NORTH CAROLINA LAW REVIEW

Volume 40 | Number 2 Article 18

2-1-1962

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Recommended Citation

T. L. Odom, *Partnerships -- Profit Sharing by Lender*, 40 N.C. L. Rev. 355 (1962).
Available at: http://scholarship.law.unc.edu/nclr/vol40/iss2/18

Congress was to prohibit a deduction for meals and lodging in situations like the one in question.

It is submitted that the preferable construction is that followed by the court in *Carasso* and suggested by the dissenting judge in *Bilder*. Using this rule under the new sections, only transportation costs are deductible while meals and lodging are not. The probable reason for the legislative limitation on the meal and lodging deduction was the abuse of it by taxpayers who were using the provision as a means of obtaining "tax deductible vacations." But it certainly seems that the trips taken by the taxpayers in the two principal cases would fall into a "necessity" category, and that the costs incurred, while of a personal living expense nature, were "extraordinary" medical expenses. Perhaps Congress did, as the majority suggested in the *Bilder* case, become entangled in sweeping terms which prohibited a deduction in cases where the trip was essential to the health of the taxpayer. However, the language of the statutes and of the committee reports is too strong to be subject to judicial construction in favor of the taxpayer, and only Congress by new legislation can correct the non-allowance of this justifiable deduction.

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Partnerships—Profit Sharing by Lender

Should a corporation which lends money to another corporation be held a partner of the latter where the loan is secured, the lender is to be repaid the principal and interest and is to share in the borrower's profits? The Fifth Circuit Court of Appeals was faced with this question in *Minute Maid Corp. v. United Foods, Inc.*[1]

United Foods, a broker of frozen foods, was an authorized direct buyer of products packaged by Minute Maid Corporation. By receiving notice of price increases a considerable time in advance, United Foods could realize a speculative profit on inventories in addition to substantial volume discounts and allowances if it had sufficient financial resources to buy large quantities. United Foods, not having sufficient funds nor normal credit sources to make such purchases, entered into a written agreement with United States Cold Storage Corporation. The agreement provided: (1) Cold Storage would lend money to United Foods to purchase foods; (2) the purchased

[1] 291 F.2d 577 (5th Cir. 1961).

goods and accounts receivable from sales of these goods would be collateral for the loans; (3) notes for the loans would be given; and (4) a "Special Account" would be set up on the books of Cold Storage and managed by it. The "Special Account" would be debited for all the warehouse charges and credited with all discounts and allowances made by Minute Maid and any profits realized by United Foods on the sale of goods bought with the borrowed money. At the end of the year the "Special Account" would be closed, and any profits or losses would be divided.[2]

During the life of this agreement United Foods became heavily indebted to Minute Maid for food purchases. Minute Maid sought to recover from Cold Storage on the ground that the contract constituted a partnership under the law of Texas, but the district court held that no partnership existed. On appeal the court of appeals reversed.

The court considered two major points in concluding that a partnership existed by virtue of the written agreement. First, the court found that under the Texas definition of a partnership[3] a common business existed by virtue of the arrangement whereby Cold Storage was to furnish the financing and warehouse facilities and United Foods was to make use of its position as a direct buyer of Minute Maid products. Cold Storage contended that the agreement created only a debtor-creditor relationship. The court readily admitted that such a relationship existed between the two corporations, but termed this "indecisive."[4]

It is undoubtedly true that one may be both a lender and a part-

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[2] At the end of seven months the contract was terminated, the "Special Account" closed, and a profit of twenty-two thousand dollars was divided between the parties.

[3] "We take it, therefore, to be the law of Texas that if the parties entered into a contract from which it is clear that the parties contemplated joining in a common business for their common benefit to be operated for their joint account and in which they as owners each of an interest would be entitled to share as principals in the profits as such, they would be partners." 291 F.2d at 583.

Although Texas had adopted the Uniform Partnership Act, it did not become effective until after this case. However, the same problem which faced the court could also arise under the act since its definition of a partnership is essentially the same as that given by the court. For a discussion of the act, see Lewis, *The Uniform Partnership Act,* 24 YALE L.J. 617 (1915); Sher & Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act,* 12 Sw. L.J. 263 (1958).

[4] 291 F.2d at 583.

ner at the same time.[5] The court therefore was correct in holding that the debtor-creditor relationship was not the sole factor to be considered. However, according to past Texas cases, the existence of a debtor and creditor relationship is a very important factor in finding that no partnership exists.[6]

Secondly, from the fact that Cold Storage had the right to accept or reject proposed collateral for loans and the fact that the parties might agree on the volume of goods to be purchased on notice of any price increases, the court found that joint control existed. The court supported its conclusion by referring to the testimony of an officer of United Foods that Cold Storage could have stepped in and "written United off." However, rather than showing the existence of joint control, this statement would seem to indicate that Cold Storage had a form of veto power. It has been held that possession of a veto power by the lender is not sufficient alone to constitute the lender a partner with his borrower.[7]

No definite rule can be drawn from the cases as to how much control must be possessed by a lender before he will be held a partner since this is a matter of degree, but the cases do provide a basis for examples and for some generalization. A partnership was found not to exist where the lender received a share of the profits and (1) had his agent in control of the books and management of the business, received a mortgage on all the financed goods and received all the proceeds from sales;[8] (2) held the right to veto speculative ventures of the borrower;[9] (3) required that all the borrower's property be placed in trust for him until the loan was repaid;[10] (4) received liens on the borrowers' crops and tools and could prohibit

[5] See, *e.g.*, Nye v. United States, 84 F.2d 457 (1st Cir. 1936); De Martini v. Industrial Acc. Comm'n, 90 Cal. App. 2d 139, 202 P.2d 828 (Dist. Ct. App. 1949).

[6] Davis v. Gilmore, 244 S.W.2d 671 (Tex. Civ. App. 1951); Dunn v. Hankins, 127 S.W.2d 983 (Tex. Civ. App. 1939); Cosner v. Weller, 109 S.W.2d 1033 (Tex. Civ. App. 1937); Eddingston v. Acom, 259 S.W. 948 (Tex. Civ. App. 1924).

[7] Martin v. Peyton, 246 N.Y. 213, 158 N.E. 77 (1927).

[8] Dubos v. Jones, 34 Fla. 539, 16 So. 392 (1894). The court termed the controls security measures which did not alter the relationship of debtor and creditor. However, it should be noted that this case appears to be inconsistent with the weight of authority.

[9] Martin v. Peyton, 246 N.Y. 213, 158 N.E. 77 (1927). The court referred to this power as a measure of ordinary caution.

[10] *In re* Mission Farms Dairy, 56 F.2d 346 (9th Cir. 1932).

the borrowers from pooling their resources;[11] (5) could cause liquidation of the borrower's business.[12]

A partnership was held to exist where the lender shared in the profits and (1) made no provision in the agreement for repayment of the advances, but provided for the lender's agent to manage the borrower's business and to receive and sell all the manufactured products;[13] (2) the lender had complete authority to dispose of the business output, and the products bore the lender's label;[14] (3) the lender kept the books and signed the checks;[15] (4) the lender assumed complete control of the business;[16] (5) the lender paid the borrower's bills.[17] In these cases it was felt that the control went beyond ordinary security measures and entered into the realm of complete takeover or management of the business, either with the borrower or to the latter's exclusion.

It would seem that the controls in the principal case amounted to nothing more than security measures. When compared with the above cases which found that a partnership existed, the controls in the principal case are not nearly as extensive. It is submitted that the decision of the principal case is against the weight of authority. Where a creditor exercises controls which in form and substance are nothing more than protective measures for his loan, no partnership should be held to exist in the absence of estoppel or a clear intent to become partners.[18]

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[11] Eddingston v. Acom, 259 S.W. 948 (Tex. Civ. App. 1924).
[12] McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951).
[13] San Joaquin Light & Power Corp. v. Costaloupes, 96 Cal. App. 322, 274 Pac. 84 (Dist. Ct. App. 1929).
[14] Southern Can Co. v. Hartlove, 152 Md. 303, 136 Atl. 624 (1927).
[15] Collyer v. Egbert, 200 Wash. 342, 93 P.2d 399 (1939).
[16] Hudson Letter Co. v. Racette, 244 Mich. 144, 221 N.W. 151 (1928).
[17] Causey v. Cottman Co., 12 F.2d 558 (4th Cir. 1926).
[18] One of the reasons suggested by the dissenting judge for not finding a partnership was that intent to create a partnership is an essential element of partnership. However, he stated that it is the manifested intent and not the secret subjective intent which is controlling. He found no evidence of an intent to create a partnership here. 291 F.2d at 585.