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Multiple Corporations - Exclusive Business Locations - Real Estate Developments

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Assuming the "surreptitious" character of the interrogation, the soundness of the *Massiah* decision, on its facts, is probably beyond question. Judicial condemnation of surreptitious interrogations seems justified due to the latent dangers therein. However, it seems indisputable that *Massiah* is not the ultimate application of the sixth amendment and that such an application may be imminent,[32] a fact equally as portentous for state judiciaries and law enforcement agencies as for the federal counterparts.[33]

Frank W. Hill

Multiple Corporations — Exclusive Business Locations — Real Estate Developments

A major concern of community planners is to provide the rapidly expanding suburban residential areas with adequate community center facilities.[1] For this reason, plans for new developments now include provisions for schools, churches, parks and shopping centers.[2] The developers of these integrated areas ordinarily carry on their activities through multiple corporations to obtain certain economic advantages. The tenants in the shopping center area of the projects customarily require restrictive covenants in their leases to insure exclusive business locations. Both multiple incorporation and restrictive covenants are economically desirable to the parties concerned, but under the federal income tax laws and the Texas antitrust law careful planning is required in order to achieve both results in a single project.

I. The Use of Multiple Corporations

A. *Organization*

There are two basic patterns of multiple incorporation which are available for development projects—horizontal and vertical.[3] In a horizontal pattern the tract to be developed is divided into sections, and a separate corporation is established to conduct the entire de-

announced . . . they are not controlling." *Id.* at 492. (Emphasis added.) It seems that the Court has left the door open to overruling *Crooker* in the near future.

[32] See note 28 *supra* and accompanying text.

[33] See Gideon v. Wainwright, 372 U.S. 335 (1963), noted in 18 Sw. L.J. 284 (1964).

[1] Haskell, *Shopping Center as the "Nucleus,"* Architectural Forum, June 1963, p. 142.

[2] See Kroger Co. v. J. Weingarten, Inc., 380 S.W.2d 145, 147 (Tex. Civ. App. 1964) *error ref. n.r.e.;* Casey, Real Estate Desk Book 233 (1961).

[3] Driscoll, *Incorporating in Multi-Corporate Form, an Existing Business,* N.Y.U. 16th Inst. on Fed. Tax 243 (1958).

velopment process on each section.[4] In this type of organization each individual corporation holds title to and controls the operations of its particular section of the subdivision.[5] In a vertical arrangement, the entire development process is one operation, and each corporation performs a separate function for the integrated development.[6] The most common types of corporations used in a vertical pattern are the construction corporation, the equipment-rental corporation, the title-holding corporation, the sales corporation and the financing corporation.[7]

B. *Advantages Of Multiple Corporations*

Multiple incorporation in real estate developments is a method used by developers to obtain advantages not available to those operating with other organizational forms. These advantages are usually considered in two categories (tax advantages and non-tax advantages), but it should be borne in mind that in the area of real estate developments the two are inseparably intertwined.

1. *Tax Advantages* Although the Revenue Act of 1964[8] reduced the attractions of using multiple corporations, certain advantages still exist.[9] If a developer operates through several corporations he may obtain tax benefits by (1) dividing income among several taxable entities, (2) obtaining additional credits and exemptions and (3) gaining preferential tax treatment (*e.g.*, long-term captial gains as opposed to ordinary income).[10]

The most important benefit is the allowance of an additional surtax exemption for each corporation.[11] Under the 1964 Act, each corporation is taxed at only twenty-two per cent for the first $25,000 of taxable income; above this amount, however, a surtax of twenty-six per cent is added, making the total tax forty-eight per cent. The use of multiple corporations provides more surtax exemptions, resulting in greater tax savings. Even if the multiple corporate structure constitutes a controlled group[12] and the taxpayer therefore is forced to

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[4] *Id.* at 258.

[5] Balter, *Selected Tax Aspects of Residential Developments—From the Investor's Point of View*, 38 Taxes 683 (1960).

[6] *Id* at 693.

[7] *Ibid.*

[8] Revenue Act of 1964, § 121, 78 Stat. 19, amending Int. Rev. Code of 1954, § 11.

[9] Maier, *Use of Multiple Corporations Under the 1964 Revenue Act*, 42 Taxes 565 (1964).

[10] Convery, *Residential Developments: Multiple Corporations, Allocations, Administration*, N.Y.U. 14th Inst. on Fed. Tax 189 (1956). See notes 18-20 *infra* and accompanying text.

[11] Int. Rev. Code of 1954, § 11(d).

[12] Int. Rev. Code of 1954, § 1563(a)(1) defines a parent-subsidiary controlled group as one or more chains of corporations connected through stock ownership with a common

pay a penalty tax of six per cent if he desires the additional exemptions,[13] a tax advantage still may exist.[14]

Another advantage of using multiple corporations results from the accumulated earnings credit of $100,000.[15] This credit allows a corporation to accumulate, free from the accumulated earnings tax, $100,000 in overall earnings and profits regardless of the reason for the accumulation.[16] The accumulated earnings tax, however, is applied to accumulations above $100,000 if retained for some reason other than the reasonable needs of the business.[17] In a real estate development, if one corporation performed the entire operation it well might accumulate much more than $100,000, causing the credit to be of little value; multiple corporations, however, created for only limited purposes, might each accumulate $100,000 during their existence, thereby making the credit very beneficial.

By completely liquidating a corporation after it has served its purpose, it is possible under section 331(a)(1) of the code[18] to secure capital-gains treatment for realized[19] earnings and profits upon distributions to the shareholders. The use of multiple corporations makes this provision especially advantageous. In a real estate development, a building corporation, for example, may complete construction of the homes long before they are all sold by the sales corporation. By liquidating the construction corporation after it has fulfilled the purpose for which it was created and has realized a substantial portion[20]

parent, if the parent has eighty per cent of the voting power in the other corporations or eighty per cent of the voting power is in one or more of the other corporations. Int. Rev. Code of 1954, § 1563(a)(2) defines a brother-sister controlled group as one in which eighty per cent of two or more corporations is owned by any one individual, estate or trust.

[13] Int. Rev. Code of 1954, 1562(b).

[14] In this situation, the controlled group has the option of dividing a single $25,000 surtax exemption or electing separate $25,000 exemptions at the cost of a 6% penalty tax on the first $25,000 of taxable income. It is not favorable to elect the multiple surtax exemptions if the total taxable income of the group not subject to surtax by the making of the election is less than $32,000. CCH 51 Stand. Fed. Tax. Rep. 158 (1964). Above this amount, however, tax savings will exist if the penalty tax is paid because it amounts to $1,500 per year (6% of $25,000) while the additional surtax exemption is worth $6,500. Maier, *supra* note 9, at 568.

[15] Int. Rev. Code of 1954, § 535(c).

[16] Driscoll, *supra* note 3, at 245.

[17] Int. Rev. Code of 1954, § 531 imposes a tax on the accumulated taxable income of corporations which, under Int. Rev. Code of 1954, § 532, are formed for the purpose of avoiding the income tax by permitting earnings and profits to accumulate instead of being divided or distributed. Int. Rev. Code of 1954, § 533 provides that accumulation beyond the reasonable needs of the business shall be determinative of the purpose to avoid the income tax unless the corporation, by the preponderance of the evidence, shall prove to the contrary.

[18] Int. Rev. Code of 1954, § 331(a)(1).

[19] The requirement of realization is very important to avoid having the corporation treated as collapsible, under Int. Rev. Code of 1954, § 341, and having the income taxed at ordinary rates. See Bittker, Federal Income, Estate and Gift Taxation 687 (3d ed. 1964).

[20] Corporations are taken out of collapsible status if a substantial part of the taxable

of the taxable income, if any, to be derived from the construction of the homes, the shareholders may obtain an early return on their investment at capital gains rates; whereas, if only one corporation were conducting the entire operation, an attempt to obtain the same results would involve a risk of having the distributions made upon partial liquidation treated as dividends,[21] or else the shareholders must wait for the completion of the whole project to receive their profits.

2. *Non-Tax Advantages* Multiple incorporation in real estate developments provides certain non-tax advantages, viz: limited liability, investment flexibility, easier financing and more efficient management.[22] A developer, by using multiple corporations, may be able to contain liability within the various steps of the development process or sections of the subdivision, thereby avoiding a general claim against the entire project.[23] The use of multiple corporations also may make the development more attractive to investors by allowing them to segregate their interests in various phases of the process or vary them in several phases as desired to insure the greatest profits.[24] In addition, the use of multiple entities may increase the over-all borrowing capacity of the project because of the limitation of the risk of individual investors.[25] The use of multiple corporations allows the management of the individual corporations to remain in closer contact with the development operations of their companies.[26] This provides for more rapid disposal of minor problems that may arise, and better employer-employee relations.[27] Also, a separately identified employer on each phase of the project simplifies the procedure for negotiating with the various labor and craft unions.[28]

C. *Dangers Of Multiple Corporations*

A separate corporation, to be recognized as such for tax treatment, must be a viable business entity; that is, it must have been formed

income to be derived from the property produced is realized. This probably means one third or more. Commissioner v. Kelley, 293 F.2d 904 (5th Cir. 1961); E. J. Zongker, 39 T.C. 1046 (1963). However, it has been held that "substantial part" refers to the amount to be realized, and not to the amount already realized. Abbott v. Commissioner, 258 F.2d 537 (3d Cir. 1958); Rev. Rul. 62-12, 1962-1 Cum. Bull. 321. See generally Bittker, Federal Income Taxation of Corporations and Shareholders 306 (1959).

[21] See Int. Rev. Code of 1954, § 316(a); Bittker, Federal Income, Estate and Gift Taxation 647 (3d ed. 1964).

[22] Balter, *supra* note 5, at 692; Convery, *supra* note 10 at 190.

[23] Convery *supra* note 10, at 190.

[24] *Ibid.*

[25] Balter, *supra* note 5, at 693.

[26] The ultimate authority, however, will remain in the developer who will oversee and coordinate the entire project.

[27] Convery *supra* note 10, at 191.

[28] See Pre-Mixed Concrete, Inc., 21 CCH Tax Ct. Mem. 1601 (1962).

for a substantial business purpose.[29] Substantial business purpose is synonymous with a *non-tax* advantage of multiple incorporation, and for the courts to observe the distinctions of the corporate entities, one of these business purposes or non-tax advantages must be the principal reason for their use.[30] The courts do not consider the reduction of taxes a valid business purpose.[31] The non-tax advantages listed above are important to a developer, but in tax cases involving subdivisions, the courts often declare tax avoidance to be the controlling objective for the use of multiple corporations,[32] and disregard the non-tax reasons.[33]

If tax evasion is the suspected purpose for a developer's use of multiple corporations, the Commissioner of Internal Revenue has available certain weapons with which he can attack the scheme.[34] Section 61 (a) of the Internal Revenue Code of 1954 codifies the basic tax principle "that income is taxable to the one who earns it."[35] The Commissioner may use this section to tax the aggregate income of a multiple corporate group to one corporation or individual if he finds the corporate structure is a mere "sham" and that the corporation or individual to which the tax is applied actually performed all of the activities and assumed all of the risks.[36] Section 482 of the Code[37] gives the Commissioner the power to allocate income, deductions, credits or allowances among commonly owned or controlled corporations to prevent tax evasion or to reflect clearly the true taxable income[38] of

[29] Aldon Homes, Inc., 33 T.C. 582 (1959). Whether or not a particular business purpose is to be considered a substantial business purpose by the tax authorities and the courts is a question of fact in each case and not one of law. Sno-Frost Inc., 31 T.C. 1058 (1959).

[30] See Turner-Moore No. 22 v. United States, 60-2 U.S. Tax Cas. ¶ 9675 (W.D. Tex. 1960); Pre-Mixed Concrete, Inc., 21 CCH Tax Ct. Mem. 1601 (1962).

[31] National Carbide Corp. v. Commissioner, 336 U.S. 422 (1949); National Investor's Corp. v. Hoey, 144 F.2d 466 (2d Cir. 1944); Aldon Homes, Inc., 33 T.C. 582 (1959).

[32] *But see* notes 45-48 *infra* and accompanying text.

[33] In Aldon Homes, Inc., 33 T.C. 582 (1959), the court stated that the existence of liability insurance and workmen's compensation laws negatived limited liability as a substantial business purpose. In Shaw Construction Co. v. Commissioner, 323 F.2d 316 (9th Cir. 1963), the court refused to consider the facilitation of handling mechanics liens as a valid reason for using multiple corporations. See also James Realty Co. v. United States, 280 F.2d 394 (8th Cir. 1960); Kessmar Construction Co., 39 T.C. 778 (1963).

[34] Bittker, Federal Income, Estate and Gift Taxation 427 (3d ed. 1964).

[35] Teschner v. Commissioner, 38 T.C. 1003, 1005 (1962).

[36] In Shaw Construction Co. v. Commissioner, 323 F.2d 316 (9th Cir. 1963), the court stated: "Whether the multiple corporations were unreal shams, serving no real business purpose and earning no income . . . are issues of fact." *Id.* at 321. In deciding the fact issues the court looks to whether or not the paper corporations actually performed the tasks alleged, and were entitled to the income attributed to them.

[37] Int. Rev. Code of 1954, § 482. "The purpose of said statute is to prevent the evasion of taxes by the shifting of profits, the making of fictitious sales, and other methods customarily used to 'milk' a taxable entity." Hamburger's York Road, Inc., 41 T.C. 821, 833 (1964).

[38] True taxable income is that which the taxpayer would have received had he dealt with the other corporations at arm's length. Maier, *supra* note 9, at 576.

each corporation. The Commissioner exercises broad discretion in applying this section, and his decision will be sustained unless the taxpayer establishes that the Commissioner has abused his discretion.[39] Under sections 269 and 1551,[40] the Commissioner is given the power to deny exemptions and credits to a taxpayer who, under section 269, has acquired a corporation for the principal purpose[41] of tax avoidance,[42] or who has, under section 1551, transferred property (other than money) to a corporation which was previously inactive or was created to receive the property[43] unless the transferee corporation establishes by the clear preponderance of the evidence that securing of exemptions was not a major purpose of the transfer.[44]

In the cases where the taxpayer has successfully defended his operation of a business through multiple corporations, the non-tax advantages for the divisions have been fortified by geographical or functional separations among the corporations.[45] However, the geo-

[39] Hamburger's York Road, Inc., 41 T.C. 821 (1964).

[40] Int. Rev. Code of 1954, §§ 269, 1551.

[41] "Principal purpose is the primary single most important purpose, not merely one of several purposes." Golden, *Multiple Incorporation and Multiple Surtax Exemptions*, 26 Ga. B.J. 385, 388 (1964).

[42] Int. Rev. Code of 1954, § 269 was designed to combat the acquisition of dormant corporations that had suffered a series of business losses. The loss carryforward of such "loss" corporations was utilized by transferring a profitable enterprise to a "loss" corporation or by merging a loss corporation with a profitable corporation. In 1954, Congress attempted to fortify section 269 by enacting Int. Rev. Code of 1954, §§ 382(a) and (b) which reduce the loss carryover when there is a change of ownership of a corporation, or a corporate reorganization with the original shareholders acquiring less than 20% of the resulting corporation. Bittker, Federal Income, Estate and Gift Taxation 428 (3d ed. 1964).

[43] Int. Rev. Code of 1954, § 1551 could be used to deny a developer a surtax exemption or an accumulated earnings credit if he should, for example, activate a previously existing but dormant corporation or create a new corporation and transfer construction equipment to the activated or newly created corporation if obtaining such exemptions or credits was a major reason for the developer's actions.

[44] Esrenco Truck Co., 22 CCH Tax Ct. Mem. 287 (1963); Pre-Mixed Concrete, Inc., 21 CCH Tax Ct. Mem. 1601 (1962).

[45] *Geographical Separations:* In Stater Bros., Inc., 21 CCH Tax Ct. Mem. 780 (1962), the formation of a separate corporation for each supermarket owned by taxpayers in different localities was upheld. The reasons stated for the use of multiple corporations were to limit the personal liability of the taxpayers and to preserve the concept of each market venture as a separate entity. In Turner-Moore No. 22 v. United States, 60-2 U.S. Tax Cas. ¶ 9675 (W.D. Tex. 1960), the use of a separate corporation for each of twenty-four service stations located in different areas operated by taxpayers was allowed with the principle purposes for the formation of the multiple corporations being to limit present and future personal liabilities of the taxpayers, to protect the assets of each corporation from the liabilities of the other corporations and to protect the businesses against possible losses in gasoline price wars.

Functional Separations: In Esrenco Truck Co., 22 CCH Tax Ct. Mem. 287 (1963), the taxpayer was permitted to separate his trucking operation from his principal business of rendering dead poultry into meal and fats to immunize the trucking operation from possible liability of the rendering company resulting from the sale of contaminated products. In Pre-Mixed Concrete, Inc., 21 CCH Tax Ct. Mem. 1601 (1962), it was held that the separation of the manufacturing function from the sales and delivery function was supported by a valid business purpose, viz., to guard against union attempts to organize the trucking operation and to prevent a strike in one operation from causing taxpayer to cease production completely.

graphical division apparently would not be applicable to real estate developments because the distances separating the corporations in the cases upholding this method of multiple incorporation have been much greater than would be possible in a single real estate subdivision.[46] Thus, functional separation seems to be the only practical justification for multiple incorporation in real estate developments that will be acceptable to the Revenue Service. If (1) each corporation performs a substantially different function (*e.g.*, the divisions are made along traditional business lines such as the separation of a construction corporation from a sales corporation), (2) each corporation is an independent income producing entity and (3) each corporation deals with the others at arm's length, multiple incorporation in a real estate development might be allowed for tax purposes,[47] provided that the taxpayer himself observes the corporate formalities and the integrity of the functional separations.[48]

D. *Disadvantages Of Multiple Corporations*

Multiple incorporation, however, is not without disadvantages. Administrative complications of observing corporate separations and additional bookkeeping and accounting procedures tend to increase the costs of operation.[49] From a tax standpoint, the inability to set the losses of one corporation off against the gains of another lessens the desirability of using multiple corporations.[50] Also, if the Commissioner should successfully attack a multiple corporate set-up, the effects might be much worse than if the developer had adopted some other form of organization in the beginning. There could be costs of reorganization, and additional surtaxes and penalties which might have been avoided had there been proper tax planning. Most developers believe, however, that these disadvantages are far outweighed by the advantages and are willing to suffer them to obtain the benefits available for using multiple corporations in real estate developments.[51]

II. Restrictive Covenants in Shopping Center Leases

The use of restrictive covenants in shopping center leases has be-

[46] See Stater Bros., Inc., *supra* note 45; Turner-Moore No. 22 v. United States, *supra* note 45. See also Concord Supply Corp. v. Commissioner, 37 T.C. 919 (1962), in which separate incorporation of adjoining warehouses was disallowed.

[47] Casey, *op. cit. supra* note 2, at 254.

[48] "[B]e sure that each corporation keeps separate records and, if possible, separate personnel, in order to show that they are operating independently and are not diverting income to each other." Casey, *op. cit. supra* note 2, at 254.

[49] Driscoll, *supra* note 3, at 253.

[50] *Id.* at 254.

[51] Maier, *supra* note 9, at 568.

come increasingly popular with the development of integrated residential and business communities.[52] A controlled business area provides numerous advantages for both the lessor and the lessee. To the lessor, a properly restricted area can mean higher rentals, long term leases and a better class of tenant.[53] To the lessee, an exclusive location provides lessened competition and a corresponding increase in profits. The main interest of a developer in an integrated development is the sale of homes in the residential area. To make this product more attractive, the developer is desirous of obtaining well-recognized businesses for the shopping center facilities. Restrictive covenants will provide these mutual benefits, but, in Texas, there are serious problems encountered in attempting to obtain them.

III. Antitrust Law and Restrictive Covenants

In *Kroger Co. v. J. Weingarten, Inc.*,[54] Frank Sharp, a real estate developer, organized two corporations on a *horizontal* basis to develop Oak Forest Addition to the City of Houston, Texas. One of the corporations was created to develop a shopping center tract, and the other primarily to develop the residential portions of the addition. Sharp wholly owned the shopping center corporation, but the other was held in two irrevocable trusts for Sharp's daughters. The trust corporation leased to Weingarten a tract of land upon which Weingarten built a supermarket. The lease contained covenants restricting the trust corporation from leasing or selling, for purposes similar to Weingarten's, any land owned or later to be acquired[55] by it within a prescribed area,[56] for the duration of the lease. A memorandum of the lease and a separate restrictive agreement were filed for record. The separate agreement was signed by Sharp and the two corporations, and restricted all of the land then owned or later to be acquired by any of the three within the area restricted by the lease. Subsequently, Kroger obtained land within the area from the trust corporation and made plans to construct a competing supermarket. Weingarten brought this suit to enforce the covenants and to restrain Kroger from carrying out its plans to build. The court held that the

[52] Note, 34 N.Y.U.L. Rev. 940 (1959).

[53] South Buffalo Stores, Inc. v. M.T. Grant Co., 153 Misc. 76, 274 N.Y. Supp. 549 (Sup. Ct. 1934).

[54] 380 S.W.2d 145 (Tex. Civ. App. 1964) *error ref. n.r.e.*

[55] If land is validly restricted, the restrictons will extend to land later acquired by the covenantor, if such is part of the agreement. Gordon v. Hoencke, 253 S.W. 629 (Tex. Civ. App. 1923).

[56] The area restricted was a circle with a radius of two miles extending from the center of the Weingarten tract. It was estimated at the trial that the circle covered approximately thirteen square miles and contained 40,000 people.

restrictive covenants contained in the three instruments were part of the same agreement to place restrictions upon the land in the prescribed area. This constituted a restraint upon competition violating the antitrust law of Texas, and rendered the entire agreement void and unenforceable.

It is recognized that parties are entitled to a degree of freedom in contracting to protect their own economic interests.[57] At common law, covenants restricting competition are upheld unless they comprise unreasonable restraint.[58] The test used in determining the reasonableness of a given set of restrictions consists of weighing the protection required by the lessee against the harm to the public which might result from excessive restrictions.[59] Under federal law, restrictive agreements are allowed unless they substantially lessen competition or tend to create a monopoly.[60] In Texas, the antitrust law prohibits all agreements in restraint of competition.[61] The courts, however, have engrafted exceptions upon this rule which allow restraint in certain specific instances.[62] In the principal case, Weingarten sought to bring

[57] Note, 34 N.Y.U.L. Rev. 940 1959).

[58] The rule allowing reasonable restraints upon trade is the common law rule. The Missouri court of appeals in Angelica Jacket Co. v. Angelica, 98 S.W. 805, 811 (Mo. Ct. App. 1906), in a quote from 2 High, Injunctions § 1167 (4th ed. 1905), stated: ". . . the third, and what may be considered the existing state of the law, as deduced from the latest English and American authorities, is that which recognizes and enforces covenants of this nature, even though the restraint is general throughout an entire state or country, provided it is founded upon a sufficient consideration and is not unreasonable in view of the nature and extent of the business of the covenantee."

[59] See, *e.g.*, Goldberg v. Tri-States Theatre Corp., 126 F.2d 26 (8th Cir. 1942).

[60] Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1964). See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Standard Oil Co. v. United States, 337 U.S. 293 (1949). "In determining whether there has been a substantial lessening of competition 'it is not necessary to show the actual impact which a . . . contract has on competition, but . . . it is sufficient if it possesses the potentiality to impede a substantial amount of competitive activity.' " Mytinger & Casselberry, Inc. v. FTC, 301 F.2d 534 (D.C. Cir. 1962).

[61] Tex. Rev. Civ. Stat. Ann. art. 7426 (1960):

> A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following reasons:
>
> 1. . . . to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.
>
> 2. . . .
>
> 3. To prevent or lessen competition in the . . . sale or purchase of merchandise, produce, or commodities. . . .

Tex. Rev. Civ. Stat. Ann. art. 7437 (1960): "Any contract or agreement in violation of any provision of this subdivision shall be absolutely void and not enforcible either in law or in equity."

[62] The exceptions to the antitrust law allowed by the Texas courts are: (1) when an agent is restricted from dealing for himself or representing others, Welch v. Phelps & Bigelow Windmill Co., 89 Tex. 653, 36 S.W. 71 (1896); (2) when, in the sale of a business, the seller agrees not to compete with the purchaser of the business, Gates v. Hooper, 90 Tex. 563, 39 S.W. 1079 (1897); Queen Insurance Co. v. State, 86 Tex. 250, 24 S.W. 397 (1893); (3) when an exclusive right or privilege is granted upon the property of the grantor, Ft. Worth & D.C. Ry. v. State, 99 Tex. 34, 87 S.W. 111 (1904); (4) when a lessor restricts other land owned by him if the restrictions are incidental to a lawful lease. Schnitzer v. Southwest Shoe Corp., 364 S.W. 373 (Tex. 1963); Celli & Del Papa

the restrictive covenants within one of these exceptions, viz.: that a person who has a property interest in land[63] may validly restrict other land owned by him if such restrictions are incident to a lawful lease.[64] The court, however, refused to treat the lessor trust corporation as the alter ego of Sharp,[65] and concluded, therefore, that since Sharp had no property interest in the land leased, the agreement signed by Sharp and the two corporations was in violation of the antitrust law and did not qualify for the exception alleged.[66]

In *Schnitzer v. Southwest Shoe Corp.*,[67] the Texas Supreme Court said: "Outside of the exceptional situations . . . we have rejected appeals for a 'reasonable' relaxation of the anti-trust statutes."[68] The Texas courts have consistently adhered to the doctrine that an agreement in restraint of trade, if it does not fall within one of the special exceptions, is invalid regardless of whether or not it is reasonable.[69] This definitely is a harsh rule, and is contrary to both the common law rule and the federal law allowing reasonable restraint.[70]

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v. Galveston Brewing Co., 227 S.W. 941 (Tex. Comm. App. 1921). It should be noted that a rule of reason is used in applying these exceptions. See Moody & Wallace, *Texas Antitrust Laws and Their Enforcement—Comparison With Federal Antitrust Laws*, 11 Sw. L.J. 1 (1957).

[63] Cilli & Del Papa v. Galveston Brewing Co., 227 S.W. 941 (Tex. Comm. App. 1921), states that the interest necessary to validly restrict land under this exception to the antitrust law is that of an owner, lessor or one who has control of the property to which the restrictive agreement has reference.

[64] Schnitzer v. Southwest Shoe Corp., 364 S.W.2d 373 (Tex. 1963); Celli & Del Papa v. Galveston Brewing Co., 227 S.W. 941 (Tex. Comm. App. 1921).

[65] The court reasoned that, because the trusts were irrevocable, the trust corporation was removed completely from Sharp's control. This holding appears justified even though Sharp's bank was the trustee because the courts require only that the parties to a conspiracy are capable of competing with each other, not that they actually compete. See Fairbanks-Morse & Co., 246 S.W.2d 647 (Tex. Civ. App. 1951) *error ref. n.r.e.;* Padgitt v. Lone Star Gas Co., 213 S.W.2d 133 (Tex. Civ. App. 1948). On rehearing the court did hold that the wholly owned corporation was the alter ego of Sharp because he had absolute control over it, but it refused to do the same for the trust corporation. Kroger Co. v. J. Weingarten, Inc., 380 S.W.2d 145 (Tex. Civ. App. 1964) *error ref. n.r.e.*

[66] The court also refused to sever the invalid separate agreement from the lease which would have been valid if standing alone. The court concluded, however, that the two instruments were pursuant to the same agreement and were thereby void under the terms of Tex. Rev. Civ. Stat. Ann. art. 7437 (1960), which renders *agreements* in violation of the antitrust law absolutely void. See Patrizi v. McAninch, 153 Tex. 389, 269 S.W.2d 343 (1954); Wegner Bros. v. Biering & Co., 65 Tex. 506 (1886).

[67] 364 S.W.2d 373 (Tex. 1963). In this case, the supreme court, confronted with a fact situation similar to that of the principal case, held that the alleged exception to the antitrust law would be allowed only when the agreements "are collateral or incidental to a lawful lease of the premises in which the lessor or grantor has a property interest." *Id.* at 375.

[68] *Id.* at 375.

[69] Climatic Air Distrib. of South Texas v. Climatic Air Sales, Inc.; 162 Tex. 273, 345 S.W.2d 702 (1961); Anheuser-Busch Brewing Ass'n v. Houck, 88 Tex. 184, 30 S.W. 869 (1895); Grand Prize Distributing Co. v. Gulf Brewing Co., 267 S.W.2d 906 (Tex. Civ. App. 1954) *error ref.*

[70] See notes 58-60 *supra* and accompanying text.