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Unwarranted Downgrading of “Partnerships and Partners”

-by Neil E. Harl*

The concepts of partners and partnerships have been firmly established in history from ancient times through the twentieth century but the harsh treatment by the United States Government over the past three or so decades has cast a dark shadow over the time-honored contributions that had become solidly anchored in history.¹ From ancient times, the partnership has been viewed as a conduit-type entity that has provided flexible and effective service in the developing world.²

The Quirad, Mudarabah and Musharakah (joint venture) institutions in Islamic law and economic jurisprudence were the precursors to the modern partnership.³ In Italy, the Commenda appeared in the 10th Century.⁴ In terms of more recent authority, an oral agreement to develop land with one party supplying capital and the other technical know-how could be a partnership.⁵ In more recent times, in a 1978 case, business was transacted under joint names and separate books of account were maintained for their activities. The court found it to be a joint venture and, therefore, a partnership. All of this was before modern developments with S corporations, limited liability companies and limited liability partnerships, for example.

One of the main line dictionaries refers to partnership as “...a company or firm with two or more members who share the risks and profits of the business.”

The targeting of the partnership for a much lesser role in society is surprising. After all, it is not the “partnership” that creates legal problems, it is those few who use the partnership for unacceptable ends. To target partnerships is to pommel a respected entity because of what those individuals pull off. Even with partnerships shackled, those seeking questionable outcomes will find an appropriate model for that activity, with or without the partnership.

The unwarranted moves by the United States Congress, the Department of the Treasury and the Internal Revenue Service

The tide began to turn with the nation-wide concern about “tax sheltering.” The interest in increasing economic activity in the 1960s had led to efforts to speed up economic activity with investment credits and more generous depreciation deductions expected to accomplish those objectives. However, the highly attractive tax rules led to efforts by investors to get in the game by “blind investing” with investors buying livestock without seeing the animals and without much understanding of the procedure.

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The widespread interest in boosting the level of economic activity in the 1960s led to investments by investors to buy and sell livestock (especially cattle) with the encouragement of highly attractive depreciation and investment tax credit rules. For the first few years, the United States Government seemed to accept the development, viewing the phenomenon as part of increased levels of economic growth. However, as time ran on, the political pressure to curb the investment activity became more intense.⁶ A feature of the decade of the 1970s was intensified activity by the U.S. Government to discourage tax sheltering. Much of the resulting pressure was on the tax writing committees, culminating with the enactment of the Tax Equity and Fiscal Responsibility Act of 1982.⁷

Several factors served to elevate the standing of the tax writing committees. The complications resulting from the activity elevated the standing of those committees.

Off the tracks

The tip off came in the enactment of I.R.C. § 7701(a)(2) which broadened the term “partnership and partner” to include “. . . a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on, and which is not . . . a trust or estate or a corporation . . .; and the term ‘partner’ includes a member in such a syndicate group, joint venture, or organization.”⁸ That language effectively disregarded the meaning of those terms under state law, as evidenced by the holding in *Methvin v. Commissioner*.⁹ It was not widely understood, but the term “partnership” essentially lost its identity by that time.

In *Methvin*, a taxpayer had a two to three percent investment in various oil and gas ventures. In Article 14 of the agreement between the taxpayer and the operating entities, the parties to that document elected to exclude their agreement from the application of sub-chapter K of the Internal Revenue Code. That was disregarded by the Internal Revenue Service notwithstanding Article 14 and the taxpayer was required to pay the assessment.

It is clear that state law does not matter inasmuch as any state

provisions are now disregarded. It is also clear that attempts to apply historic state-level precedents in transactions are disregarded and, apparently, common law fares no better.

Source of guidance

With members of Congress openly admitting that they are not capable of mastering federal tax law, and the senior committee, the Joint Committee on Taxation, is in a position to do about as they please,¹⁰ the opportunity to reflect citizen views in tax policy are severely limited. It is not surprising that only a few individuals are in a position where their voices can be heard.

Tax policy is too important to leave it to a committee that seemingly pursues its own agenda.

ENDNOTES

¹ See, e.g., Hillman, “Limited Liability in Historical Perspective,” 54 *Wash. & Lee L. Rev.* 615 (1997); Wheeler v. Comm’r, T.C. Memo. 1978-208; Underwriters Ins. Agency of America v. Comm’r, T.C. Memo. 1980-92. See also 70 Acre Recognition Equipment Partnership v. Comm’r, T.C. Memo. 1996-547.

² See 6 Harl, *Farm Income Tax Manual* § 6.01[1][b] (Matthew Bender 2017 ed.).

³ See Hillman, note 1 *supra*.

⁴ *Id.*

⁵ Wheeler v. Comm’r, T.C. Memo. 1978-208.

⁶ In 1967, the author was asked to serve on a task force in Washington to review the situation and make recommendations.

⁷ Pub. L. No. 97-324, 96 Stat. 324 (1982), adding I.R.C. § 6231(a)(1)(B).

⁸ I.R.C. § 7701(a)(2).

⁹ 2016-1 U.S. Tax Cas. (CCH) ¶50,328 (10th Cir. 2016).

¹⁰ See Harl, “Gross Misunderstanding of the Small Partnership Concept,” *Tax Notes*, Page 1015, Vol. 152, No. 7, August 15, 2016.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

AUTOMATIC STAY. The IRS had withheld tax refunds for 2013 and 2014 after the debtor filed for Chapter 12. The debtor filed suit for recovery of the refunds, damages and attorney fees. The IRS agreed that the withholding of the refunds violated the automatic stay and issued the refunds to the debtor. The debtor then sought to exhaust administrative remedies by filing a claim to two different IRS employees and an attorney at the U.S. Department of Justice. The debtor did not file any claim with the Chief of the Insolvency Unit of the IRS for the Eastern

District of California. The claim has also never been properly served on the IRS. Under I.R.C. §§ 7430(b)(1) and 7433(e)(2)(B)(i), a suit for recovery of attorney’s fees and costs cannot be filed until all administrative appeals have been exhausted. Treas. Reg. § 301.7430-1(e) establishes the administrative remedies that a debtor must exhaust before pursuing attorney’s fees and costs for a violation of the automatic stay under Section 362(k). This regulation requires a party to “file[] an administrative claim for relief from a violation of section 362 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the judicial district in which the bankruptcy petition that is the basis for the asserted automatic stay violation was filed pursuant to §301.7433-2(e) and satisfies the other conditions set forth in §301.7433-2(d).” Treas. Reg. § 301.7433-2(e) and (d) contain more conditions that must be satisfied. Treas. Reg. § 301.7433-2(d) requires a debtor to file