



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Travis Co.

Dear Sir:

Opinion No. O-2764

Re: Whether or not the stores owned by a partnership and a corporation constitute one chain instead of two chains by virtue of the same group of persons controlling both concerns; and whether or not a husband is deemed to control the shares of stock owned by his wife.

This is in answer to your request for our opinion on whether or not under the fact situation you give, the stores operated by "the X grocery chain" and the stores operated by "the Y grocery chain" constitute one chain or two chains. According to the facts that you have given us in your letter and in our subsequent conference with you, "the X grocery chain" is a partnership (hereinafter called "partnership X") that operates several grocery stores, and said partnership is owned by five persons, divided as follows:

A owns 47.15% of the partnership;
B owns 27.26% of the partnership;
C owns 16.99% of the partnership;
D owns 5.40% of the partnership;
E owns 3.18% of the partnership;

The information you give shows that "the Y grocery chain" is a corporation (hereinafter called "corporation Y") that operates several grocery stores, and said corporation has

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1300 outstanding shares, owned in part as follows:

A owns 103 shares;
A's wife owns 308 shares;
C owns 104 shares.

The remaining shares in "corporation Y" are divided among a large number of other persons, none of said other persons owning more than a few shares each.

According to the information you have given us, the parties in said "partnership X" have a vote and voice in the control of the partnership in proportion to their interest. We presume that such is the case by virtue of a partnership agreement.

You state that A and C are the same persons in both "partnership X" and "corporation Y."

In determining whether the stores operated by "partnership X" and those operated by "corporation Y" constitute one chain or two separate chains, we must decide whether or not all of said stores are "ultimately controlled or directed by one management or association of ultimate management." Sections 6 and 7 of the Texas Chain Store Tax Law (House Bill No. 18, Acts 1935, 44th Legislature, 1st Called Session, and which is codified as Article 1111d in Vernon's Annotated Penal Code of Texas) provide as follows:

"Sec. 6. The provisions of this Act shall be construed to apply to every person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management."

"Sec. 7. The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership

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or association, either domestic or foreign, in which goods, wares, or merchandise of any kind are sold, at retail or wholesale."

In the case of H. E. Butt Grocery Co., v. Sheppard, 137 S. W. (2d) 823 (writ of error refused) the Court of Civil Appeals at Austin, held that by virtue of said Sections 6 and 7 if one person owned a majority of the stock in two or more corporations all of the stores operated by said corporations constituted one chain; and the court said:

"Sec. 6 was manifestly intended to prevent large chains of stores, which receive the benefits flowing from such system (considered and enumerated in part by the U. S. Supreme Court in State Board of Tax Comm'rs. v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, 75 A. L. R. 1536, and in Hurt v. Cooper, 130 Tex. 433, 110 S. W. (2d) 896, sustaining the validity of the Act as constituting a reasonable classification), from circumventing the tax burdens imposed under the Act, by organizing separate corporations to operate them, the capital stock of which, or a majority of it, being owned by a parent corporation or holding company, or by an individual or association of individuals. Thus through a common management or control over a number of individual units or corporations the clear purpose of the law would be defeated. * * *

* * * * The ownership by Butt of 83% of the stock in one corporation, and of 75% of the stock in the other, gave him such unified control of both corporations, through such stock ownership, as to bring the stores owned and controlled by such separate corporations under the provisions of the Act; and required that they be treated as one chain for tax purposes. * * *

In this case you have asked about, no one person owns a majority of the stock or interest in both the partnership and the corporation, or even in one of them. A, A's wife, and C, together, own a majority of the stock in "corporation Y"; and A and C, together, own a majority of the

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interest in "partnership X".

In Attorney General's Opinion No. G-400, dated March 10, 1939, we made a holding in language as follows:

"It is our belief that the phrase 'which is * * * controlled * * * by one management or association of ultimate management' in Section 6, and the phrase 'stores * * * controlled by the same copartnership or association' in Section 7, does not mean that the control or management must be in one individual person, but it means what it says, and that is the stores are in the same chain if the control and management is in the same association or copartnership. By the same association or copartnership as used there is meant the same group of people.

"If a group of three men, or any other number, could restrain or govern, or had authority over several stores, having authority over some of the stores by virtue of owning a majority of the stock of the corporation that held the title to those stores, and having authority over the other stores by virtue of being majority owners of the partnership that owned them, then those stores would all be in the same chain just the same as if one individual person controlled all of the stores."

We still adhere to that opinion. We believe it is supported by the recent case of Florida Industrial Commission v. Gary-Lockhart Drug Company, Inc., (Sup. Ct. of Fla.) 196 So. 855, in which it was held that four separate corporations should be considered as one employment unit for tax purposes under the Florida Unemployment Compensation Law by virtue of the fact that the same group of persons owned a majority of the stock in each of the corporations, although no single person owned a majority of the stock in any of said corporations. In that case the court said:

"The ownership of stock in the four corporations, as disclosed by the record, is as follows:

"Perry Corporation:

"Estate of C. W. Gary 49 shares
 "P. O. Lockhart 49 shares
 "Claude W. Gary 1 share
 "Celia J. Gary 1 share
 "(each share of equal value)

"Foley Corporation:
 "Gary Estate 36 shares
 "P. O. Lockhart 37 shares
 "G. C. Scruggs 25 shares
 "Celia J. Gary 1 share
 "(each share of equal value)

"Port St. Joe Corporation:
 "Celia J. Gary 2 shares
 "G. W. Gary 36 shares
 "P. O. Lockhart 37 shares
 "Bernice Lockhart 1 share
 "Unissued 33 shares
 "(each share of equal value)

"Leesburg Corporation:
 "W. J. Taylor 33 shares
 "P. O. Lockhart 33 shares
 "C. W. Gary 34 shares
 "(each share of equal value)"

"No one of the four corporations employs as many as eight people, but considering the four as a single employment unit, eight people or more are employed.

* * *

"It is admitted on the record that a majority of the stock in each of the four corporations is owned by a common interest unit, to-wit, P. O. Lockhart and the Gary Estate. The statute, supra, provides that an employing unit, together with one or more employing units, when owned or controlled directly or indirectly by the same interests, or which owns or controls one or more other employing units, and which, if treated as a single unit with other employing units, or interests, or both, would be an employer. * * * the conclusion is inevitable that the four

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corporations are an employment unit because they are each under the control and ownership of the same interests, to-wit: P. O. Lockhart and Gary Estate. * * *

In this case A and C together have the control of "partnership X" by virtue of together owning 64.14% of the interest in said partnership. As stated above, in this partnership each partner has a vote and voice in the management of the partnership in proportion to his interest.

However, "corporation Y" is not controlled "by the same copartnership or association," to-wit, A and C unless the stock owned by A's wife is deemed in law to be under the control of A. A and C together own 207 shares of stock in said corporation, but there are 1300 outstanding shares. A's wife owns 508 shares of stock in said corporation, and if A is deemed in law as controlling the stock owned by his wife, then A and C control a total of 715 shares, and would thereby together own a majority of the stock and would control said corporation. The answer to this question depends on whether the stock owned by A's wife is the community property of her and her husband or is her separate property.

"The statute (Article 4619, R. C. S.), except for a short time -- from 1913 to 1925 -- has always vested the right of control and disposition of the community property in the husband." 23 Tex. Jur. 107. "Whatever is community property is under the control, management and disposition of the husband alone, whether it be the earnings of both jointly, the earnings of the husband alone, or the earnings of the wife alone." 23 Tex. Jur. 108. The two foregoing sentences are based on Article 4619 of Vernon's Annotated Revised Civil Statutes of Texas, of which Section 1 says:

"Sec. 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by

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the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a femme sole. * * *

In the case of Coleman v. Coleman, 295 S. W. 695, (writ of error refused) the Court of Civil Appeals at San Antonio said:

"* * * The words community property with us are such as relate to property owned in common between the husband and wife, a kind of marital partnership, and by our statutes defined in article 4619, R. S. Of such property, both under the civil law and our statutes pertaining thereto, the husband has always had the control and power of disposition, and his dealings with such has always appeared to be final and conclusive where there are no restrictions. The wife seems to have had only the right of partition upon the termination of the marital rights. * * *"
(Underlining ours)

See also the case of Stone v. Jackson, 109 Tex. 385, 210 S. W. 953, and the text "Law of Marital Rights in Texas, 3rd Ed." by Speer, page 173.

On the other hand the Constitution of Texas (Article XVI, Section 15) provides that a married woman can own separate property, and the statute (Article 4614, R. C. S.) gives the control of the wife's separate property exclusively to the wife. Article 4614 of Vernon's Annotated Revised Civil Statutes of Texas, says:

"All property of the wife, both real and personal, owned or claimed by her before marriage,

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and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. The wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law."

In the case of Levin v. Jeffers, 122 Tex. 83, 98 S. W. (2d) 81, the Supreme Court of Texas said:

"* * * The granting to the wife of the sole control and management of her separate property by necessary implication clothed her, in the making of contracts in respect thereto, with all such incidental power as will render effectual the power expressly granted. It must be remembered that a married woman owns in her own right her separate property. When as such owner she was vested by law with its sole management and control, it must have been contemplated that her power in this respect should be as broad and comprehensive as if she were a single woman." (Underscoring ours)

In a discussion of the right of a married woman to own and control separate property in 23 Tex. Jur. 86, it says:

"* * * she may own stock in a railroad or any other private corporation, and she may acquire the same in any of the ways usual, as by purchase, gift, devise or descent. She may in the same manner become the owner of bank stock, and as such is subject to all statutory regulations and assessments. Indeed, our statutes expressly declare that charters may be subscribed by married women who may be stockholders, officers and directors in private corporations.

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Our statutes of conveyance by the wife of stocks and bonds owned by her necessarily recognize her right of individual ownership."

Whether the stock owned by A's wife is community property or her separate property is a fact question on which you have not given us any information. If this stock is community property it is subject to A's control, and in such case A and C together control both "partnership X" and "corporation Y". In other words "partnership X" and "corporation Y" are "controlled by the same copartnership or association." However, if the stock owned by A's wife is her separate property she controls it, and A and C do not control "corporation Y."

It is apparent by the foregoing discussion that we cannot answer your questions categorically. We can only say that if the stock in "corporation Y" owned by A's wife is the community property of her and her husband then the two organizations are "controlled by the same copartnership or association," to-wit, A and C, and all of the stores operated by the two organizations constitute one chain; but, if the stock is the separate property of A's wife then the two organizations are not controlled by the same copartnership or association, and the stores operated by the two organizations constitute separate chains.

APPROVED DEC 20, 1940

FIRST ASSISTANT
ATTORNEY GENERAL OF TEXAS

CCR:LM

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Cecil C. Rotsch*
Cecil C. Rotsch
Assistant

