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JOINT ADVENTURE - RELATIONSHIP DISTINGUISHED FROM THAT OF EMPLOYER-EMPLOYEE

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JOINT ADVENTURE — RELATIONSHIP DISTINGUISHED FROM THAT OF EMPLOYER-EMPLOYEE — The taxpayer had an arrangement whereby he planned to furnish the Russian Government with shrapnel shells by farming out the various stages of manufacture to several different companies. A Canadian corporation, also having a contract for furnishing shrapnel, made arrangements with the taxpayer whereby the latter cancelled his contract and went in with the Canadian corporation. Under this arrangement the taxpayer was to furnish his manufacturing arrangement, plans, tools, gauges, drawings, etc., and to get fifteen per cent of the profits on the present contract and five per cent of the profits on future contracts of a similar nature. An American corporation was formed to put the plan in effect, the taxpayer being a director and general manager. The principal contract was completed and the goods delivered. Shrapnel on another contract were completed but they exploded before delivery. After much litigation the Canadian court, King's Bench Division, found the Canadian corporation liable to the taxpayer on the first contract, and that it could not set off the loss suffered on the second contract.[1] In an appeal from a finding by the tax board that the taxpayer's profits were "income" within the taxing statute, it was held that the relationship was that of joint adventure, and not that of employer-employee, as contended, and therefore the profits were assessable at the lower figure as "net capital gain," instead of "income." *First Mechanics National Bank of Trenton v. Commissioner of Internal Revenue,* (C. C. A. 3rd, 1937) 91 F. (2d) 275.

The relative synonymy of the relationships of joint adventure and partnership has resulted in the application of partnership law, rules and cases in the evolution of the law of joint adventure.[2] Since the relationship is contractual, the basic inquiry in determining when there is a joint adventure is to ascertain the intent of the parties. When such intention is ambiguous or otherwise

[1] Bird v. Canadian Car & Foundry Co., Ltd., 33 Quebec (K. B.) 166 (1922).

[2] A joint adventure has been defined as a "special combination of two or more persons, where in some specific venture, a profit is jointly sought, without any actual partnership or corporate designation." SCHOULER, PERSONAL PROPERTY, 5th ed., § 167 (a) (1918). It has been defined as a quasi-partnership. Worms v. Lake, 198 App. Div. 776, 191 N. Y. S. 113 (1921). See Mechem, "The Law of Joint Adventures," 15 MINN. L. REV. 644 (1931), in which the author concludes that there is no law of joint adventure, but that joint adventures are merely a particular type of partnership. Practically the same conclusion is reached in 35 MICH. L. REV. 297 (1936).

uncertain the presence or absence of certain objective elements is balanced in order to effect the determination.[3] In partnership law the usual approach is to find there is not a partnership if some other relationship can be found which will adequately give effect to the intentions of the parties; and the same method of decision is usually followed in joint adventure cases.[4] In the principal case the approach of the court seems to be the reverse, with a finding of a joint adventure notwithstanding several missing elements. The general rule is that all parties to a joint adventure should share both the profits and the risks.[5] Although in some cases there is a joint adventure predicated upon little more than a sharing of the profits,[6] the general rule is that other elements must be present.[7] Sharing of losses has been said to be one of the most important tests; [8] however, a number of cases have upheld joint adventures when loss-sharing was absent.[9] It is common knowledge that the employer has control over and directs

[3] 1 ROWLEY, MODERN LAW OF PARTNERSHIP, § 102 (1916); 2 ibid., § 975.

[4] Keep v. Pacific Development Co., 118 Misc. 779, 194 N. Y. S. 605 (1922); Berry v. Hamlin, (Mo. App. 1924) 262 S. W. 464; McFarland v. Gillioz, 327 Mo. 690, 37 S. W. (2d) 911 (1931) (employer-employee); Gottlieb Bros. v. Culbertson's, 152 Wash. 205, 277 P. 447 (1929) (landlord and tenant); Chapman v. Dwyer, (C. C. A. 2d, 1930) 40 F. (2d) 468 (debtor-creditor); Foshay Co. v. Mercantile Trust Co., 175 Minn. 115, 220 N. W. 551 (1928) (debtor-creditor). Cf. Kraemer v. World-Wide Trading Co., 195 App. Div. 305, 187 N. Y. S. 16 (1921), and Allan v. Hargadine-McKittrick Dry Goods Co., 315 Mo. 254, 286 S. W. 16 (1926).

[5] Goodwin v. Camp, (C. C. A. 6th, 1924) 295 F. 785; Domandich v. Doratich, 165 Wash. 315, 5 P. (2d) 310 (1931); Moore v. Williamette Iron & Steel Works, 127 Ore. 134 , 271 P. 49 (1928); Stettauer Bros. v. Carney & Stevens, 20 Kan. 474 (1878); Atlas Realty Co. v. Galt, 153 Md. 586, 139 A. 285 (1927).

[6] Kraemer v. World-Wide Trading Co., 195 App. Div. 305, 187 N. Y. S. 16 (1921); Koehler v. Myers, (C. C. A. 3d, 1927) 21 F. (2d) 596.

[7] Gottlieb Bros. v. Culbertson's, 152 Wash. 205, 277 P. 447 (1929); Atlas Realty Co. v. Galt, 153 Md. 586, 139 A. 285 (1927); Denny v. Guyton, 327 Mo. 1030, 40 S. W. (2d) 562 (1931); Domandich v. Doratich, 165 Wash. 315, 5 P. (2d) 310 (1931). A sharing of profits is essential. Moore v. Williamette Iron & Steel Works, 127 Ore. 134, 271 P. 49 (1928); Hodgman v. Citizens Public Utilities, Inc., 110 Conn. 571, 148 A. 658 (1929). A sharing of losses only would be some type of insurance. The profits must be shared as profits and not as compensation. Goodwin v. Camp, (C. C. A. 6th, 1924) 295 F. 785. It is not necessary that the proportionate sharing in the profits be definitely settled. Simpson v. Richmond Worsted Spinning Co., 128 Me. 22, 145 A. 250 (1929).

[8] Gottlieb Bros. v. Culbertson's, 152 Wash. 205, 277 P. 447 (1929); Domandich v. Doratich, 165 Wash. 315, 5 P. (2d) 310 (1931).

[9] Kraemer v. World-Wide Trading Co., 195 App. Div. 305, 187 N. Y. S. 16 (1921); Keiswetter v. Rubenstein, 235 Mich. 36, 209 N. W. 154 (1926); Koehler v. Myers, (C. C. A. 3d, 1927) 21 F. (2d) 596; Foster v. Callaghan & Co., (D. C. N. Y. 1918) 248 F. 944; Simpson v. Richmond Worsted Spinning Co., 128 Me. 22, 145 A. 250 (1929); Allan v. Hargadine-McKittrich Dry Goods Co., 315 Mo. 254, 286 S. W. 16 (1926). It should be pointed out that there is no real reason why it should be a conclusive test, and furthermore, that, if sharing of losses is considered in an all-inclusive sense, there can often be a sharing of losses in the employer-employee relationship; e.g., if an employee works on a commission he may lose the value of his

the actions of the employee. When both parties have nearly equal power in the determination of the manner in which the business will be consummated, there is strong evidence of a relationship other than employer-employee, viz. joint adventure or partnership.[10] In determining the existence of this power of management or proprietorship, the actual conduct of the parties may be considered, unless the existence of such power is one of the main issues of the case.[11] Here the joint adventure was with a corporation. While there have been decisions that a corporation cannot enter into a partnership,[12] it has been held that a corporation can enter into a joint adventure since the reason for the partnership limitation is missing.[13] The right to an accounting is a common feature of a partnership, and to some extent, of a joint adventure. In the principal case the Canadian court had allowed an accounting, but such a test is of minor value.[14] The taxpayer did not receive a salary, which fact is some evidence of a relationship other than employer-employee, but, of course, it is not too weighty, since commission employments are commonplace.[15] It is submitted that the principal case was rightly decided, for the reasons that there were sufficient elements present for joint adventure and that the employer-employee relationship would not sufficiently give effect to the evident intent of the parties as to the taxpayer's right to direct the manufacture.[16]

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time. Kraemer v. World-Wide Trading Co., 195 App. Div. 305, 187 N. Y. S. 16 (1921). If an employer fails in marketing a marketable patent of the employee's, the latter may lose the value of his patent. Foster v. Callaghan & Co., supra.

[10] Domandich v. Doratich, 165 Wash. 315, 5 P. (2d) 310 (1931); Dempsey Kearns T. & M. Picture Enterprises v. Pontages, 91 Cal. App. 677, 267 P. 550 (1928); Denny v. Guyton, 327 Mo. 1030, 40 S. W. (2d) 562 (1931).

[11] Neville v. D'Oench, 327 Mo. 34, 34 S. W. (2d) 491 (1931).

[12] Mallory v. Hanaur Oil Works, 86 Tenn. 598 (1888). Cf. Mervyn Inv. Co. v. Biber, 184 Cal. 637, 194 P. 1037 (1921).

[13] Kent v. Universal Film Mfg. Co., 200 App. Div. 539, 193 N. Y. S. 838 (1922). See 35 MICH. L. REV. 297 at 304 (1936).

[14] A contractor or an employee who is to get a specified per cent of the profits may be entitled to an accounting. Weldon v. Brown, 84 App. Div. 482, 82 N. Y. S. 1051 (1903); Kent v. Universal Film Mfg. Co., 200 App. Div. 539, 193 N. Y. S. 838 (1922) (dicta).

[15] There may be a joint adventure although one of the parties receives a salary. Elliott v. Murphy Timber Co., 117 Ore. 387, 244 P. 91 (1926).

[16] Griffiths v. Von Herberg, 99 Wash. 235, 169 P. 587 (1917).