January 31, 1954	120,011.82	
Cost of 105 contracts sold		839,409.38
Gross Income on Contracts Sold		$158,490.62
Interest income on delinquent equity payments		291.75
Interest income on collateral notes receivable		885.17
Net rental income on apartments not sold - Schedule B-II		96.35
Income from forfeiture of apartment 401		66.83
Total Income		$159,830.72
EXPENSES:		
Accounting fee	$ 125.00	
Advertising	271.68	
Credit reports	32.50	
Display apartment expense	10.26	
Furniture and furnishings for display apartment	791.36	
Legal fees	1,500.00	
Miscellaneous expenses:		
Selling	56.89	
General	19.02	
Postage	37.31	
Printing of brochure, by-laws, ownership contracts, etc.	728.44	

Salaries:		
Former resident manager	1,428.56	
Receptionist	280.00	
Telephone	61.92	
Travel	75.00	5,417.94
NET INCOME		$154,412.78
Distributed To:		
Lea G. Willson - 50%	$ 77,206.39	
Edmund J. Flynn Co. - 50%	77,206.39	$154,412.78*

* * * * *

*LEA G. WILLSON AND EDMUND J. FLYNN CO.

ONTARIO VENTURE

SCHEDULE SHOWING COST OF COOPERATIVE OWNERSHIP CONTRACTS SOLD

FOR PERIOD FEBRUARY 10, 1953 TO JANUARY 31, 1954

Costs of Building And Improvements:	
Cooperative ownership contracts	$900,000.00
Certificate of title, title policy, settlement fee, revenue stamps, etc.	3,238.50
Redecorating, painting and plastering	20,412.71
Kitchen equipment	4,139.85
Electrical repairs	3,399.58
Plumbing and heating repairs	1,857.70
Elevator and repairs	13,510.38
Stoker and boiler repairs	2,616.04
Miscellaneous improvements	452.05
Upholstering furniture	385.00
Roof work	382.57
Iron railing	158.10
Sanding building	1,000.00
Landscaping	1,100.00
Changing gas meters	113.76
Incorporation expense	154.96
Working capital contributed by venture	14,000.00
Total	$966,921.20
Less: Contribution by prior owner toward redecorating, painting, etc.	7,500.00
Net Cost of Building and Improvements	$959,421.20
Cost of Apartment Contracts Not Sold	
Original sales value of 15 apartment contracts not sold, $142,600.00 X percentage of cost to sales value 84.15975% - see note	120,011.82
Cost of Apartment Contracts Sold	$839,409.38

Note - Percentage of cost to sales value is determined as follows: Cost of 120 apartment contracts, $959,421.20 ÷ original sales value of 120 contracts $1,140,000.00 = 84.15975%."

13. The acquisition of the option to purchase the Ontario, the sale of the individual apartments and all other work and services performed in connection with the joint venture here involved were performed entirely by the individuals comprising the joint venture, namely, Lea G. Willson and the individual partners in the firm of Edmund J. Flynn Company.

14. On December 29, 1954, the Assessor assessed "Ontario Venture,

Lea G. Willson and Edmund J. Flynn Co.", a deficiency in franchise tax in the sum of $5,933.36, plus interest in the sum of $221.49, or a total sum of $6,1[illegible].85. On December 30, 1954, the petitioners paid such tax and interest. This proceeding was filed on March 28, 1955.

Opinion

There is no controversy about the computation of the tax here involved. The sole question is whether the petitioners' joint venture was an "unincorporated business" within the meaning of the Income and Franchise Tax Act of 1947,(1) which imposes a franchise tax on corporations and unincorporated businesses for the privilege of engaging in, or carrying on a trade or business within the District of Columbia.

Sometime in January, 1953, one of the venturers, Lea G. Willson, learned that the Ontario Apartment House Company was anxious, or at least willing to sell an apartment building which it owned, known as the Ontario Apartments, hereinafter called "the Ontario", for approximately $900,000 and would give an option to buy of substantial duration for the sum of $10,000, which would be considered a part of the purchase price should the option be exercised. Willson approached Edmund J. Flynn Company, a partnership consisting of four partners, which was primarily engaged, on behalf of owners of apartment buildings, in the promotion and conversion of such buildings into co-operative apartment buildings. As a result Willson and the Flynn Company entered into a written contract which provided that a joint venture was formed for the acquisition of the Ontario and the sale of the apartment units therein on a cooperative basis; that each Willson and the Flynn Company would contribute $5,000 with which to acquire the option to purchase; that the profits would be equally divided between Willson and the Flynn Company; and that both would be equally interested in the venture.

On February 10, 1953, Willson entered into an option agreement with the Ontario Apartment House Company, which provided for the payment of $10,000 for an option to purchase the Ontario at anytime on or

(1) Chapter 1[illegible], Title 47, D. C. Code, 1951 Edition.

before September 30, 1953 for $900,000, payable partly in cash and partly in notes secured by an encumbrance. Later, on May 12, 1953, the option agreement was amended or supplemented with terms more favorable to the joint venture, in consideration of which Willson, representing the joint venture, agreed to expend "not less than $15,000" on improvements to the Ontario subject to being reimbursed by the sellers to the extent of $7,500.

As soon as the option agreement of February 10, 1953, was obtained the joint venture began the sale of the individual apartments to the public on a basis of 45 per cent cash, including a cash deposit, and the balance secured by an encumbrance. The agreement of sale provided that it was binding on the purchaser, but not the joint venture, that is to say, it was a hedging permitting the joint venture to cancel the transaction and return the deposit if the option should not have been exercised.

The sale of the apartment units was successful and was accomplished by the efforts of Willson and the four partners personally and by no other persons. When it appeared that the sale of the apartment units would be a success the petitioners caused to be organized a cooperative apartment house corporation, "The Ontario Owners, Inc.", with one of the partners of the Flynn Company as President and another as secretary. Thereupon the joint venture and corporation executed an agreement whereby the interest of the joint venture was assigned to the corporation, with the accompanying obligations, plus an agreement by the joint venture to pay the cooperative $14,000 as a reserve operating fund. In consideration of such the cooperative agreed to convey all of the apartment units to the joint venture by issuing to it "a separate 'Cooperative Apartment Ownership Contract' duly executed by the Corporation, for each of the one hundred and twenty (120) apartment units in said premises". The petitioning joint venturers then notified the Ontario Apartment House Company that they would exercise the option to purchase the Ontario, and called upon the purchasers of the apartment units to pay the balance of the cash required by their respective agreements.

The transfer of title was effected by a deed from the Ontario

Apartment ouse Company to the petitioning joint venturers and in turn from them o the Ontario Owners, Inc. The purchase price of $900,000 was paid b encumbrances and cash consisting of the $10,000 paid for the option and a portion of the cash paid by the individual purchasers of the apartment units. The portion of such cash payments not so used, less certain disbursements and expenses, represented the net profit to the joint venture, computed as follows:

INCOME:		
Sales of 105 Cooperative Ownership Contracts (Original sales value $997,400.00, ownership contract of apartment 401 resold for $500.00 in excess of original sales value)		$997,900.00
Cost of Contracts Sold - Schedule B-I:		
Total cost of 120 contracts, including improvements	$959,421.20	
Less: Cost of 15 contracts not sold January 31, 1954	120,011.82	
Cost of 105 contracts sold		839,409.38
Gross income on Contracts Sold		$158,490.62
Interest income on delinquent equity payments		291.75
Interest income on collateral notes receivable		885.17
Net rental income on apartments not sold - Schedule B-II		96.35
Income from forfeiture of apartment 401		66.83
Total income		$159,830.72
EXPENSES:		
Accounting fee	$ 125.00	
Advertising	271.68	
Credit reports	32.50	
Display apartment expense	10.26	
Furniture and furnishings for display apartment	791.36	
Legal fees	1,500.00	
Miscellaneous expenses:		
Selling	56.89	
General	19.02	
Postage	37.31	
Printing of brochure, by-laws, ownership contracts, etc.	728.44	
Salaries		
Former resident manager	1,429.56	
Receptionist	280.00	
Telephone	61.92	
Travel	75.00	5,417.94
NET INCOME		$154,412.78
Distributable To:		
Leo G. Wilson - 50%	$ 77,206.39	
Edmund J. Flynn Co. - 50%	77,206.39	$154,412.78

The cost of the apartment contracts sold was as follows:

Costs of Building and Improvements:	
Cooperative ownership contracts	$900,000.00
Certificate of title, title policy, settlement fee, revenue stamps, etc.	3,238.50
Redecorating, painting and plastering	20,412.71
Kitchen equipment	4,139.85
Electrical repairs	3,399.58
Plumbing and heating repairs	1,857.70

Elevator and repairs	$ 13,510.38
Stoker and boiler repairs	2,616.04
Miscellaneous improvements	452.05
Upholstering furniture	385.00
Roof work	382.57
Iron railings	158.10
Sanding building	1,000.00
Landscaping	1,100.00
Changing gas meters	113.76
Incorporating expense	154.96
Working capital contributed by venture	14,000.00
Total	$966,921.20
Less: Contribution by prior owner toward redecorating, painting, etc.	7,500.00
Net Cost of Building and Improvements	$959,421.20
Cost of Apartment Contracts Not Sold	
Original sales value of 15 apartment contracts not sold, $142,600.00 X percentage of cost to sales value, 84.15975% - see note	120,011.82
Cost of Apartment Contracts Sold	$839,409.38

Note - Percentage of cost to sales value is determined as follows: Cost of 120 apartment contracts, $959,421.20 ÷ original sales value of 120 contracts $1,140,000.00 = 84.15975%."

During the taxable period involved, namely, from February 10, 1953 to January 31, 1954, the joint venture sold 105 apartments to individual owners, and at the end of that period had 15 units unsold.

The petitioners under name or title "Ontario Venture, Lea G. Willson and Edmund J. Flynn Co.", filed an unincorporated business franchise tax return for the fiscal period from February 10, 1953 to January 31, 1954, under protest, reporting net income of $154,412.78, but did not pay the franchise tax computed thereon. The Assessor assessed the petitioners a deficiency in franchise tax and interest in the total amount of $6,154.85. It is from such assessment that the petitioners here appeal claiming that the joint venture outlined above was not an unincorporated business within the meaning of the Income and Franchise Tax Act, for following reasons: (1) more than 80 per cent of the gross income of the joint venture was derived from personal services actually rendered by its members and capital was not an income producing factor, and (2) the joint venture was an isolated transaction. The respondent, on the other hand, denies the validity of both claims. The issue thus raised brings into focus Section 47-1574, District of Columbia Code, 1951 Edition, which reads:

"Sec. 47-1574. Definition of unincorporated business. For the purposes of this article (not alone of this title) and unless otherwise required by the context, the words 'unincorporated business' mean any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or

common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under sections 47-1571 to 47-1571a. The words 'unincorporated business' do not include any trade or business which by law, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor."

At this point it should be observed that the joint venture is an entity separate and distinct from its individual constituents. District of Columbia v. Pickford, 86 U.S. App. D. C. 179 F.2d. Whatever the constituents did outside the joint venture is not material and testimony concerning the same has been ignored by the Court. The fact that the petitioners were engaged is some phase of the real estate business outside the joint venture, has no place in the solution of the problems here presented.

The Court has thoroughly considered all of the facts and points made by the petitioners in relation to the question as to whether more that 80 per cent of the gross income of the joint venture was derived from personal services and whether capital was an income producing factor, and can see no substantial difference between the facts in this case and those in Rohrbaugh v. District of Columbia, ____U.S. App. D.C. ____, 229 F.2d 264, unless it be that the facts here, certainly in respect to the use of capital, are more favorable to the respondent than in that case. The Court must hold that the gross income of the joint venture was not derived from personal services and that capital was an income producing factor. This was not a brokerage transaction, but was the purchase and sale of real estate in which capital played an essential role. This does not dispose of the case, however, if, as the petitioners contend, the joint venture was an isolated transaction.

Section 5-1 (g) (B) of the regulations pertaining to the Income and Franchise Tax Act, adopted by the Commissioners of the District of Columbia provides as follows:

"(D) Often the continuity, frequency and regularity of activities, as distinguished from transactions of an isolated

or incidental nature, will be the factors which will determine whether or not the activities constitute the carrying on of an unincorporated business. For example, an individual would not be deemed to be engaged in an unincorporated business solely by reason of the purchase and sale of real estate for his own account but if he makes a business of buying and selling real estate such activities would be subject to the unincorporated business tax - - - - - - - -."

Counsel for the respondent insinuates that the above quoted regulation is invalid for the reason, apparently, that if its application results in cutting out the petitioners from the statutory category of unincorporated businesses, it must be wrong. The Court cannot agree with the respondent. The regulation is valid and is a proper exercise of the regulation making power granted to the Commissioners by the Income and Franchise Tax Act. (See Section 47-1995). It is merely declaratory of the general rule that an isolated transaction is not "business" of any kind; that "one swallow does not make a summer", so to speak. Cooper Mfg. Co. v. Ferguson, 113 U.S. 727, 5 S.Ct. 739, 28 L.Ed. 1137; Hutchins v. Burnet, 61 App. D.C. 109, 58 F.2d 514; Frye v. Batavia etc. Credit Union, Civil Action No. 19213, U.S.D.C. for D.C., 8 F.R.D. 334, and cases therein cited; Geneva Steel Co. v. State Tax Comm., 116 Utah 170, 209 P.2d 208; Ersted v. Hobart Howry Co. et al., 68 S.D. 111, 299 N.W. 66. For example, one isolated real estate transaction would not be business. General Conference of Free Baptist v. Berkey, 156 Cal. 466, 105 P. 411; North Dakota R. & Int. Co. v. Abel, 85 Ind. App. 569, 155 N.E. 46; Parker v. Wear, (Missouri) 230 S.W. 75. The fact that the completion of the transaction requires a substantial length of time does not destroy its status as an isolated transaction. Bay City v. Frazier, 77 F.2d 570; Consolidated Indemnity Co. v. Salmon & Cowan, 64 F.2d 756; Richmond Screw Anchor Co. v. E. W. Minter Co., 156 Tenn. 19, 300 S.W. 574. And, if the joint venture was the acquisition and even resale of the Ontario in one transaction, the Court would hold that it was not an unincorporated business, even if Section 8-1 (g) (D) of the regulations had not been adopted. But the Court does not believe that in the form that it took the joint venture can be said to be an isolated transaction. This was not the mere buying of a piece of real estate and its resale in that

form, but a highly organized plan involving a series of sales of separate apartment units over a period of nearly a year, and extending into the next. The line of distinction is narrow and the solution of the problem has given the Court some trouble, but after a great deal of consideration the Court has come to the conclusion that the "isolated transaction" rule is not here applicable. There are no decided cases which bear directly on the kind of transaction or transactions here involved, but there are a few having features similar to, or essentially the same as this, which supports the conclusion that the Court has reached. Commonwealth v. Summons, 157 Pa Super. 95, 41 A.2d 697; Peck-Williamson H. & V. Co. v. McKnight & Mers 140 Tenn. 563, 205 S.W. 419; Tripp State Bank v. Jerke, 45 S.D. 448, 18 N.W. 314; Hoffman Construction Co. v. Erwin, 200 A 579, 580.

For the reasons stated above the Court is of the opinion that the joint venture participated in by the petitioners was an unincorporated business as contemplated by the Income and Franchise Tax Act. The Court holds, therefore, a franchise tax for the fiscal period from February 10, 1953 to January 31, 1954, in the amount of $5,933.36, plus interest in the amount of $221.49, or a total of tax and interest of $6,154.85, assessed against the petitioners under the name of "Ontario Venture, Lea G. Willson and Edmund J. Flynn Co.", was validly assessed against the petitioners, and that the petitioners are not entitled to any refund thereof.

Decision will be entered for respondent.

Jo. V. Morgan,
Judge.