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CONCLUSION

The present Ohio Professional Association Law obviously represents a first and very important step in obtaining the tax benefits of qualified pension and profit-sharing plans for professional men. There are a number of technical corporate problems to be corrected by the legislature. The special problems of attorneys, and perhaps of other professions, will require further action by other governmental agencies before the professional association will be a useful vehicle. Serious consideration also will have to be given to the benefits to be derived from establishing a qualified plan, how it will affect the organization, who will share in benefits, the cost of the plan and the like. The Internal Revenue Service is proceeding with deliberation and probably it will be some time before the Service approves any plans for associations and corporations formed under the new state laws. In these unsettled circumstances one must consider and evaluate most carefully the many factors involved before recommending that a professional organization incorporate under the new law.

II

SOME TAX PROBLEMS OF A PROFESSIONAL ASSOCIATION

Donald C. Alexander

TRANSFER OF PRACTICE TO ASSOCIATION

The decision to create a professional association for the conduct of a partnership practice must be implemented by transferring the practice to the association. Such transfer presents tax problems as well as opportunities for tax savings.

Of course, it is clear that the incorporation of a partnership enterprise is, without other complicating factors, a tax-free transaction. If the transaction is used, however, as a means of making a gift or of paying compensation, the protective umbrella of section 351 does not extend so far as to prevent recognition of its true tax nature.

91. The procedure outlined in Revenue Procedure, 61-11, 1961-1 CUM. BULL. 897, requires a complete review of the question of the organization’s status at both the local office and the national office of the Internal Revenue Service before the plan can be considered for approval by the local office.

92. Professor Boris Bittker in a recent article, Professional Associations and Federal Income Taxation: Some Comments and Questions, 17 TAX L. REV. 1, 33 (1961), argues that the Treasury would do well to delay ruling on the association or corporate status of professional organizations formed under the new laws until there has been developed a body of state law determining the legal consequences attendant upon such organizations.
Accounts Receivable

An initial question arises with respect to receivables due the partnership at the time of incorporation. Can such receivables be transferred to the association without the realization of income? Accounts receivable of a cash-basis partnership constitute "unrealized receivables" under section 751(c) of the Code and a sale or exchange of a partnership interest attributable to such receivables or a disproportionate distribution involving them is a taxable transaction. On the other hand, if section 351 applies, as will usually be the case, to prevent the recognition of gain or loss on the transfer, the partnership provisions should not require a tax upon the transfer of receivables to the new professional association, provided such association reports the income from such receivables as they are collected.

Obviously, this is not the complete answer. To the extent that the receivables relate to services performed by the partnership, it seems that income of the two entities, partnership and association, is most accurately reflected by having the partnership report the income from the receivables arising by reason of services rendered by it. On the other hand, Thomas W. Briggs offers direct Tax Court authority that a cash-basis transferor does not have to pay the tax on service fees transferred prior to collection to a corporation organized to take over the enterprise. Conservative practitioners may hesitate to rely on the Briggs case, however, for the possible application of section 45 (now section 482) was not raised until the government briefed the case. It is not surprising to find a reluctance on the part of the Internal Revenue Service to give advance rulings on this issue.

1. INT. REV. CODE OF 1954 § 351 [hereinafter cited as CODE §]; S.M. 3748, IV-2 CUM. BULL. 17 (1925); G.C.M. 11557, XII-I CUM. BULL. 128 (1933). For a general discussion of the incorporation of a partnership, see Paul & Kalish, Transition From a Partnership to a Corporation, N.Y.U. 18TH INST. ON FED. TAX 639 (1960).
2. CODE § 351, Treas. Reg. § 1.351-1(b) (1955) [hereinafter cited as Reg. §]. Furthermore, if over twenty per cent of the stock is given for services — past, present, or future — the transaction does not qualify as tax free. CODE § 351(a).
3. Since professional partnerships and associations will normally report income on the cash basis, it is assumed in the following discussion that this will be the case.
5. For a case under prior law treating a contingent fee arrangement as resulting in the transfer of an equitable interest in property, see The Roberts Co., 5 T.C. 1 (1945), acq., 1945 CUM. BULL. 6.
6. See CODE § 482.
7. 15 CCH Tax Ct. Mem. 440 (1956). See also P. A. Birren & Son, Inc. v. Commissioner, 116 F.2d 718 (7th Cir. 1940). But cf. H. Lewis Brown, 40 B.T.A. 565 (1939), aff'd, 115 F.2d 337 (2d Cir. 1940); Palmer v. Commissioner, 267 F.2d 439 (9th Cir. 1959).
Of course, it is not necessary to transfer receivables to the new association, and many partnerships may prefer, without regard to tax considerations, to let the old entity receive them. To assist in solving practical problems of collection, the association could act as agent for the partnership in such activities.\textsuperscript{10}

As a final word on incorporation, the adverse tax consequences of having the new corporation continue partnership drawing accounts is illustrated by a recent case in the Eighth Circuit.\textsuperscript{11} If the transfer of partnership assets is to be made, in part, for obligations of the association, one must be careful to qualify such obligations as securities.\textsuperscript{12}

\textbf{TAX CONSIDERATIONS AFTER INCORPORATION}

\textit{Accounting Period}

A further question to be decided upon soon after the formation of an association is its choice of accounting period.\textsuperscript{13} Under section 441 of the Code and the applicable Regulations\textsuperscript{14} a new corporation (or entity taxable as such) has the right to select a taxable year, and unlike a partnership, the corporation need not use the same period as that employed by its members.\textsuperscript{16} The members of an association succeeding to the practice of a calendar-year partnership may thus secure a fairly substantial one-shot saving through adopting a fiscal year ending fairly early within the first calendar year after incorporation, whether or not they make an election to be taxed as a partnership. Of course, any such savings will be materially reduced if it is necessary for the association to pay large current salaries to its members.

On the other hand, the members of a partnership with a fiscal year ending early in the calendar year are faced with a serious problem of bunching or doubling of income in the year the partnership becomes an association.\textsuperscript{18} Irrespective of whether the association elects to be taxable as a partnership, income passed through during the calendar year to the members of the new association will be added to their shares of partnership income for the final fiscal year.\textsuperscript{17} Thus the progressive tax rates

\begin{itemize}
  \item \textsuperscript{10} See Eber, \textit{The Pros and Cons of the New Professional Service Corporations}, 15 J. TAXATION 308 (1961).
  \item \textsuperscript{11} Harrison v. Commissioner, 235 F.2d 587 (8th Cir. 1956).
  \item \textsuperscript{12} For a discussion of what is included within the term "securities," see 3 MERTENS, \textit{FEDERAL INCOME TAXATION} § 20.67 (1957).
  \item \textsuperscript{13} As shown below, in certain instances the switch from partnership to association should be timed with this factor in mind.
  \item \textsuperscript{14} Reg. § 1.441-1(b) (3) (1957).
  \item \textsuperscript{15} \textit{Cf.} CODE § 706(b); Reg. § 1.706-1(b) (1956).
  \item \textsuperscript{16} It is assumed that all members use the calendar year, as will usually be the case.
  \item \textsuperscript{17} The problem of electing under Subchapter S to be taxable as a partnership is discussed on pp. 222-23 \textit{infra}.
\end{itemize}
may well produce a substantial wastage of income in the initial year, and, if possible, salaries should be held to a reasonable minimum during this period so that the adverse effect of bunching may be avoided. In the meantime, the stockholder-employees have to eat, but it may be suggested to those lucky enough to have a reservoir of capital that a dollar of principal (or a dollar borrowed from the bank) buys as much as a dollar of income. If principal or outside loans are not available, a solution may be sought through the judicious making of loans or withdrawals from the association, with repayment made later through salary credits. Although this solution may be frequently used, it is not ideal; careful planning is necessary to prevent the loans from being classified as dividend distributions when made.

Reasonable Salaries

Professionals who turn their partnerships into associations may be unhappily surprised to find a double tax upon amounts paid to them exceeding "a reasonable allowance for salaries or other compensation for personal services actually rendered." In other words, payments to member-owners of a professional association in excess of reasonable compensation will be treated as dividends taxable to the recipient but non-deductible by the association.

At first glance, this does not look like a difficult problem. Why shouldn't the members of a professional association continue to draw the same substantial compensation they received as partners and why aren't these payments deductible? Analysis unfortunately demonstrates, however, that the solution is not so easy. Partnership distributions take into account not only the services, including supervisory work, rendered by the particular individual but also his share of income, earned and unearned, engendered by all the activities and investments of the partner-
Therefore, conservative tax practitioners will likely agree with the statement of Chief Judge Jones of the Court of Claims that "It is uncertain to what extent the share of a partner in the profits of a partnership may be compared to the salary of a corporation employee who is also a large stockholder in the corporation."  

It is somewhat surprising to find that there is judicial guidance for determining how much compensation is too much for physicians and surgeons. A leading case is Klamath Medical Service Bureau v. Commissioner, involving an Oregon corporation which was engaged primarily in selling and servicing prepaid medical, surgical, and hospital plans but also owned two hospitals and a hotel. The taxpayer paid its member-physicians more than 100 per cent of their gross billings in the years in question. Although the taxpayer's fee schedule and thus its billings were quite low compared to fees charged by other doctors for similar services, the Ninth Circuit upheld the finding of the Tax Court that amounts in excess of 100 per cent of the billings of the members were non-deductible distributions of corporate income. In rejecting helpful considerations for the taxpayer like the fact that the payments in question were not in proportion to stock ownership, the court approved arguments of the government that some of the income paid to the doctors came from other than professional services and that the contracts with the doctors were ambiguous and apparently did not require the organization to pay them more than 100 per cent of their base fees.

In a later decision, the Tax Court followed the Klamath holding, but added an interesting modification. All the stock of the McClung Hospital, Inc., which operated a West Virginia hospital, was owned by an elderly and relatively inactive doctor and his two sons, also doctors. During the years in question, the older man, who rendered only part-time services, received five per cent of the taxpayer's gross receipts, and the two younger stockholder-doctors were paid an aggregate of their entire billings, one more than his individual billings and one less. Non-shareholder doctors received only sixty per cent of fees attributable to their services. Judge Train found that the compensation to the older doctor in excess of $100 a week was unreasonable, but he allowed a deduction for the full amounts paid the two younger men. In reaching this result, he rejected the government's argument that the amounts paid to the younger doctors should be reduced by overhead expenses and uncollectible accounts, as well as the contention that the test of 100 per cent of billings should be applied individually rather than to aggregate billings.

22. CODE §§ 701-02.
of both stockholder-doctors. Adding the McClung holding to Klamath, one can reach a quick and rather easy conclusion that 100 per cent of stockholder billings is fine, but anything more creates trouble.26

Applying the rule (if two cases establish a rule) of Klamath and McClung to a particular association may not prove troublesome if either (1) substantially all the revenues of the association are derived from the professional services of the members, or (2) if not, the members are content with compensation not exceeding the billings for their services. If the association realizes income from the services of non-members or from equipment or other income-producing property, and the members want to distribute all or substantially all the profits, a question of unreasonable compensation may well arise.27

Certain professional groups derive a substantial portion of their revenues from the services of technicians and assistants who are not eligible to be members, and the Service might well take the position that the payment, as compensation, of profits arising from the services of such people is beyond the permissible limit except to the extent that it represents the value of supervisory services rendered by the members in directing their work. If the professional association derives income from property — whether such income arises from the use of costly medical or dental equipment or from investment properties as in Klamath — payments of compensation attributable to such “passive” revenue may be reasonable only to the extent of a fair charge for managerial services. The problem becomes greater if the profits of the association are paid to members in substantially the same proportion as their stock ownership, as will frequently be the case.28

As mentioned below, the Service appears to require written employment contracts between the professional practitioners and the association as a condition to granting a ruling.29 Even without regard to this, it seems advisable to have such formal contracts. The wording of these agreements is quite important, not only in establishing the necessary employer-employee relationship,30 but also in securing a deduction at the corporate level for amounts paid as compensation to the members.31 It

26. One can reach the further conclusion that the professional association should maintain records showing individual billings. But see the discussion below of possible personal holding company problems if there is too much emphasis on the individual and too little on the group.

27. Of course, an election under section 1371 of the Code to be taxable as a partnership should go far toward solving this problem, but may well likely create others. This is discussed pp. 222-24 infra.


30. This problem is discussed pp. 225-27 infra.

31. Also, the wording of these contracts can have an important bearing on whether the organization meets the tests for qualification as an association under the new Regulations. For example, one should guard against inserting protective provisions reserving managerial powers
is basic, of course, that compensation, particularly if contingent, must be designated as such and that the contracts should, if possible, expressly obligate the association to pay the amounts in question. Also, the contract should place the horse ahead of the cart; the amount retained by the association should depend, inter alia, upon the amount paid out as compensation, not vice versa.

The basic question, of course, is whether the compensation paid is reasonable, and this turns on the particular facts of the individual case. The situation may be particularly troublesome if all the association's income is distributed as compensation. Although there is authority to the effect that the distribution of all the profits of a corporation to three officers, including the two who owned all its stock, was not unreasonable, the circumstances of this case are so unusual that little reliance can be placed upon it.

One must also remember that contributions made for a stockholder-employee under a pension or profit-sharing plan are taken into account in determining whether his aggregate compensation is reasonable. Internal Revenue Service agents examining retirement plans are aware of this requirement, and they are unlikely to overlook it when reviewing plans created by professional associations.

Problems With Respect to Accumulation of Income

Accumulated Earnings Tax

One of the benefits of conducting a professional practice through an organization taxable as a corporation is the right to accumulate income at the relatively low corporate tax rate of thirty per cent on the first

32. For a case illustrating the unfortunate consequences of a failure to make clear that automobiles bought for stockholder-officers were intended as compensation and not as dividends, see Annabelle Candy Co., CCH 1961 TAX CT. REP. (20 CCH Tax Ct. Mem.) Dec. 24889 (June 12, 1961).
33. What may happen if this is not done is illustrated by Klamath Medical Service Bureau v. Commissioner, 261 F.2d 842 (9th Cir. 1958), cert. denied, 359 U.S. 966 (1959).
34. Ibid.
37. Reg. § 1.404(a)-1(b) (1956).
$25,000. A further advantage is the dividends received deduction, which has the effect of making the corporate tax rate on dividends only 4.5 per cent if taxable income is less than $25,000 and 7.8 per cent if more. Some associations of professional people will want to take advantage of this right to store up income at small tax cost, with the various benefits available through such accumulations.

Under present law, an association taxable as a corporation can accumulate $100,000 of earnings before any problem can arise with respect to unreasonable accumulation of earnings. After the $100,000 figure is reached, it may well be difficult, in the ordinary situation, for the association to justify further substantial accumulations. Usually little capital is needed to conduct a professional practice, and unless the organization is unusually large or has unusually heavy demands for working capital, accumulations beyond $100,000 may well be questioned as unreasonable. Present law permits retention, however, to meet the "reasonably anticipated needs" of the business. Certainly, accumulations to buy expensive medical equipment needed for the present or future practice of the association should be permissible.

Also, presumably an association could store up funds to acquire a building in which its practice could be conducted, and perhaps other investments in bricks and mortar could be justified, if permitted by state law, but accumulations beyond $100,000 to buy investments having little relation to the practice of the association would be dangerous. Accumulations to implement a buy-sell arrangement were given a great boost in the recent Mountain State Steel Foundries case, and the Second Circuit opinion in Gsell restores to the law a provision which the Tax Court sought, in effect, to eliminate — section 534 which places the burden of proof upon the Commissioner with respect to the issue whether earnings have been accumulated beyond the reasonable needs of the business, if

38. Code § 11(b).
40. Uses (particularly insurance) for accumulated income are discussed at length in Wolper, Medical Entities Taxed as Corporations: A New Field, 15 C.L.U. Journal 353 (1961).
41. Code §§ 531, 535(c)(2).
44. In the Klamath case, 261 F.2d 842 (9th Cir. 1958), the taxpayer had acquired two hospitals and a hotel.
45. 284 F.2d 737 (4th Cir. 1960). See also Emeloid Co. v. Commissioner, 189 F.2d 230 (3d Cir. 1951); but compare the surprising case of Pelton Steel Casting Co. v. Commissioner, 251 F.2d 278 (7th Cir. 1958), where Judge Finnegan, in a sarcastic opinion, held that the preservation of the independent enterprise was not a valid business purpose. See Armstrong, Section 531 — Recent Cases Suggest New Problems, 39 TAXES 859 (1961).
46. R. Gsell & Co., Inc. v. Commissioner, 294 F.2d 321 (2d Cir. 1961); see also Young Motor Co. v. Commissioner, 281 F.2d 488 (1st Cir. 1960).
the taxpayer files a sufficient statement of the grounds on which it relies.\textsuperscript{47}

**Personal Holding Company**

A further problem in this field is whether the association can accumulate income without running afoul of the confiscatory taxes applicable to personal holding companies.\textsuperscript{48} A dual test must be satisfied for an organization to be classified as a personal holding company; not only must at least eighty per cent of the total gross income of the association for the year be personal holding company income, as discussed below, but also at some time during the last half of the taxable year more than fifty per cent of the value of the outstanding stock must be owned, directly or indirectly, by or for not more than five individuals.\textsuperscript{49} Broad constructive ownership rules apply in determining whether the requirement relating to ownership of stock is met.\textsuperscript{50}

Small professional associations or large associations controlled by a single family will probably meet the stock ownership test for personal holding company classification. On the other hand, the income test is much less likely to be satisfied. While personal holding company income includes, \textit{inter alia}, dividends, interest, royalties, rents (unless more than fifty per cent of gross income) and gain from transactions in stock and securities,\textsuperscript{61} one would hardly expect these categories of nonoperating income to make up eighty per cent of the total gross income of a professional association. The difficulty arises, however, by reason of the inclusion in personal holding company income of certain amounts received under "personal service contracts," and in this connection the exact wording of the statutory description is of great significance:

Amounts received under a contract under which the corporation is to furnish personal services; if some person other than the corporation has the right to designate (by name or by description) the individual who is to perform the services, or if the individual who is to perform the services is designated (by name or by description) in the contract . . .\textsuperscript{62}

Receipts under such contracts are included in personal holding company income if at least twenty-five per cent of the stock of the association is

\textsuperscript{47} Code \textsection 534(c). This shift in burden applies only to cases in the Tax Court. Reg. \textsection 1.533-1(b) (1960).

\textsuperscript{48} The tax rate on the accumulated income of a personal holding company is seventy-five per cent on the first $2,000 and eighty-five per cent on the excess. Code \textsection 541.

\textsuperscript{49} Code \textsection 542(a). Various types of corporations are excluded from personal holding company classification, but none of these exclusions seem applicable to professional associations. Code \textsection 542(c).

\textsuperscript{50} Code \textsection 544(a).

\textsuperscript{51} Code \textsection 543(a).

\textsuperscript{52} Code \textsection 543(a) (5) (A).
owned, at some time during the taxable year, by or for the individual performing the services in question.

Is the above provision applicable to a professional association? A reading of the Senate Finance Committee report on the Revenue Act of 1937, which brought this provision into the law, indicates clearly that the new subsection was aimed at the practice of incorporating talent, not at the type of operation to be carried on by professional associations:

The provision that some third party must have the right to designate who shall perform the services contracted for, or that the person to perform the services must be designated in the contract, will prevent this rule from applying in general to operating corporations engaged primarily in rendering personal services and which necessarily enter contracts to render such services, selecting such members of their staff as they desire to render such services. Thus, corporations which let out the services of architects, engineers, and advertisers would not as a general rule be required to report such income as personal holding company income. It is believed that the proposed amendment will take care of the "incorporated talent" loophole.

Current regulations under this statutory provision contain an example, involving a contract to render engineering services, which bears out the view expressed above. Although there is little authority under section 543(a)(5), a helpful discussion is found in Revenue Ruling 59-172, holding that commissions received by a small fire and casualty insurance agency under agreements with various insurers are not personal holding company income since (1) no individuals were named in the contracts and (2) additional licensed agents could be employed in the future to perform the selling services then carried on by the two agents owning all the stock of the corporation. Through an examination of the cases construing this provision, one can draw a fairly distinct line between contracts which escape the label of personal service contracts and those which do not.

By implication, both the statute and the Regulations seem to require a written contract, which will rarely be made, by, say, a professional association engaged in the practice of medicine. On the other hand, there is no express limitation in the statute or the Regulations restricting the application of this provision to situations involving written contracts. Accepting a somewhat strained extension of the provision regarding in-

55. 1959-1 CUM. BULL. 144. This ruling distinguished Revenue Ruling 54-53, 1954-1 CUM. BULL. 175, in which the individual agents were named in the agency contract assigned to their corporation.
come from personal service contracts to instances where no written contract is made, it remains clear that there must be, at least a contract of some nature. Does the physician-patient relationship create or result in an implied contract? In Ohio, as in most other states, this seems to be the case.\(^{57}\)

Applying further guesswork to medical associations, the method of operation of the particular entity may be of considerable importance. In other words, if the patient seeks aid from the association rather than any of the doctors employed by it and the association has the sole right to assign a particular doctor or several doctors to care for the patient, the patient would not have the required right of designation. On the other hand, if a patient selects a doctor from the group employed by the association, and the other doctors do not perform services for such patient, a personal holding company problem might possibly arise. While under section 543(a)\(^5\) the association, not the particular doctor, must render the services pursuant to the contract, presumably all professional services of members are rendered through the association.\(^{58}\)

One should not forget that even if the patient is considered as designating or having the right to designate the particular physician to perform services under a contract, the resulting income is untainted unless such physician owns, directly or indirectly, at least twenty-five per cent of the stock. Therefore, if an organization is owned in equal shares by five unrelated doctors, the income from their services will not be personal holding company income, irrespective of how their practice is conducted. Also, if the contract requires "important and essential" services of others than stockholders having the required percentage interest, the portion of the income attributable to such services is excluded from the dangerous category.\(^{59}\)

**Election to be Taxed as a Partnership**

If a professional association has no more than ten shareholders, it is eligible to elect to be taxable as a partnership under sections 1371 to 1377 of the Code.\(^{60}\)

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57. Relevant cases include Craig v. Chambers, 17 Ohio St. 253 (1867); Gillette v. Tucker, 67 Ohio St. 105 (1902); Morningstar v. Jones, 31 Ohio L. Abs. 440 (Ct. App. 1940); Doyle v. Byers, 5 Ohio L. Abs. 727 (Ct. App. 1927); Broadway v. Jeffers, 194 S.E. 642 (S.C. 1938); Brown v. Moore, 247 F.2d 711 (3d Cir.), cert. denied, 355 U.S. 882 (1957). In one well-reasoned case, however, it was pointed out that the relationship was one of status rather than of contract. Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956).

58. OHIO REV. CODE § 1785.03.

59. Reg. § 1.543-1(b) (8) (i) (1958). Incidental personal services do not count, however. See General Management Corp. v. Commissioner, 135 F.2d 882 (7th Cir. 1943).

60. CODE § 1371(a). By reason of the nature of a professional association and the requirements of the laws under which it is created, there need be little concern about the other requirements for election. Although a professional association, like any other corporation, would be disqualified from continuing such election if more than twenty per cent of its gross receipts
Space is not available here to discuss all the advantages, problems and pitfalls of an election by a professional association to be taxable as a corporation; Subchapter S of the Code has been fully and ably discussed elsewhere.\(^6^1\) In general, however, the effect of such election is to tax all the income of the association to its shareholders, after deductions for contributions to retirement plans and other fringe-benefit programs. The association itself pays no tax.\(^6^2\) Thus any concern about the personal holding company problem or unreasonable accumulation of earnings is eliminated, but the tax benefit of accumulating income in the corporation at the low thirty per cent rate is also lost. It seems likely that the problem of unreasonable compensation is also removed, except to the extent it affects deductions claimed for contributions to retirement plans, but doubts have been expressed on this point.\(^6^3\) Also, the Commissioner is expressly authorized to reapportion the income of a family group to reflect the value of services rendered.\(^6^4\)

In considering the advisability of making any such election, one should note that some of the usual advantages of the election should have little practical meaning to a professional association. For example, it would be a rare professional group that would sustain a loss which could be passed through to its shareholders.\(^6^5\) Furthermore, most professional associations are unlikely to have substantial capital gains as to make a transmission of such gains to the shareholders a material benefit.\(^6^6\) Also, Congress has made some tentative gestures toward denying deductions for contributions to retirement plans and other fringe benefits to electing corporations, and adverse legislation might some day come to pass in this field.\(^6^7\) Finally, an election to be taxable as a partnership, after deductions for retirement plans and other like programs, would highlight and tend to strengthen a possible argument by the Commissioner that the retirement program and fringes were the principal reason for the creation...
of the association in the first place. In this field, as in others, the election to be taxable as a partnership should be made with caution.\textsuperscript{68}

If it is concluded that the advantages of electing outweigh the pitfalls, one should keep in mind the rules that it is generally desirable for an electing corporation to pay out all its income and that income not previously paid out will be taxable to those persons who are shareholders at the end of the year in proportion to their then interests.\textsuperscript{69} Thus, an electing association which has a fiscal year overlapping the calendar year can provide tax savings to its members by carefully timing its payments and distributions.

**Corporate Entity and Tax Avoidance**

It may be contended that the Commissioner can disregard the professional association and treat it as a sham for tax purposes. If the association actually carries on a professional practice, and if there is no effort to split a single enterprise among multiple entities,\textsuperscript{70} such argument has little chance of success.

In the first place, the attributes which qualify a professional association under the stringent tests of the Regulations\textsuperscript{71} also satisfy the lesser requirements laid down in the controlling decisions for the recognition of the corporate entity. As stated by the Supreme Court,

> Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.\textsuperscript{72}

If an attack upon a single corporate entity is thus quite unlikely to succeed, the Commissioner might fall back upon section 269 of the Code, a weapon which he has used with much recent success. This provision disallows a deduction if any person or persons acquire control of a corporation and "... the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit or other allowance which such person or

\textsuperscript{68} For a like view, see Eber, *The Pros and Cons of the New Professional Service Corporations*, 15 J. TAXATION 308 (1961).

\textsuperscript{69} CODE § 1373(b); Reg. § 1.1373-1 (1959).

\textsuperscript{70} E.g., Advance Mach. Exchange Inc. v. Commissioner, 196 F.2d 1006 (2d Cir. 1952), cert. denied, 344 U.S. 835 (1952); Aldon Homes, Inc., 33 T.C. 582 (1959); Shaw Constr. Co., 35 T.C. 1102 (1961).

\textsuperscript{71} Reg. § 301.7701-2 (1960).

corporation would not otherwise enjoy . . . ." Both the Regulations\(^74\) and the decisions\(^76\) hold that the creation of a new corporation involves the acquisition of control within the meaning of section 269.

Therefore, one can visualize the possibility of a claim that the deduction for contributions to a retirement plan should be denied a professional association since, according to the Commissioner, the principal purpose of creating such association was to secure such deduction. Should such an attack be made, however, the professional association is hardly defenseless. Not only are there certain technical arguments that section 269 has no application here,\(^78\) but there is a more basic question. Since Congress has seen fit to tax corporations (and associations) differently from partnerships, should section 269 be stretched to deny the choice provided by Congress for bona fide organizations which can qualify as associations? The answer should be in the negative.\(^77\)

**Employer-Employee Relationship**

Recognition of the professional association as an entity taxable as a corporation does not mean that its members are automatically entitled to coverage under qualified retirement plans and other benefit programs. Such benefits are available only to employees,\(^78\) and it is necessary that the association and its members establish that their relationship is one of employer to employee.\(^79\)

Adopting the old common-law view, the applicable Regulations find an employer-employee relationship if the person for whom services are

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73. CODE \(\S\) 269(a).
75. James Realty Co. v. United States, 280 F.2d 394 (8th Cir. 1960); Coastal Oil Storage Co. v. Commissioner, 242 F.2d 396 (4th Cir. 1957).
76. Is the deduction for contributions to the retirement plan dependent upon the acquisition of "control" under section 269? See Commodores Point Terminal Corp., 11 T.C. 411 (1948), aeq., 1949-1 CUM. BULL. 1.
77. See TREASURY DEPARTMENT PUBLICATION No. 334, TAX GUIDE FOR SMALL BUSINESS 10 (1960 ed.), but note the change in the 1962 edition of PUBLICATION No. 334 at 7 in omitting the sentence stating that the effect of the income tax laws should be borne in mind in organizing a business. In this respect, the considerable body of authority protecting Western Hemisphere Trade Corporations against attack under section 269 is directly relevant. A. P. Green Export Co. v. United States, 284 F.2d 383 (Ct. Cl. 1960); Barber-Greene Americas, 35 T.C. 365 (1960), appeal dismissed, P-H 1961 FED. TAXES \(\S\) 56450 (7th Cir. 1961); International Canadian Corp. v. Frank, P-H 1961 FED. TAXES (7 Am. Fed. Tax R.2d) \(\$\) 61-516 (W.D. Wash. March 29, 1961); Pan Am. Eutectic Welding Alloys Co., 36 T.C. No. 30 (May 17, 1961); I. T. 3757, 1945 CUM. BULL. 149-150.
78. Qualified pension and profit sharing plans, CODE \(\S\)\(\S\) 401-04; Rev. Rul. 61-157, 1961 Int. Rev. Bull. No. 35, at 5; Accident and health plans and sick pay, CODE \(\S\\S\) 104-06; Death benefit plans, CODE \(\S\) 101(b); Group insurance plans, Reg. \(\S\) 1.61-2(d) (2) (1957).
79. As mentioned below, determining the existence of the employer-employee relationship is one of the two conditions precedent required by Revenue Procedure 61-11, 1961 INT. REV. BULL. NO. 18, at 53, for approval of a retirement plan established by a professional association.
performed "has the right to control and direct the individual who performs the services, not only as to the results to be accomplished by the work but also as to the details and means by which that result is accomplished." Furthermore, the Regulations also state that physicians, lawyers, dentists, and others who follow an independent profession are generally not employees. Without the gloss put on this strict view by more liberal court decisions and Service rulings, establishing the required relationship might be an uphill fight.

In 1956, however, the Tax Court handed down a leading decision in which it rejected the strict common-law test of control in a situation involving a physician and instead held that control in such an instance "must necessarily be more tenuous and general than the control over non-professional employees." In holding that a pathologist was an employee of a hospital, Judge Kern thus adopted a more flexible and less difficult standard, and other courts have taken the same view. In its most recent statement on the subject, the Internal Revenue Service spelled out a four-part test for determining whether a physician is an employee, making employee status depend upon:

(1) the degree to which such individual has become integrated into the operating organization of the person or firm for which the services are performed; (2) the substantial nature, regularity, and continuity of his work for such person or firm; (3) the authority vested in or reserved by such person or firm to require compliance with its general policies; and (4) the degree to which the individual under consideration has been accorded the rights and privileges which such person or firm has created or established for its employees generally.

Using the liberal standard established in the Wendell James case and further refined by the Service, most full-time members of a professional association should be able to demonstrate, rather easily, that they are employees. Of course, the employment contracts discussed above should be so written as to assist in establishing the required relationship. Also, conservative practitioners will not rely completely on satisfying the four-part test quoted above but will take into account a possible shift in

80. Reg. § 31.3401(c)-1(b) (1957) (withholding tax regulations); Reg. § 31.3121(d)-1(c)(2) (1954) (social security regulations).
81. Reg. § 31.3401(c)-1(c) (1957); Reg. § 31.3121(d)-1(c)(3) (1954).
82. Wendell E. James, 25 T.C. 1296, 1301 (1956).
83. E.g., Flemming v. Huycke, 284 F.2d 546 (9th Cir. 1960); Walker v. Altmeyer, 137 F.2d 531 (2d Cir. 1943).
Treasury thinking to protect tax revenues by making it more difficult for professionals to qualify as employees.\textsuperscript{85}

Even if the Service continues to apply a liberal test of the employer-employee relationship, it will still be necessary that professionals actually join together in order to obtain the benefits which they seek from establishment of an association. Joint conduct of separate practices — combined solely for the purpose, say, of creating a retirement and fringe benefit program and nothing more — is not enough. Furthermore, a split practice, with only part-time work for the association, introduces an element of risk, which can be avoided if the members work substantially full time for the association.\textsuperscript{86}

\textit{State Taxation, Workmen's and Unemployment Compensation, and Extra-Territorial Practice}

Ohio\textsuperscript{87} and Connecticut\textsuperscript{88} have already ruled that professional associations formed under their respective laws will be regarded as corporations for state tax purposes. It seems likely that most other states will follow this approach.\textsuperscript{89}

As a consequence, an Ohio professional association will be subject to incorporation fees\textsuperscript{90} as well as to the annual franchise tax of three mills (.3\%).\textsuperscript{91} On the other hand, professional associations may gain an Ohio tax advantage over unincorporated entities since investments in corporate stock owned by the professional association will be exempt from the Ohio intangible tax.\textsuperscript{92} It is likely that no significant difference will arise as a result of treatment as a corporation instead of as a partnership or other unincorporated entity under the various Ohio municipal in-
come tax ordinances. Each shareholder, however, will be required to pay intangible tax upon his interest in the association.\textsuperscript{93}

The professional shareholders of the association would be counted in determining whether there are three or more employees for purposes of the Ohio Workmen's Compensation Act and the Ohio Unemployment Compensation Act, and compensation paid to them will be taken into account for such purposes.\textsuperscript{94} While few professionals will stand to benefit materially from unemployment compensation, coverage under workmen's compensation may well be helpful.

Where the services performed by the professional association extend beyond the borders of its home state, the association will probably be treated as a corporation for tax purposes in the foreign state. By virtue of state regulation of the various professions, however, it seems unlikely that associations will engage in practice beyond their own states. Virtually all jurisdictions prohibit the practice of professions other than by duly licensed individuals, except for rather limited exceptions. Consequently, a professional association, regarded as a corporation under the laws of its own state, could probably not be licensed to practice in a foreign state. This would be true even where the foreign state had a professional association statute unless that statute specifically extended the privilege of practice as an association to nonresidents.\textsuperscript{94a}

For the present, then, it will probably be necessary for professional persons licensed in a foreign state to continue any practice in the foreign state in their individual capacity, and the articles of association should make provision for this contingency.

\section*{TRANSFER OF INTEREST AND TERMINATION OF THE ASSOCIATION}

Switching from a partnership to an association eliminates a host of problems arising on the sale of a partnership interest.\textsuperscript{95} To the extent that state law permits the transfer of interests in a professional association, a transfer to a third party is treated as a sale and a transfer to the association as a redemption, under the rules governing the disposition of corporate stock.\textsuperscript{96} An immediate question is whether the former part-
ners have merely substituted the fire for the frying pan; can a professional association be a collapsible corporation so as to convert capital gain into ordinary income on disposition of an interest?  

_Collapsible Corporation Treatment_

So far as relevant here, the collapsible corporation provision is applicable only to corporations "formed or availed of principally for the manufacture, construction, or production of property. . . ." If a professional association does not manufacture, construct, or produce property, this dangerous provision should, therefore, be inapplicable. Does a professional association manufacture, construct, or produce anything? Obviously, a factual inquiry must be made into the specific activities of the particular association under consideration, bearing in mind that a corporation is deemed to have produced property, for example, if it engaged in the production of such property "to any extent," and that the courts have construed this definitional language quite broadly. Interesting questions can arise: Does an orthodontist engage in production or manufacture when he creates braces for his patients? What about a surgeon who inserts material to replace or strengthen a bone or organ? If, as indicated in _The Roberts Company_ a contingent fee arrangement may be an interest in property, does obtaining such fee constitute "production"? Could the mere rendition of services in exchange for an account receivable be the production of property?

If the question of possible collapsibility is not resolved at the outset by a finding that the association has not engaged in manufacture, construction, or production to any extent whatever, then the advisor must examine section 341 in all its complexity to determine (1) whether the other requirements for collapsibility are met and (2) whether any of the

98. Code § 341(b) (1). The inclusion of corporations purchasing inventory property and of holding companies should have little effect upon professional associations. On the other hand, a professional association conceivably could be used as the vehicle for the purchase and indirect disposition within three years of property used in the trade or business such as expensive medical equipment or rental real estate. Code § 341(b) (3) (D).
99. This is subject, of course, to a caveat in the case of an organization whose heavy investments in depreciable property render it subject to the trap described in note 98 supra. But cf. United States v. Ivey, 294 F.2d 799 (5th Cir. 1961), which refused to permit the application of section 341 to convert capital gain into ordinary income.
100. Code § 341(b) (2) (A).
101. Preliminary and relatively inconsequential steps have been regularly held to constitute construction for purposes of determining collapsibility. Jack Farber, 36 T.C. No. 116 (Sept. 29, 1961), Ellsworth J. Sterner, 32 T.C. 1144 (1959); J. D. Abbott v. Commissioner, 258 F.2d 357 (3d Cir. 1958).
various escape clauses apply. Such a review is far beyond the confines of this article.104

Sale of Interest

Sales of interests present an easier problem than redemptions or liquidations, for, if the collapsible corporation provisions do not apply, the property sold is ordinarily a capital asset and the sale ordinarily results in capital gain or loss. On the other hand, a redemption of less than the professional's entire interest may result in ordinary income if it does not qualify as a disproportionate distribution,105 and complex attribution rules apply to associations controlled by a related group.106

Liquidation

On liquidation of a professional association, a question arises, similar to that discussed above with respect to the creation of the association, about the treatment of receivables created by the services of the association but not yet taken into income by the taxpayer. The case of Susan J. Carter107 supplies authority for the proposition that on liquidation a cash-basis corporation must report as income the amounts later collected by its shareholders from billings resulting from services fully performed by it.108 On the other hand, to tax the association upon the fruit of its services, one must be certain that the fruit is actually there; a substantial contingency to payment may produce an opposite result.109

In a liquidation of a professional association whose practice is to be continued,110 an even more serious question arises. As demonstrated by the recent Tax Court decision in Merle P. Brooks,111 goodwill of very substantial proportions may attach to a professional practice, if the suc-

104. For a comprehensive discussion, see Axelrad, Collapsible Corporations and Collapsible Partnerships, U. So. CALIF. 1960 TAX INST. 269.
105. Code § 302(b) (2).
106. Code §§ 302(c), 318. Since the stock owned by a partner is attributed to the partnership and that of the partnership attributed proportionately to the partner, the presence of a partnership overlapping the association practice can cause trouble in effectuating a buy-sell agreement to which the association is a party. Code § 318(a) (2) (A); cf. Rev. Rul. 56-103, 1956-1 CUM. BULL. 159.
107. 9 T.C. 364 (1947), aff'd on other grounds, 170 F.2d 911 (2d Cir. 1948).
108. For analogous authority see Standard Paving Co. v. Commissioner, 190 F.2d 330 (10th Cir. 1951); Jud Plumbing & Heating Inc. v. Commissioner, 153 F.2d 681 (5th Cir. 1946); United States v. Lynch, 192 F.2d 718 (9th Cir. 1951), cert. denied, 343 U.S. 934 (1952).
110. In the unlikely event that the practice of the association is not to be continued by any of its members, it is hard to see, as a practical matter, how goodwill could survive the liquidation. Nevertheless, it could well be argued that value is determined by what the association possessed immediately prior to dissolution. But cf. Goodman v. Granger, 243 F.2d 264 (3d Cir. 1957), cert. denied, 355 U.S. 835 (1957).
111. 36 T.C. No. 113 (Sept. 27, 1961). Of the $240,000 purchase price of an orthodontic practice, $230,000 was paid for good will.
cess of the enterprise is not dependent upon the skill or services of a particular individual. This doctrine is now rather firmly imbedded in the law, and the Commissioner reluctantly accepted it in a ruling published in 1960. He now may be able to turn this proposition to the advantage of the revenues by imposing a heavy tax, with no resulting recovery through depreciation, upon the liquidation of a professional association.

If the professional association has very little accumulated earnings, it might seek to solve the goodwill problem by electing to liquidate under section 333 of the Code, which permits non-recognition of gain on liquidations completed within one calendar month. Looking before leaping is especially important when a one-month liquidation is under consideration; one cannot rely upon a judicial rescue from the trap of an election based upon an erroneous determination of the absence of earnings.

CLEARANCE FROM INTERNAL REVENUE SERVICE

In the Internal Revenue Bulletin of May 1, 1961, the Service issued Revenue Procedure 61-11 spelling out the procedural rules to be followed by a professional association which seeks a determination of its status and clearance of its retirement plan. Under this ruling, as conditions precedent to determining qualification of the retirement plan, the organization must establish (1) that it is an association taxable as a corporation and (2) that an employer-employee relationship exists between it and its associates.


114. Accumulated earnings of the liquidated corporation are taxable as a dividend, however, and gain is recognized to the extent that money, or stock or securities acquired after 1953 are received by a stockholder and exceed any earnings taxable to him as dividend. CODE § 333(e); Reg. § 1.333-4 (1955).


116. In view of the fact that, at the time of this writing, no Rulings have been issued pursuant to Revenue Procedure 61-11, the more cynical will consider April 1 to be a more appropriate date.


118. In connection with the latter requirement, Revenue Procedure 61-11 repeated the Service view, contrary to the holding of the Ninth Circuit in the Kintner case, that no credit can be
The determination whether an organization is classified as an association is made, for all years beginning after December 31, 1960, in accordance with the new Regulations under section 7701 of the Code, but the more liberal tests of the Regulations under the 1939 Code are apparently applied for prior years. Organizations in existence on November 17, 1960, the date of the issuance of the final Regulations under Code section 7701, are given the right to amend their articles to meet the new tests, provided such amendments are made before October 1, 1961. In view of the fact that this deadline passed without any official word from the Service applying the general rules of the new Regulations to specific cases, organizations should be given extra time to amend after they are told what amendments are necessary.

It would be extremely unfair for the Service to enforce its time limit against an organization which failed to make a timely amendment because of the delays of the Service, and equity demands application here of the provisions of the relief Regulations lifting time limits in meritorious cases.

There has been considerable speculation on the question whether an organization created under one of the new professional corporation or association laws must qualify under the tests in the new Regulations for tax treatment as an association. Are such Regulations and Revenue Procedure 61-11 applicable? For example, the following strong opinions have been stated:

Neither the Kintner Regulations nor Revenue Procedure 61-11 have any more application to Professional Corporations than they do to any other business corporation. It is the writer's considered opinion that tax advisors should take their state Professional Corporation laws at face value and expect the IRS to do likewise.

On the other hand, the author of the above statement believes that professional associations must satisfy the Regulations.

Despite the considered opinion stated above, one may question why
the character of the organization for tax purposes should be determined by the particular label applied by the state legislature in passing its law. Is it really this simple? Are professional corporations created under the acts of Arkansas, Florida, Minnesota, Oklahoma, South Dakota, and Wisconsin automatically corporations by reason of their titles, while professional associations under the laws of Alabama, Connecticut, Georgia, Illinois, Ohio, Pennsylvania, Tennessee, and Texas must meet the strict tests of the Regulations?  

The Internal Revenue Service has not yet taken an official position on this question, but conservative practitioners should heed the following words of Isidore Goodman, Chief of the Pension Trust Branch, Tax Rulings Division:

Legislation has been enacted in various states recently authorizing the establishment of professional associations having corporate characteristics. Notwithstanding the classification for local law purposes, however, in order to constitute the organization an association taxable as a corporation for Federal tax purposes, it must have sufficient corporate characteristics to more nearly resemble a corporation than a partnership. Mere conformance with state law does not automatically establish such status. A determination is made on the particular facts in a given case.  

A taxpayer seeking to obtain clearance for his professional association and its associates under Revenue Procedure 61-11 must file with his local District Director of Internal Revenue a request for rulings accompanied by the following documents:

1. copies of the articles of association or agreement establishing the organization;
2. by-laws or code of regulations;
3. all other data relevant to the formation and operation of the organization, with the dates of organization and transfer of the professional practice;
4. copies of the local law applicable to the organization;
5. copies of the employment contracts between the organization and its associates; and
6. a brief setting forth the position of the organization with respect to its association status and the employer-employee relationship.  

124. Connecticut also has an old statute permitting the formation of non-stock corporations to conduct medical clinics. In Connecticut, Tennessee, and Texas the statutory approach was to amend the Uniform Partnership Act to provide an exception for associations, and thus in these states, a somewhat more difficult question may arise as to qualification than in the states expressly creating a new entity (professional association or corporation) governed in general by the corporation law of the state.  


Obviously, there will be a considerable duplication of materials in multiple filings from the same state; the Treasury will be inundated with copies of Ohio Senate Bill 550.

The District Director's Office is directed to review the voluminous materials filed with it and has the authority to hold against the taxpayer on either the association question or that of employer-employee relationship. Furthermore, Revenue Procedure 61-11 states specifically that the appeals procedures for National Office review of adverse field determinations with respect to qualification of retirement plans are not applicable, and, therefore, a taxpayer has no official access to Washington to obtain review of an unfavorable decision made in the District Director's Office.127

If the District Director's Office does not take a position or believes that the organization is taxable as a corporation and that the employer-employee relationship is present, he must forward the case to Washington with his recommendations "supported by findings of fact and conclusions of law."128 Thus the field office has the authority to deny but not the right to approve; this one-way street is novel in the field of tax procedure.129 In the National Office of the Internal Revenue Service, the Individual Income Tax Branch of Tax Rulings Division has the responsibility of ruling on the association question and the Employment Tax Branch rules on the question of the employer-employee relationship.

In view of the reluctance of the National Office to act in these matters, taxpayers should indicate in their requests that a hearing is desired in the event of no action or of an unfavorable decision.130

To the date of this writing, it is understood that the Internal Revenue Service has not issued a single Ruling under Revenue Procedure 61-11.131 The lack of action has not been caused by a lack of cases, and one may wonder whether the delays in acting upon requests for ruling or technical advice, some of which had reached the National Office as early as 1959, may be due to the opposition, as a matter of the Treasury policy manifested in the new association Regulations, to tax equality for professionals in retirement planning. While, of course, the Internal Revenue Service can refuse to rule when action is not "in the interest of sound tax

131. The only ruling which, it is believed, has been made by the Internal Revenue Service to a professional association since promulgation of the new Regulations was issued on March 2, 1961, prior to publication of Revenue Procedure 61-11, to a Connecticut medical clinic, which had apparently filed its original application on July 10, 1958. Special Ruling, 7 CCH 1961 STAND. FED. TAX REP. § 6375 (March 27, 1961).
administration, it would seem better administrative practice for the Service to state publicly that it did not propose to act — favorably or otherwise — in this area rather than indicate the opposite by the publication of Revenue Procedure 61-11.  

132. Reg. § 601-201(a) (1) (1960); Rev. Rul. 54-172 § 2, 1954-1 CUM. BULL. 394.  
133. Reference has been made in note 84 above to an article by Boris Bittker, a professor at Yale Law School, attacking professional association acts, including that of Ohio, as "schemes for indirectly amending the Internal Revenue Code." Bittker, Professional Associations and Federal Income Taxation: Some Comments and Questions, 15 TAX L. REV. 1, 30 (1961). One can assume that Mr. Bittker would also consider the Seventh Circuit's decision for the Government in Pelton v. Commissioner, 82 F.2d 473 (7th Cir. 1936), to be a similar scheme.