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Capital Gains Treatment of an Interest in Future Profits

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Capital Gains Treatment of an Interest in Future Profits

Pounds, a real estate broker and expert appraiser, assisted Elrod, another broker, in selling land to Gilson. Neither the seller nor Gilson paid a commission to Pounds or Elrod. Instead, Gilson orally agreed to pay each of them twelve and one-half per cent of the net profits from a subsequent sale of the land.[1] Pounds purchased Elrod's interest in the possible future profits for $2,500. The contract written by Gilson subsequent to this transaction recognized that Pounds held no title interest in the land and that the twenty-five per cent of net profits, if and when realized, was in consideration for personal services rendered in arranging the purchase. In 1959 Gilson sold the land in accordance with the agreement and remitted $14,481.14, twenty-five per cent of the net profits, to Pounds. Pounds reported the amount received as a long-term capital gain with a basis of $5,000.[2] The Commissioner interpreted Pounds' gain as ordinary income. Pounds paid the deficiency and brought suit in the federal district court for a refund. He argued, *inter alia*, that the agreement between Gilson and himself constituted a joint venture. After the district court dismissed the action, Pounds appealed to the Fifth Circuit. *Held, affirmed*: The original twelve and one-half per cent interest in the profit is compensation for services rendered and therefore ordinary income, while the twelve and one-half per cent interest acquired by purchase fails as a capital gain for lack of a sale or exchange. *Pounds v. United States*, 372 F.2d 342 (5th Cir. 1967).

I. The Capital Gains Provision

Congress established the capital gains provision in the Revenue Act of 1921 to permit the taxpayer to avoid the high surtaxes imposed on ordinary income under the progressive income tax system. The purpose of Congress was to afford capital gains treatment only in situations typically involving the realization of appreciation in value accrued over a substantial period of time to ameliorate the hardship of taxation of the entire gain in one year.[3] The capital gains provision is an alternative tax computation[4] available only for income derived from the sale or exchange of a capital asset which increased in value. A capital gain is the amount received from the sale or exchange of a capital asset in excess of the cost or other basis of the capital asset. A capital loss exists if the receipts from the sale or exchange of a capital asset are less than its cost at acquisition or other basis. A capital gain or loss is considered long-term if the capital asset was held for more than six months[5] and short-term if held for six months or less.[6]

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[1] It was further agreed that taxes, interest, and other expenses would be paid and recovered by Gilson before net profits would exist.

[2] $2,500 for the purchase of Elrod's interest and an equal amount for his own interest.

[3] Commissioner v. Brown, 380 U.S. 563 (1965); Commissioner v. Gillette Motor Transp., Inc., 364 U.S. 130 (1960); Corn Products Ref. Co. v. Commissioner, 350 U.S. 46 (1955); Burnet v. Harmel, 287 U.S. 103 (1932).

[4] Int. Rev. Code of 1954, § 1201(b) [hereinafter referred to as the Code].

[5] *Id.* §§ 1222(3), (4).

[6] *Id.* §§ 1222(1), (2).

Throughout the forty-six year history of the capital gains provision, the basic requirement that there be a sale or exchange of a capital asset has remained unchanged. Both elements of this requirement, "sale or exchange" and "capital asset," must be present before the reporting of gains and losses as capital gains and losses is permitted.[7] The Internal Revenue Code defines a capital asset as property, but imposes certain enumerated exclusions.[8] The taxpayer's interest qualifies as a capital asset if it does not fall under one of the five listed exclusions and if the subject matter of the transaction meets the court's interpretation of property. Property is a word of very broad meaning, and when used without qualification may reasonably be construed to include obligations, rights, and other intangibles, as well as physical things. Property within the tax laws should not be given a narrow or technical meaning.[9] However, since the capital gains provision is an exception to the usual tax liability, the definition of a capital asset is "narrowly applied and its exclusions interpreted broadly."[10] The term capital asset connotes the investment of money in property, with a resulting appreciation in value accruing over the requisite length of time.[11]

Unlike the lengthy definition of a capital asset, the 1954 Code contains no definition of a sale or exchange. The substance of the transaction and not merely its form must be examined before a determination can be made as to the existence of a valid sale or exchange for capital gains treatment.[12] A sale usually means a transfer of property for cash, its equivalent, or

[7] Grill v. United States, 303 F.2d 922 (Ct. Cl. 1962); Agency of Canadian Car & Foundry Co., 39 T.C. 15 (1962); J. Francis Driscoll, Jr., 37 T.C. 52 (1961); INT. REV. CODE of 1954, §§ 1202, 1222(1), (2), (3), (4); J. MERTENS, FEDERAL INCOME TAXATION § 22.91 (1966).

[8] INT. REV. CODE of 1954, § 1221 (capital asset defined).

> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
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> (1) stock in trade of the taxpayer or other property of a kind which would probably be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;
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> (2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;
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> (3) a copyright, a literary, musical, or artistic composition, or similar property, held by—
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> (A) a taxpayer whose personal efforts created such property, or
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> (B) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property;
>
> (4) accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1); or
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> (5) an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue.

[9] Jones v. Corbyn, 186 F.2d 450 (10th Cir. 1950); Citizens State Bank v. Vidal, 114 F.2d 380 (10th Cir. 1940).

[10] Corn Products Ref. Co. v. Commissioner, 350 U.S. 46, 52 (1955).

[11] Pridemark v. Commissioner, 345 F.2d 35 (4th Cir. 1965); United States v. Woolsey, 326 F.2d 287 (5th Cir. 1964).

[12] Bisbee-Baldwin Corp. v. Tomlinson, 320 F.2d 929 (5th Cir. 1963); Marsan Realty Corp., 32 P-H Tax Ct. Mem. ¶ 63,297 (1963); Martin Weiner, 31 P-H Tax Ct. Mem. ¶ 62,044 (1962); Sidney Weisner, 30 P-H Tax Ct. Mem. ¶ 61,234 (1961); Conrad N. Hilton, 13 T.C. 623 (1949); Wilhelmina Deauth, 42 B.T.A. 1181 (1940).

the transferee's promise to pay cash.[13] An exchange is essentially a barter, differing from a sale in that the consideration received by the transferor consists, at least in part, of property other than cash.[14] The words "sale or exchange" as used in section 1222 and other capital gains sections of the 1954 Code are thus given their normal and ordinary meaning.[15]

II. Rights to Future Profits as Compensation for Services Rendered

A broad area always treated as ordinary income is that of compensation derived from personal services.[16] The compensation, in whatever form received, is measured for tax purposes at its fair market value.[17] If the value is not ascertainable, no income is realized and no tax is imposed when the compensation is received.[18] The compensation is taxed when it is realized, when the transaction becomes closed. Compensation received in the form of a promissory note constitutes a closed transaction, and ordinary income is realized.[19] The discounted value of the note is its ascertainable fair market value. In order for a transaction to be closed and therefore constitute realized ordinary income, the property received can be in the form of cash or a cash equivalent. Although courts generally say that executory contracts are not the equivalent of cash,[20] the contract received by Pounds for his services is freely disposable and not so contingent on uncertain events as to make its value unascertainable. The court in *Pounds* did not discuss whether the interest received by Pounds had an ascertainable value. But it did state that the transaction's character as compensation for services rendered did not change since the transaction merely stayed open until the land was ultimately sold.[21] The court further stated that a real estate agent's ordinary income derived from compensation for personal services in selling land cannot be transmuted into capital gain by

[13] Commissioner v. Brown, 380 U.S. 563 (1965); Jones v. Corbyn, 186 F.2d 450 (10th Cir. 1951); Gruver v. Commissioner, 142 F.2d 363 (4th Cir. 1944); Galvin Hudson, 20 T.C. 734 (1953); J. Mertens, Federal Income Taxation § 22.92 (1966).

[14] " 'Exchange' is a word of precise import, meaning the giving of one thing for another, requiring the transfers to be in kind, and excluding transactions into which money enters either as the consideration or as a basis of measure. . . . The term is almost synonymous with 'barter.' " Trenton Cotton Oil Co. v. Commissioner, 147 F.2d 33, 36 (6th Cir. 1945). *See also* J. Mertens, Federal Income Taxation § 22.92 (1966).

[15] Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247, 249 (1941), "Generally speaking, the language of the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently." *See also* Trenton Cotton Oil Co. v. Commissioner, 147 F.2d 33 (6th Cir. 1945); Hale v. Helvering, 85 F.2d 819 (D.C. Cir. 1936); Louis W. Ray, 18 T.C. 438 (1952), *reasoning aff'd*, 210 F.2d 390 (5th Cir. 1954).

[16] Craig M. Smith, 33 T.C. 465 (1959); David L. Gordon, 29 T.C. 510 (1957); Merton E. Farr, 11 T.C. 552 (1948).

[17] Maxfield v. United States, 152 F.2d 593 (9th Cir. 1945); Whitlow v. Commissioner, 82 F.2d 569 (8th Cir. 1936); Treas. Reg. § 1.61-2(d)(1) (1957).

[18] Burnet v. Logan, 283 U.S. 404 (1931).

[19] Continental Ill. Nat'l Bank & Trust Co. v. United States, 137 F. Supp. 821 (N.D. Ill. 1955); Paul M. Potter, 15 P-H Tax Ct. Mem. ¶ 46,050 (1946).

[20] Bedell v. Commissioner, 30 F.2d 622 (2d Cir. 1929); Harold W. Johnston, 14 T.C. 560 (1950).

[21] Hort v. Commissioner, 313 U.S. 28 (1941); Holt v. Commissioner, 303 F.2d 687 (9th Cir. 1962); David L. Gordon, 29 T.C. 510 (1957); B. Bittker, Federal Income, Estate and Gift Taxation 581 (3d ed. 1964).

measuring its value in terms of possible profits from the sale of the land.[22] The court failed to recognize that there is a difference in compensation measured by the value of future profits and a freely transferable interest in the proceeds which is the compensation. The interest Pounds received for his services rendered was freely transferable (Pounds purchased an identical interest from Elrod), and if its value was fully ascertainable, the court incorrectly held that the transaction remained open.

There is little difference between the contract right actually received by Pounds and the right he would have held if he had received his commission, reported and paid taxes on it, and then invested it in a right to the future, uncertain profits. The courts should properly allow the $2,500 basis because they do not hold the value of interests unascertainable except in extraordinary circumstances.[23] The fact that Pounds paid Elrod $2,500 for an identical interest is support for the conclusion that the value is ascertainable. In addition, the application of the normal commission rate to the purchase price of the land shows that the $2,500 basis is very near the appropriate commission.[24] If so, the taxpayer should have reported and paid taxes on this interest in 1954 when the contract was made. Therefore, in the instant case the taxpayer could claim that the $2,500 was taxable at an earlier year, barred by the statute of limitations, and should not be taxable in the current year.[25] Thus the tax for the current year should be on the excess of the $14,481.14 over $5,000. This excess still will be taxed as ordinary income since, as the court pointed out, no sale or exchange took place.

III. Rights to Future Profits as an Investment

In order for an investment to result in a capital gain, there must be a sale or exchange of a capital asset.

Capital Asset. The courts make a distinction between the future right to *earn* income and the future right to *earned* income.[26] That distinction is the difference between the right to earn an uncertain amount of income (a capital asset) as opposed to the right to an already ascertained amount of earned income (assignment of income).[27] The right to earn an uncertain amount of income becomes a property right owned by the pur-

[22] Pounds v. United States, 372 F.2d 342, 346 (5th Cir. 1967).

[23] Boudreau v. Commissioner, 134 F.2d 360 (5th Cir. 1943); Treas. Reg. § 1.1001-1(a) (1957); Rev. Rul. 402, 1958-2 Cum. Bull. 15.

[24] The purchase price of the land was $102,000. With the normal commission rate of 5 per cent, the commission to be divided by Pounds and Elrod would have been $5,100. Pound's commission would have been $2,550.

[25] Such procedure might not work. *See* Int. Rev. Code of 1954, § 1312(7).

[26] United States v. Dresser Indus. Inc., 324 F.2d 56 (5th Cir. 1963).

[27] The distinction being made between certain or earned income and uncertain income or the right to earn income is the difference between the purchase of something possibly worthless or with a possible increase in value and something the value of which is fixed and definite. The fact that the income would be measured by a fixed percentage of increment of value does not make the right one to earned income. The purchased right could still produce no income if no increase in value occurred even though the percentage is fixed.

chaser[28] with a basis measured by the consideration given.[29] Although in the present case the right to any future income was already earned in the sense that Elrod had already performed his services, the property right that Pounds purchased was in the form of an investment. It was an asset, a right, a property which would produce income. This investment contained the usual risk of capital in that the value of real estate can either increase or decrease appreciably. Pounds could have lost his entire investment of $2,500, or an appreciable gain could result, as actually happened.

Although the courts are inclined to avoid the capital asset question, where permissible,[30] by examining only the sale or exchange question, where the cases do furnish decisions concerning the capital asset question[31] the result is that a naked contract right to future profits will not be held to be a capital asset.[32] It has long been settled that a taxpayer does not bring himself within the capital gains provision merely by fulfilling the simple syllogism that a contract normally constitutes property, that he held a contract, and that his contract does not fall within a specified exclusion.[33] Something more is needed; the questioned property must have more "substance"[34] than a mere contractual right. The recent decisions have indicated that for contractual rights to create capital assets, the taxpayer must either have what might be called an "estate" in,[35] or an "encumbrance"[36] on, or an option to acquire an interest in[37] property which, if itself held, would be a capital asset. Because the court in *Pounds* assumed a capital asset did exist, these cases were never mentioned. They also seem clearly distinguishable from the present fact situation. The naked contract right deemed insufficient to constitute a capital asset is usually held by an original con-

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[28] Assignments of income rights by the earner for cash or property, measured by the then worth of such rights, may not be disregarded, and as respects such earner-assignor, he has elected to anticipate normal realization by assigning or discounting such right. Consideration received by him represents ordinary income realized by him upon the anticipatory assignment of his rights to income. Once such rights to income from property or for services are separated from the earner by his act of assignment, they become property rights owned by the purchaser or assignee with a basis in his hands measured by the consideration paid.
G.C.M. 24849, 1946-1 CUM. BULL. 66, 68.

[29] INT. REV. CODE of 1954, § 1012.

[30] When the courts assume the taxpayer's interest or right to be a capital asset, they ultimately conclude that capital gains are not present by a failure of the transaction constituting a sale or exchange. The same result could undoubtedly be reached by determining whether a capital asset is present or not, illustrating the courts' reluctance to tackle the problem.

[31] Dorman v. United States, 296 F.2d 27 (9th Cir. 1961); Metropolitan Bldg. Co. v. Commissioner, 282 F.2d 592 (9th Cir. 1960); Commissioner v. McCue Bros. & Drummond, Inc., 210 F.2d 752 (2d Cir. 1954); Commissioner v. Ray, 210 F.2d 390 (5th Cir. 1954); Commissioner v. Golonsky, 200 F.2d 72 (3d Cir. 1952).

[32] *See, e.g.*, Commissioner v. Pittston Co., 252 F.2d 344 (2d Cir. 1958).

[33] Commissioner v. Gillette Motor Transp. Inc., 364 U.S. 130 (1960); Commissioner v. Ferrer, 304 F.2d 125 (2d Cir. 1962); Surrey, *Definitional Problems in Capital Gains Taxation*, 69 HARV. L. REV. 985 (1956).

[34] Commissioner v. Pittston Co., 252 F.2d 344 (2d Cir. 1958).

[35] Metropolitan Bldg. Co. v. Commissioner, 282 F.2d 592 (9th Cir. 1960) (release of lessee's entire interest to a sublessee); Commissioner v. McCue Bros. & Drummond, Inc., 210 F.2d 752 (2d Cir. 1954) (a lessee's surrender of his lease to the lessor); Commissioner v. Golonsky, 200 F.2d 72 (3d Cir. 1952) (same).

[36] Commissioner v. Ray, 210 F.2d 390 (5th Cir. 1954) (lessee's relinquishment of right to restrict lessor's renting to another tenant in same business).

[37] Dorman v. United States, 296 F.2d 27 (9th Cir. 1961) (abandonment of option to acquire a partnership interest).

tracting party who is not an investor.[38] Pounds was not an original contracting party, and he was an investor in the future, uncertain profits from the sale of the real estate involved. Pounds invested his capital in the hope that the contract or property right purchased would appreciate in value over the required period of time and result in a gain.[39] The investment aspect of the contract right is the dominant factor, for contract rights acquired by investors, analogous to the rights held by Pounds, are deemed to be capital assets.[40] The classification of this interest as a capital asset becomes more apparent if a third party purchases the interest from Pounds, for then it is held by an investor who is in no manner connected with the original transactions.

In this difficult area many cases[41] do not decide the capital asset question; rather, the courts assume the right to be a capital asset, and then consider only the sale or exchange question. An example of this line of cases analogous factually to *Pounds* is *Jones v. Commissioner*.[42] In this case an assignor had a possible claim for additional compensation against the United States. The United States was being sued by the assignor's general contractor. The assignor assigned his right to any amount subsequently due from this claim in consideration for $10,000 and a promise to pay his income taxes for three previous years. The court held that the consideration to the assignor was ordinary income and any amount received by the assignee above the consideration paid was ordinary income because of a failure to meet the capital gain requirement of a sale or exchange. The court answered the assignee's query as to capital gains treatment by saying that he had "sold nothing."[43] The assignee's interest is analogous to the interest that Pounds purchased from Elrod. The Fifth Circuit in both cases reached the same result by the same method, by disregarding the capital asset question and considering only the sale or exchange question.

Sale or Exchange. The court in *Pounds* concluded that no capital gains transaction occurred concerning the interest purchased from Elrod because of the lack of a sale or exchange. The court stated that the claim or right which Pounds held against Gilson was extinguished or collected, not sold or exchanged. It is unquestionable that a sale or exchange as used in sec-

[38] *E.g.*, in Commissioner v. Pittston Co., 252 F.2d 344 (2d Cir. 1958) the taxpayer held an exclusive contract to purchase coal from a mine. The court in discussing the validity of a capital asset said: "While the contract right here surrendered was 'property' of value it carried with it no direct interest in the mine itself, or in the coal produced until delivery f.o.b. car or truck. It was a naked contract right." *Id.* at 348.

[39] *See* cases and report cited in note 3 *supra*.

[40] In Pat O'Brien, 25 T.C. 376 (1955) petitioner Ryan acquired a contract right to 10 per cent of the profits from a motion picture by selling the story from which the movie was made. Sale of 50 per cent of this interest in the profits resulted in a capital gain. In Pacific Fin. Corp., 12 CCH Tax Ct. Mem. 419 (1953) petitioner bought the right to receive the first $550,000 in profits for $450,000. After receiving $375,000, petitioner sold all his rights for $175,000. The $100,000 gain was held to be taxable at capital gain rates.

[41] *E.g.*, Commissioner v. Pittston Co., 252 F.2d 344 (2d Cir. 1958); Commissioner v. Starr Bros., 204 F.2d 673 (2d Cir. 1953); Pat N. Fahey, 16 T.C. 105 (1951).

[42] 306 F.2d 292 (5th Cir. 1962).

[43] *Id.* at 306.

tion 1222 of the Code comprehends intangible property, including contract rights.[44] But previous cases have held that a taxpayer who collects a debt or claim has extinguished his claim and not sold or exchanged it to the obligor.[45] These courts reason that no property was transferred to the obligor,[46] hence, the other half of the sale or exchange, a receipt of property by the other party to the transaction, is lacking. Therefore, the payment by Gilson to Pounds was a payment of an obligation according to its terms, not a sale or exchange.

If Pounds had sold his interest to a third party, a capital gain undeniably would result even if the purpose of the sale was to avoid a higher tax rate.[47] The court in *Pounds* realized this possibility and stated that the distinction between a sale to a third party and the collection from Gilson may be formalistic, nevertheless the distinction is meaningful because special tax treatment to capital transactions is to facilitate the disposal of appreciated property, and after Gilson sold the land, Pounds no longer had control over the timing of his income realization.

IV. JOINT VENTURE

A joint venture, a modern legal term unknown to the common law,[48] is an association of two or more persons to carry out a single business enterprise for profit.[49] If a joint venture can be established, each joint venturer will have an interest in a joint venture, and the sale or exchange of property held in a joint venture might constitute capital gain or loss. This is true because the Code treats a joint venture as a partnership,[50] and the character of any item of income included in a partner's income will be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.[51] Thus if the land when sold to a third party

[44] Jones v. Corbyn, 186 F.2d 450 (10th Cir. 1950) (cancellation of an exclusive agency contract held a sale of a capital asset).

[45] Fairbanks v. United States, 306 U.S. 436, 437 (1939) ("Payment and discharge of a bond is neither sale nor exchange within the normally accepted meaning of the words"); Hale v. Helvering, 85 F.2d 819 (D.C. Cir. 1936) (settlement of a note for less than full value is not a sale or exchange and does not give rise to a capital loss); Pat N. Fahey, 16 T.C. 105 (1951) (no sale or exchange where an attorney received an assignment of an interest in a fee and, upon settlement of the related litigation, was paid for his part of the fee).

[46] Bingham v. Commissioner, 105 F.2d 971, 972 (2d Cir. 1939); Hale v. Helvering, 85 F.2d 819, 821 (D.C. Cir. 1936).

[47] Conrad N. Hilton, 13 T.C. 623 (1949).

[48] Finney v. Terrell, 276 S.W. 340 (Tex. Civ. App. 1925). At common law an enterprise of a limited character, such as is now called a joint venture, was regarded as within the principles governing partnerships, as an informal kind of partnership, and the courts made no attempt to distinguish the one from the other. Today the distinction is that a partnership is formed for the transaction of a business of a particular kind and character, while a joint venture is related to a single transaction.

[49] J. MERTENS, FEDERAL INCOME TAXATION § 35.05 (1964); 48 C.J.S. *Joint Adventures* § 1 (1947). There is no exact definition of a joint venture, but this is one of several the authorities accept as a general definition. Another general definition is 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. A joint venture is usually, but not necessarily, limited to one transaction, though the business of conducting such a venture to successful termination may continue for a number of years.

[50] INT. REV. CODE of 1954, § 761(a): "For purposes of this subtitle the term 'partnership' includes . . . joint venture, . . ."

[51] *Id.* § 702(b).

was the subject of a joint venture, the gain would be a capital gain both to the "partnership" and to a "partner."

The courts, to determine the existence of a joint venture, consider all the facts and circumstances of the particular situation along with the parties' intent. The basic criteria for determining the existence of a joint venture are: (1) the agreement between the parties, (2) the parties' joint interest, (3) the sharing of profits and losses,[52] (4) the mutual control of the property, and (5) the fiduciary relationship.[53]

Because the existence of a joint venture depends upon the facts and circumstances of the particular situation, the results obtained in the various jurisdictions by applying the concepts of a joint venture are neither consistent nor clear. Another reason the results are inconsistent[54] in the tax court and in the federal courts sitting in tax cases is that these courts look to the state substantive law to determine the rights held by alleged joint venturers.[55] In Texas, the criteria of a joint venture are well recognized[56] and the purchase and resale of real estate, as in *Pounds*, leads to no problem in creating a joint venture if it meets the prerequisites.

In the *Pounds* case, the court interpreted the facts as a normal brokerage transaction concerning real estate. Since the brokers and Gilson entered into an agreement concerning the subsequent sale of the land instead of receiving their normal commissions, the possibility of a joint venture becomes a necessary consideration. The scope of the entire transaction shows that the parties had a community of interest concerning the land because of their joint effort in procuring the purchase of the land and because of the possibility of monetary gain if the land sells for a profit.[57] A long line of cases has established the rule that employment agreements allowing a

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[52] In the *Pounds* case different interpretations of the agreement are possible concerning the sharing of losses. One is that Pounds had not agreed to absorb a share of the loss if the land ultimately sold at a loss. Because joint ventures are generally governed by the law of partnership and under partnership law each partner is to share in the losses *subject to any agreement between the partners*, another interpretation of the agreement is that Pounds and Gilson agreed that Pounds need not share in any loss.

[53] Taubman, *What Constitutes a Joint Venture?*, 41 CORNELL L.Q. 640 (1956).

[54] *Compare, e.g.*, Tate v. Knox, 131 F. Supp. 514 (D. Minn. 1955) (sharing of losses not necessary to the creation of a joint venture) *with* Balestrieri & Co. v. Commissioner, 177 F.2d 867 (9th Cir. 1949) (sharing of losses is an essential element under California law).

[55] Flanders v. United States, 172 F. Supp. 935 (N.D. Cal. 1959); Tate v. Knox, 131 F. Supp. 514 (D. Minn. 1955).

[56] The necessary elements to create a joint venture in Texas are as follows: (1) an agreement, implied or express, Donald v. Phillip, 13 S.W.2d 74 (Tex. Comm'n App. 1929); Gill v. Smith, 233 S.W.2d 223 (Tex. Civ. App. 1950) *error ref. n.r.e.*; (2) a community of interest, Brown v. Cole, 155 Tex. 624, 291 S.W.2d 704 (1956); Mummert v. Stekoll Drilling Co., 352 S.W.2d 526 (Tex. Civ. App. 1956) *error ref. n.r.e.*; (3) a sharing of both profits and losses, Brown v. Cole, *supra*; Mummert v. Stekoll Drilling Co., *supra*; (4) a mutual right to control the subject matter of the enterprise, Brown v. Cole, *supra*; Mummert v. Stekoll Drilling Co., *supra*; (5) a fiduciary relationship, Whatley v. Cato Oil Co., 115 S.W.2d 1205 (Tex. Civ. App. 1938); Warner v. Winn, 145 Tex. 302, 197 S.W.2d 338 (1946); (6) intention—considered in scope of entire agreement, Luling Oil & Gas Co. v. Humble Oil & Ref. Co., 144 Tex. 475, 191 S.W.2d 716 (1945).

[57] Holcombe v. Lorino, 124 Tex. 446, 455, 79 S.W.2d 307, 311 (1935): "The authorities sustain the general rule that there must be a community of interest and participation in the profits."; Brown v. Cole, 155 Tex. 624, 631, 291 S.W.2d 704, 709 (1956): A joint venture "is in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit. . . . For a joint adventure to exist there must be a community of interest both as to the profits and losses, if any. . . . The relationship being in the nature of a partnership, losses must be shared as well as profits." (Citation omitted.).

party to receive a percentage of the net profits of the business for services rendered does not of itself create a joint venture.[58] In these cases the courts reason that the employee has no right to dispose of the interest as a principal in a joint business. The *Pounds* case is distinguishable from the employment cases in that Pounds had an interest freely disposable, exemplified by the act of Pounds' purchasing of Elrod's interest.

All jurisdictions uniformly require joint control over the subject matter of the venture.[59] Because the agreement stated that Pounds had no title interest in the land, he could not control the use or disposition of the land. This control was entirely in the discretion of Gilson. The taxpayer's only control over the subject matter of the joint venture was his control as an expert appraiser in procuring a suitable investment for the joint venture. A possible but invalid interpretation of the case is that Pounds and Gilson had mutual control concerning the purchase of a suitable investment, but after the purchase Pounds relinquished his control to Gilson. Pounds did not procure the second sale, and he had no voice as to when or to whom the land, if at all, would be sold. Thus, Pounds had no control.

This result seems definitely correct despite an early case, *Reid v. Shaffer*,[60] reaching a contrary result on similar facts. In that case, a defendant interested complainant in the acquisition of a leasehold. Complainant agreed to pay the price demanded, and he and the defendant entered into a contract providing that for compensation for his services defendant should receive a percentage of the expected profits of the transaction.[61] The court held that the enterprise was a joint venture on the basis of profits since what Reid, the defendant, was to receive "was not 'commissions,' as upon an agency, or 'compensation' for services rendered, whatever the contract says . . . ."[62] The court uses the phrase, "on the basis of profits,"[63] when referring to the character of the joint venture. This is the character of the joint venture in the *Pounds* case. But it seems unsound to say such an enterprise can exist because profits are always sought. Control of the subject matter of the venture must encompass something tangible rather than mere profits. No such control was present in either case.

The control prerequisite lacking in *Pounds* is caused by Gilson's reluctance to give Pounds an interest in the land. A joint venture could have

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[58] Friedlander v. Hillcoat, 14 S.W. 786, 788 (Tex. Comm'n App. 1890): "Where the interest in the profits arises from the fact that they are looked to as a fund affording compensation for the services of the person engaged in the business, and not as property to which he has a right, by reason of his being a part owner of the principal, he is in such case not a partner."; Austin Bldg. Co. v. National Union Fire Ins. Co., 403 S.W.2d 499, 504 (Tex. Civ. App. 1966) *error ref. n.r.e.*: "Earlier our Supreme Court held that to constitute a joint adventure the sharing must be by virtue of right as principal in the joint business, not as mere compensation for services."; McCord v. Fort Worth Nat'l Bank, 275 S.W.2d 717, 719 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[59] In Texas a leading case is C.C. Roddy, Inc. v. Carlisle, 391 S.W.2d 765 (Tex. Civ. App. 1965) *error ref. n.r.e.*

[60] 249 F. 553 (6th Cir. 1918).

[61] The complainant purchased the leasehold from the owner and then sublet the premises back to the original owner. Complainant was first to recover the purchase price through payments of rent from the sublessee, and then defendant was entitled to a percentage of any subsequent "profits" by virtue of the rent payments.

[62] 249 F. at 561.

[63] *Id.*