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# Associations: Partnerships Taxable As Corporations

ALVIN B. RUBIN\*

An ever increasing awareness of the possibilities of tax saving devices has prompted innumerable legal practitioners to experiment with means to reduce tax incidence upon business enterprises. Since some business men can reduce their overall tax load by conducting their affairs as a partnership, instead of as a corporation,<sup>1</sup> many new businesses are being created as partnerships, and many existing corporations have been, and are being dissolved to obtain the resultant tax savings.

But when there are several owners of a business, certain advantages are likely to be derived from devices generally obtained through the corporate form of doing business. Thus, for example, in many businesses, centralized control is desirable, if not necessary. Limited liability is obviously appealing. And it is desirable to avoid interruption of the business by the death of one of the entrepreneurs. So there are impelling reasons for attempting to achieve these ends—allowable in most cases under state laws—while remaining ostensibly a partnership for state and federal tax purposes.

This is ingenious. It may be sound business practice. But in other cases ingenuity is likely to overreach itself. For there is an apparently innocuous clause contained in the "definitions" sections of the Internal Revenue Code to the effect that "The term 'corporation' includes *associations*, joint stock companies, and insurance companies."<sup>2</sup>

The definition of a partnership gives an inkling that there may be something more to "corporation" for federal tax purposes than meets the eye. For "The term 'partnership' includes . . . [any] *unincorporated* organization, through or by means of which any business, financial operation, or venture is carried on, and *which is*

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1. See, for example, Rabkin and Johnson, *The Partnership under the Federal Tax Laws* (1942) 55 Howard L. Rev. 909.

2. C. C. H., I. R. C. § 3797 (a) (3) (1947).

*not within the meaning of this title, a trust or estate or a corporation.*"<sup>3</sup>

The code itself does not state a definition for an "association." The regulations, however, are more helpful to the understanding, albeit not to the purpose of achieving at one and the same time the advantages of a clever business form together with a minimum tax liability. They state that "The term 'Association' is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs . . . which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity."<sup>4</sup>

"If an organization is not interrupted by the death of a member, or by a change in ownership of a participating interest during the agreed period of its existence, *and* its management is centralized in one or more persons in their *representative* capacities, such an organization is an association, taxable as a corporation,"<sup>5</sup> for "The Internal Revenue Code provides *its own* concept of a partnership."<sup>6</sup>

These elaborated definitions are not overreaching. Their validity has been sustained.<sup>7</sup> And it makes no difference what state law may choose to call a particular form of business venture: the Internal Revenue Code "provides its own concept."<sup>8</sup>

That, of course, means that what is a partnership, with perhaps unlimited liability, under state law, becomes an association, hence a corporation, for federal tax purposes. That means, too, that in

3. C. C. H., I. R. C. § 3797 (a) (2) (1947).

4. C. C. H., Income Tax Reg. 111, § 29.3797-4 (1947).

5. *Ibid.*

6. *Ibid.*

7. See *Morrissey v. Commissioner*, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935); *Sherman v. Commissioner*, 146 F. (2d) 219 (C. C. A. 6th, 1944). See also *Trust No. 5833, Security-First National Bank v. Welch*, 54 F. (2d) 323 (C. C. A. 9th, 1931), cert. denied 286 U. S. 544, 52 S. Ct. 496, 76 L. Ed. 1281 (1931).

8. See *Burk-Waggoner Oil Association v. Hopkins*, 269 U. S. 110, 46 S. Ct. 48, 70 L. Ed. 183 (1925); *Johnson v. Commissioner*, 56 F. (2d) 58 (C. C. A. 5th, 1932); *Commissioner v. Fortney Oil Co.*, 125 F. (2d) 995 (C. C. A. 6th, 1942). In *Poplar Bluff Printing Co. v. Commissioner*, 149 F. (2d) 1016 (C. C. A. 8th, 1945), the very taxpayer there held to be an association had previously been held a partnership in a state court. See also *Wholesalers Adjustment Co. v. Commissioner*, 88 F. (2d) 156 (C. C. A. 8th, 1937); *Tyrell v. Commissioner*, 91 F. (2d) 500 (C. C. A. 5th, 1937), cert. denied 302 U. S. 747, 58 S. Ct. 265, 82 L. Ed. 577 (1937).

many attempts to create tax savings, there may be a weakening of business structure, without the slightest reduction in tax liability. What the category of "association" does is "to impose a fair share of the whole burden of taxation upon business organizations which, although not operating under corporate form, nevertheless are engaged in making or creating profits in much the same way that corporations carry on business activity."<sup>9</sup> On the other hand, not every partnership which deviates from the norm should automatically be classified as an association. The attempt to trace the shadow line which divides the association and the partnership is a subject which—among the excellent material dealing with the taxation of partnerships<sup>10</sup>—has been strangely neglected.<sup>11</sup>

Merten's treatise states that, "It is very difficult to draw a satisfactory dividing line . . . . The line cannot be drawn upon the basis of the laws of any particular state; nor can it be drawn upon the basis of provisions as to dissolution and admission of new members. The basic test is whether an organization which may be thought to be a partnership conducts business in the general form and manner of a corporation: if it does, it will be taxed as a corporation."<sup>12</sup>

Despite this difficulty, a reading of the many cases on the subject induces a belief that identifiable factors are of strong evidentiary value in establishing whether a business form is sufficiently akin to the corporation to be taxable as one. Cases dealing with the closely related problem of when a trust is an "association" and therefore taxable as a corporation are helpful, and have been utilized in some of the references in this article.

In *Burk-Waggoner Association v. Hopkins*,<sup>13</sup> the Supreme Court for the first time held that an unincorporated joint stock association constitutionally could and statutorily should be taxed as a corporation. The court remarked, in advancing its reasons, that joint stock associations conduct their business in the *general form*

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9. *Equitable Trust v. Magruder*, 37 F. Supp. 711 (D. C. Md. 1941).

10. On the general problems of partnership taxation, see Rabkin and Johnson, *supra* note 1; Levy, *The Incorporation of Partnerships* (1947) 25 *Taxes* 43; Schiller, *The Lawyer's Dilemma* (1946) 24 *Taxes* 837; Paul, *Partnerships in Tax Avoidance* (1945) 13 *Geo. Wash. L. Rev.* 121; Ross, *The Status of the Family Partnership under the Recent Decisions* (1945) 4 *N. Y. U. Institute on Fed. Tax.* 674.

11. A good annotation, however, is available in 108 *A. L. R.* 340 (1937). See also 144 *A. L. R.* 1050 (1943).

12. 7a Merten, *Law of Federal Taxation*, § 43.30.

13. *Supra* note 8. In *Hebert v. Malley*, 265 U. S. 144, 44 S. Ct. 462, 68 L. Ed. 949 (1924) the Supreme Court had held a "Massachusetts trust" taxable as a corporation since it was an "association."

and *mode of procedure* of a corporation. "Because of this resemblance in form and effectiveness, these business organizations are subjected by the Act to these taxes as corporations."<sup>14</sup>

That settled the question for formal joint stock associations. In 1935, the *Morrissey* case posed the issue of whether a trust could be considered an association, when it was operating a golf club, and when its beneficiaries had no voice in the management of its affairs.<sup>15</sup> The court held the trust taxable as a corporation. It decided at the same time that certain other types of trusts were also taxable as corporations,<sup>16</sup> although they had a limited number of beneficiaries.<sup>17</sup>

Although none of the Supreme Court cases have involved partnerships, strictly speaking, they have stressed that a business which is conducted like a corporation may be taxed like one. And in determining what functional aspects of corporate organization are most characteristic, the Supreme Court has stressed centralized management.<sup>18</sup>

#### CENTRALIZATION OF MANAGEMENT

This is, as the regulations indicate, a basic issue. In the "normal" partnership, the power to determine fundamental policies of the business is held by all the partners or co-owners. Each votes on every basic matter. Only minor matters, the day-to-day conduct of affairs, is entrusted to employees or to one or more partners, acting for all. In the typical corporation, on the other hand, it is the board of directors, acting as representatives of the stockholders, which charts business policy.

Both the regulations and the decisions have therefore relied heavily on a preliminary test: Is there centralized management by persons acting in a representative capacity?<sup>19</sup>

14. 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935).

15. *Ibid.*

16. *Swanson v. Commissioner*, 296 U. S. 362, 56 S. Ct. 283, 80 L. Ed. 273 (1935); *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369, 56 S. Ct. 285, 80 L. Ed. 278 (1935). Compare *A. A. Lewis & Co. v. Commissioner*, 301 U. S. 385, 57 S. Ct. 799, 81 L. Ed. 1174 (1935).

17. *Swanson v. Commissioner*, 296 U. S. 362, 56 S. Ct. 283, 80 L. Ed. 273 (1935).

18. See, for example, in addition to the cases already cited, *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369, 56 S. Ct. 285, 80 L. Ed. 278 (1935).

19. See *Wholesalers Adjustment Co. v. Commissioner*, 88 F. (2d) 156 (C. C. A. 8th, 1937) where management of the venture was centralized in a single person. See also *Bert v. Helvering*, 67 App. D. C. 340, 92 F. (2d) 491 (1937). Compare *A. A. Lewis & Co. v. Commissioner*, 301 U. S. 385, 57 S. Ct.

## TRANSFERABILITY OF INTERESTS

A second basic test announced by the regulations is whether the business unit is interrupted by the death of a member or by a change in ownership of an interest. In the "typical" partnership, the members are drawn together by their personal evaluations each of the other. Partners contribute personality as well as capital. On the other hand, in the corporation the stockholder's primary contribution is financial. Therefore, in the "typical" partnership, the sale of a partner's interest dissolves the business unit as it previously existed, whereas in the corporation, the shares representing capital contribution are freely negotiated.<sup>20</sup> Likewise in the "normal" partnership, the death of one of the partners terminates the enterprise, at least as it previously existed, while the corporation achieves continuity of life despite the death of its stockholders.

## OTHER FACTORS

Centralization of management and the accomplishment of continuity of business life despite transfers of ownership or death of the business investors are the only criteria mentioned in the regulations. The cases, however, indicate that perhaps they are not exclusive. The courts have consistently considered other matters in an effort to appraise whether or not a particular business unit more closely follows the corporate method of doing business than it does the orthodox partnership method, and whether it is therefore an "association." As the Circuit Court of Appeals for the Tenth Circuit put it in the *Brouillard* case, decided in 1934: "In determining whether the entity is a partnership or an association, there should be a balancing of resemblances and contrasts, since Congress evidently intended to tax as a corporation, only partnerships conducting business by corporate methods and forms."<sup>21</sup>

This "balancing of resemblances and contrasts" to get the "feel" of a particular business unit is widely—indeed, almost universally—

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799, 81 L. Ed. 1174 (1937). Where a single "manager" is appointed, it may be indicative of partnership that his powers are expressly limited. *Commissioner v. A. B. Whitcomb Coca-Cola Syndicate*, 35 B. T. A. 1031 (1937), affirmed 95 F. (2d) 596 (C. C. A. 5th, 1938).

20. For typical cases where an association was found to exist at least partly because of an effort to make investment interests freely transferable, see *Bert v. Helvering*, 67 App. D. C. 340, 92 F. (2d) 491 (1937).

21. *Commissioner v. Brouillard*, 70 F. (2d) 154 (C. C. A. 10th, 1934), cert. denied 293 U. S. 574, 55 S. Ct. 85, 79 L. Ed. 672 (1934). See also *Bert v. Helvering*, 67 App. D. C. 340, 92 F. (2d) 491 (1937); *Glensder Textile Co. v. Commissioner*, 46 B. T. A. 176 (1942).

used by all of the courts, including the tax court. Some of the resemblances and contrasts which they have considered include the following:

#### EFFORTS TO LIMIT LIABILITY

The regulations clearly state that the limitation of liability of some of the members of a partnership, in accordance with state laws authorizing the creation of limited partnerships, or partnerships *in commendam*, does not per se make the business unit an association.<sup>22</sup> But, since incorporation means universal limited liability in most cases, and since partnership generally implies at least someone with unlimited liability, efforts to maintain a partnership and yet to limit the liability of *all* the members, among themselves, if not against outside creditors, are enough to create suspicion that there is an association,<sup>23</sup> whereas a lack of such efforts ordinarily creates a feeling that the business unit is really a partnership.<sup>24</sup>

#### PUBLIC APPEARANCE

A business which is actually incorporated is generally required by state laws to indicate in its firm name that it is a corporation. A business which under state law is a partnership but holds itself forth as a corporation, for whatever reason, is likely to be using its technical business form as a subterfuge. Therefore when an unincorporated firm indicates to customers, creditors, or the public that it is a corporation or fails to indicate that it is *not* a corporation, that may be evidence that it is at least an association.<sup>25</sup> Certainly when a corporation is dissolved and a partnership created, the change should be clearly announced to the world if classification as a partnership rather than a corporation is sought.<sup>26</sup>

22. C. C. H., Income Tax Reg. 111, § 29.3797-5. See also *Wholesalers Adjustment Co. v. Commissioner*, 88 F. (2d) 156 (C. C. A. 8th, 1937). See also I. T. 2904, XIV-2 Cum. Bull. 151 (1935); O. D. 599, 3 Cum. Bull. 15 (1921); S. 1160, 1 Cum. Bull. 5 (1922). But see T. D. 2943, 1 Cum. Bull. 9 (1922); G. C. M. 2467, VII-2 Cum. Bull. 188 (1926).

23. See *Poplar Bluff Printing Co. v. Commissioner*, 149 F. (2d) 1016 (C. C. A. 8th, 1945), where the provision that no partner should be responsible for partnership debts until all of the partnership property had been liquidated was considered "inconsistent with ordinary partnerships." But see I. T. 1849, II-2 Cum. Bull. 6 (1923); S. 1361, 2 Cum. Bull. 11 (1920).

24. See *Hoffman v. United States*, 21 F. (2d) 241 (D. C. Ill. 1927).

25. See *H. Lisoner Co., Inc. v. United States*, 52 F. (2d) 1058 (Ct. of Cl. 1931) where the taxpayer contended it had been an "Association during a brief period." In ruling against this contention, the Court relied on the absence of evidence that it had held itself out as an "association" or corporation.

26. See *Jackson-Wermick Trust v. Commissioner*, 24 B. T. A. 150 (1931).

## OBSERVANCE OF CORPORATE RITUAL

The corporation is a far more formal sort of business organization than the partnership. It names officers; it keeps formal written records of meetings; it adopts resolutions; it generally has a seal; it has an identity apart from that of its stockholders. This sort of ceremony is generally absent from the partnership. Evidence of the existence or non-existence of such ceremony will be considered in determining whether a business is an association.<sup>27</sup> Even the existence or non-existence of formal documents serving as evidence of the investment of capital ("shares" or "certificates") may be persuasive.<sup>28</sup>

## OTHER INDICIA

Corporations are ordinarily created for long terms. Partnerships, or their tax companions, joint ventures, frequently are formed for stated brief periods. The fact that a business venture "was limited [in duration] to a short period has some tendency to distinguish it from a corporation."<sup>29</sup> Of course, brief life indicates a lack of con-

27. See *Seattle Renton Lumber Co. v. United States*, 135 F. (2d) 989 (C. C. A. 9th, 1943), where the court was influenced by the taxpayer's showing that it had opened a new set of books, changed signs on its place of business and vehicles, ordered altered stationery, and had verbally informed customers who inquired of the change in name that the business was now being handled as a partnership. On the other hand, where there was no change of name or books, etc., this was cited as evidence of existence of an "association." *Poplar Bluff Printing Co. v. Commissioner*, 149 F. (2d) 1016 (C. C. A. 8th, 1945).

28. See *Commissioner v. Brouillard*, 70 F. (2d) 154 (C. C. A. 10th, 1934), cert. denied 293 U. S. 574, 55 S. Ct. 85, 79 L. Ed. 672 (1934), relying in part upon an absence of such circumstances to hold that a group which pooled oil leases for development in the hands of a trustee was not an association. See also *Commissioner v. Rector & Davidson*, 111 F. (2d) 332 (C. C. A. 5th, 1940). Compare the relatively early case of *Niles Fire Brick Co.*, 6 B. T. A. 8 (1927) (Non-acq.) where a group of heirs commenced formation of a corporation but never completed it. See also *Joe Gilorich & Co.*, 6 B. T. A. 864 (1927) (Acq.) where organizational informality was stressed. Accord: *Myers, Long & Co. v. Commissioner*, 14 B. T. A. 460 (1928). See also *Doral Trading Account v. Commissioner*, 34 B. T. A. 837 (1936); *Stantex Petroleum Co. v. Commissioner*, 38 B. T. A. 269 (1938); *MacConaughy v. Commissioner*, 41 B. T. A. 408 (1940); *P-H Group v. Commissioner*, 43 B. T. A. 1041 (1941). In connection with the related trust problem, see *United States v. Davidson*, 115 F. (2d) 799 (C. C. A. 6th, 1940); *Commissioner v. Nebo Oil Co. Trust*, 126 F. (2d) 148 (C. C. A. 10th, 1942), cert. denied 317 U. S. 636, 63 S. Ct. 27, 87 L. Ed. 512 (1942); *Keating Snyder Trust v. Commissioner*, 126 F. (2d) 860 (C. C. A. 5th, 1942).

29. See *Morrissey v. Commissioner*, 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 263 (1935): "The test of an association is not to be found in the mere formal evidence of interests or in a particular method of transfer, yet the absence of familiar provisions for adequate evidence of transfer is important to be considered." See also *Commissioner v. Gerstle*, 95 F. (2d) 587 (C. C. A. 9th, 1938); *Poplar Bluff Printing Co. v. Commissioner*, 149 F. (2d) 1016 (C. C. A. 8th, 1945); *Glensder Textile Co. v. Commissioner*, 46 B. T. A. 176 (1942).

tinuity of operation.<sup>30</sup> Likewise, whether the investors vote by "heads" or in ratio to their proportionate investments may be of persuasive value.<sup>31</sup> And the extent of the activity of some so-called "partners" may be considered.<sup>32</sup>

Of course, occasionally the rules set up to prevent ostensible partnerships from escaping federal corporate tax liability may work to the advantage of the business unit, rather than otherwise. Thus, in the *Wild* case<sup>33</sup> where more tax would have been collected had the business venture been considered a partnership, the Court of Appeals for the Second Circuit found that the business was *not* a partnership, whatever else it might be, and therefore that the members of it were *not* taxable on profits realized by the business but not distributed to them.

Where the terms under which the business is organized and under which it is to be conducted are reduced to a formal document, but the actual conduct of affairs varies from what was formally authorized, should the taxability of the business depend on what is written or on what is actually done? For this question, there are answers in dicta both ways, depending apparently on how the court confronted with a particular case otherwise felt about the matter.<sup>34</sup> Consequently, there is tax advantage neither in understating the resemblance to a corporation in the formal documents, nor in overstating it.

To aid the reader in considering how the two major tests and the various other items of evidence discussed may add up to a determination that a particular business is either a partnership or an association, a group of fourteen more or less typical cases has been

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30. See *Commissioner v. N. B. Whitcomb Coca-Cola Syndicate*, 35 B. T. A. 1031 (1937), affirmed in 95 F. (2d) 596 (C. C. A. 5th, 1938). See also *Utica Motor Car Co. v. Commissioner*, 10 B. T. A. 878 (1928); *Doral Trading Account v. Commissioner*, 34 B. T. A. 837 (1936).

31. *Pierre S. Dupont v. Commissioner*, 37 B. T. A. 1198 (1938), affirmed 118 F. (2d) 544 (C. C. A. 3rd, 1941); *Cord v. Commissioner*, 38 B. T. A. 1372 (1938); *MacConaughey v. Commissioner*, 48 B. T. A. 408 (1940).

32. See *Commissioner v. J. A. Riggs Tractor Co.*, 6 T. C. 889 (1946) (Acq.). See also A. R. R. 2773, II-2 Cum. Bull. 1 (1923).

33. *Wild v. Commissioner*, 62 F. (2d) 777 (C. C. A. 2nd, 1933).

34. The terms of the instrument control: *Wholesalers Adjustment Co. v. Commissioner*, 88 F. (2d) 156 (C. C. A. 8th, 1937); *Bert v. Helvering*, 67 App. D. C. 340, 92 F. (2d) 491, 493 (1937); *Commissioner v. Security-First Nat. Bank of Los Angeles*, 148 F. (2d) 937 (C. C. A. 9th, 1945). It is what was actually done, rather than what might have been done, which counts: *Commissioner v. Brouillard*, 70 F. (2d) 154 (C. C. A. 10th, 1934), cert. denied 293 U. S. 574, 55 S. Ct. 85, 79 L. Ed. 672 (1934); *Commissioner v. Rector & Davidson*, 111 F. (2d) 332 (C. C. A. 5th, 1940), cert. denied 311 U. S. 672, 61 S. Ct. 33, 85 L. Ed. 432 (1940).

classified in tabular form at the conclusion of this article. It should be noted in examining this chart that, although the answers to the first two criteria are strongly indicative, the other evidence will be weighed, and the final result is generally predicated on a consideration of all the evidence available. Cases involving groups of individuals combining their capital for short or long term investments or speculation in securities<sup>35</sup> and those involving combinations of capital for the development of mineral leases<sup>36</sup> have been the most frequently litigated, and the footnotes to this sentence contain references to a number of the decisions in those matters.

If there is a "word to the wise," it is that, if a partnership is being formed, either "from scratch" or by the dissolution of an existing corporation, there is a possibility that provisions which may be wholly innocuous under state laws may be tantamount to inviting federal taxation as a corporation. If a bona fide partnership is being created and taxation as an association is sought to be avoided, it is well to draw up formal articles of partnership to indicate beyond question what sort of business unit is being created. Centralized

35. *Wild v. Commissioner*, 62 F. (2d) 777 (C. C. A. 2d, 1933) (not a partnership); *Glenmore Securities Corp. v. Commissioner*, 62 F. (2d) 780 (C. C. A. 2nd, 1933) (not a partnership); *Wholesalers Adjustment Co. v. Commissioner*, 88 F. (2d) 156 (C. C. A. 8th, 1937) (association); *Bert v. Helvering*, 67 App. D. C. 340, 92 F. (2d) 491 (1937) (association); *Commissioner v. Gerstle*, 95 F. (2d) 587 (C. C. A. 9th, 1938) (not an association); *Commissioner v. N. B. Whitcomb Coca-Cola Syndicate*, 35 B. T. A. 1031 (1937), affirmed 95 F. (2d) 596 (C. C. A. 5th, 1938) (not association); *Realty Associates*, 17 B. T. A. 1173 (1929) (non-acq.) (no association); *Doral Trading Account v. Commissioner*, 34 B. T. A. 837 (1936) (set up to acquire one block of stock; not an association); *Schroeder Employees Thrift Club v. Commissioner*, 36 B. T. A. 645 (1937) (association); *Farish v. Commissioner*, 36 B. T. A. 1114 (1937), reversed on other grounds 103 F. (2d) 63 (C. C. A. 5th, 1939) (not association); *Pierre S. Dupont v. Commissioner*, 37 B. T. A. 1198 (1938), affirmed 118 F. (2d) 544 (C. C. A. 3rd, 1941) (joint venture taxable as partnership); *Cord v. Commissioner*, 38 B. T. A. 1372 (1938) (not association); *MacConaughy v. Commissioner*, 41 B. T. A. 408 (1940) (to acquire then dispose of all stock of one company) (not association); *P-H Group v. Commissioner*, 43 B. T. A. 1041 (1941) (not association); *Wilmot v. Commissioner*, 44 B. T. A. 1155 (1941).

36. *Commissioner v. Brouillard*, 70 F. (2d) 154 (C. C. A. 10th, 1934), cert. denied 293 U. S. 574, 55 S. Ct. 85, 79 L. Ed. 672 (trust); *Thrash Lease Trust v. Commissioner*, 99 F. (2d) 925 (C. C. A. 9th, 1938), cert. denied 306 U. S. 654, 59 S. Ct. 643, 83 L. Ed. 1052 (1939) (association); *Commissioner v. Horseshoe Lease Syndicate*, 110 F. (2d) 748 (C. C. A. 5th, 1940), cert. denied 311 U. S. 672, 666, 61 S. Ct. 24, 85 L. Ed. 427 (1940) (not association); *Commissioner v. Rector and Davidson*, 111 F. (2d) 332 (C. C. A. 5th, 1940); cert. denied 311 U. S. 672, 61 S. Ct. 33, 85 L. Ed. 432 (1940) (not association); *Commissioner v. Fortney Oil Co.*, 125 F. (2d) 995 (C. C. A. 6th, 1942) (association); *Myers, Long & Co. v. Commissioner*, 14 B. T. A. 460 (1928) (partnership); *Winston v. Commissioner*, 22 B. T. A. 1194 (1931) (partnership); *G. E. Jordan v. Commissioner*, 28 B. T. A. 372 (1933) (not a trust); *Stantex Petroleum Co. v. Commissioner*, 38 B. T. A. 269 (1938) (not association); *Everts v. Commissioner*, 38 B. T. A. 1039 (1938) (not association); *Johnston v. Commissioner*, 38 B. T. A. 1199 (1938) (not association).

management should not be combined with provisions insuring relatively continuous life to the business unit. If one factor is indispensable, the other should be avoided, both in appearance and fact. If it is essential to retain some medium whereby interests may be transferred, the articles of partnership should provide for acceptance of the personality of a proposed transferee of an interest by the present partners by means of some formal procedure for consent in writing.<sup>37</sup>

If some partners are to have limited liability, the fact that there are no limitations of liability as to others should be stated clearly. Attempts to limit the liability of the partners, as among themselves, to what is invested, indicate the association.

Ordinarily, it will not detract one whit from the desired business purposes of a partnership to indicate clearly that it is a *partnership* or at least to avoid any appearance that it is a corporation in its business name, on its stationery and business signs. In addition, it is well to avoid titles, such as "president," and the ceremony of resolutions and the like.<sup>38</sup>

Ultimately, this means of course that you cannot have all the tax advantages of a partnership and yet retain the business and legal advantages of a corporation. This indeed is as it should be. If a taxpayer wants the advantages of the corporation, let the taxpayer pay corporate taxes. A business which desires to be taxed as a partnership should bear a reasonable relationship in its method of doing business to a "normal" partnership. However, if a partnership is desired, careful consideration of its structure and business methods can generally accomplish an effective organization for business and legal purposes and yet fall short of the corporate resemblance necessary to make it an association. It is of no moment under the present Internal Revenue Code whether a business is conducted as a corporation or as a partnership *solely* because of tax advantages attendant upon one form or the other.<sup>38</sup> The taxpayer may weigh the advantages of the forms available and choose between them without penalty for his motive.<sup>39</sup> What is of moment is that the business unit which acts like a corporation must expect to be treated like one.

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37. See *Hoffman v. United States*, 21 F. (2d) 241 (D. C. Ill., 1927).

38. See, for example, *Jordan Creek Placers v. Commissioner*, 43 B. T. A. 181 (1940).

39. See *Seattle Renton Lumber Co. v. United States*, 135 F. (2d) 989 C. C. A. 9th, 1943).

Type of Business	Was Centralized?	Were Shares Transferable?	Were Efforts Made to Limit Liability Among Partners?	Was Public Appearance that of a Corporation?	Was There Observance of Corporate Ritual?	Result
Poplar Bluff Printing Company <sup>1</sup>	Yes	Limited but continuity of business not affected	Yes	No	Yes	Association
Seattle Renton Lumber Company <sup>2</sup>	No	No	No	No	No	Partnership
Wholesalers Adjustment Company <sup>3</sup>	Yes	Limited	Yes	No	No	Association
Hoffman v. U. S. <sup>4</sup>	Yes	Limited	Yes	No	Probably	Partnership
W. F. Enright <sup>5</sup>	Yes	Limited	No	No	No	Partnership
Waas and Stinson Canning Company <sup>6</sup>	Yes	Yes	No	Yes	Yes	Association
Cincinnati Stamping Company <sup>7</sup>	Yes	Limited but continuity of operation in event of death of "partner"	?	?	?	Association

C. C. A. CASES

DISTRICT AND TAX COURT CASES

- 5. 4 T. C. M. 1102 (1945).
- 6. 4 T. C. M. 1042 (1945).
- 7. 4 T. C. M. 806 (1945).

- 1. 149 F. (2d) 1016 (C. C. A. 8th, 1945).
- 2. 135 F. (2d) 989 (C. C. A. 9th, 1943).
- 3. 88 F. (2d) 156 (C. C. A. 8th, 1937).
- 4. 21 F. (2d) 241 (D. C. Ill. 1927).

	Type of Business	Was Centralized? Control Utilized?	Were Shares Transferable?	Were Efforts Made to Limit Liability Among Partners?	Was Public Appearance that of a Corporation?	Was There Observance of Corporate Ritual?	Result
J. A. Riggs Tractor Company <sup>8</sup>	Dissolved corpora- tion selling and servicing road building ma- chinery	Yes	No. But continuity in event of death provided for	No	No	No	Partner- ship
Glensder Textile Company <sup>9</sup>	"Limited partner- ship" operating textile com- pany	Yes. In general partners	Limited. Continuity in event of death of one of general part- ners especially pro- vided for	Yes as to limited partners but not as to general partners	No	No	Partner- ship
Jordan Creek Placers <sup>10</sup>	Mining "partner- ship"	Yes	Yes	Yes	No	Yes	Associa- tion
P-H Group <sup>11</sup>	Group to invest in stock	No	Not specified	No	No	No	Partner- ship
George Brothers & Company <sup>12</sup>	Group to manufac- ture work clothing	Yes	Limited	No	No	No	Partner- ship
Bardwell, Pritchard & Company <sup>13</sup>	"Partnership" to op- erate grain and feed store	No	Not specified	No	No	No	Partner- ship
E. A. Landreth Company <sup>14</sup>	Investment in min- eral leases	Yes	Not specified	Not specified	Yes	Yes	Associa- tion

12. 41 B. T. A. 287 (1940) (Acq.).

13. 20 B. T. A. 350 (1930).

14. 11 B. T. A. 1 (1928).

8. 6 T. C. 889 (1946) (Acq.).

9. 46 B. T. A. 176 (1942).

10. 43 B. T. A. 131 (1940).

11. 43 B. T. A. 1041 (1941).