

VINA-RUG (CANADA) LIMITED APPELLANT;

1967
*Oct. 5, 6

AND

1968

THE MINISTER OF NATIONAL
REVENUE }

RESPONDENT.

Jan. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Associated corporations—Control by same group of persons—More than one group in position to control—Income Tax Act, R.S.C. 1952, c. 148, s. 39(4)(b).

The issue in this case was whether the appellant company was "associated" with a second company, Stradwick's Ltd., within the meaning of s. 39 of the *Income Tax Act*, R.S.C. 1952, c. 148, and, therefore, was not entitled to the benefit of the lower tax rate on part of its income, on the ground that both corporations were controlled by the same group of persons. All the shares of Stradwick's Ltd. were owned by a father, as to 12, his two sons, as to 10 each and a fourth party, as to 8. On the other hand, the principal shareholders of the appellant company were the two sons and the same fourth party. The Minister contended that Stradwick's Ltd. was controlled by a group consisting of the two sons and the fourth party (it is common ground that, if that is so, the same group also controlled the appellant company). However, it is contended by the appellant company that Stradwick's Ltd. was controlled by a group consisting of the father and the two sons—that group not being in a position to control the appellant company. The Exchequer Court upheld the Minister's contention that the two companies were associated. An appeal was launched to this Court.

Held: The appeal should be dismissed.

Applying the principles enunciated in *M.N.R. v. Dworkin Furs Ltd.*, [1967] S.C.R. 223, once it is established that a group of shareholders owns a majority of the voting shares of a company, and the same group a majority of the voting shares of a second company, that fact is sufficient to constitute the two companies associated within the meaning of s. 39 of the Act. Moreover, in determining *de jure* control more than one group of persons can be aptly described as a "group of persons" within the meaning of s. 39(4)(b) of the Act. It is immaterial whether or not other combinations of shareholders may own a majority of voting shares in either company, provided each combination is in a position to control at least a majority of votes to be cast at a general meeting of shareholders.

Revenu—Impôt sur le revenu—Corporations associées—Contrôle par le même groupe de personnes—Plus d'un groupe en état d'exercer le contrôle—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, arts. 39(4)(b).

Il s'agit dans cette cause de déterminer si la compagnie appelante était «associée» à une seconde compagnie, Stradwick's Ltd., dans le sens de l'art. 39 de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, et, en conséquence, n'ayant pas droit au bénéfice du taux d'impôt moindre

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sur une partie de son revenu, pour le motif que les deux corporations étaient contrôlées par le même groupe de personnes. Toutes les actions de la compagnie Stradwick's Ltd. étaient possédées par un père, qui en avait 12, ses deux fils, qui en avaient 10 chacun et une quatrième personne, qui en avait 8. D'un autre côté, les principaux actionnaires de la compagnie appelante étaient les deux fils et cette même quatrième personne. Le Ministre soutient que la compagnie Stradwick's Ltd. était contrôlée par un groupe formé des deux fils et de cette quatrième personne (les parties étant d'accord que, si telle était la situation, ce même groupe contrôlait aussi la compagnie appelante). Cependant, la compagnie appelante plaide que la compagnie Stradwick's Ltd. était contrôlée par un groupe formé du père et des deux fils—ce groupe n'étant pas en état de contrôler la compagnie appelante. La Cour de l'Échiquier a fait droit à la prétention du Ministre que les deux compagnies étaient associées. Un appel a été logé devant cette Cour.

Arrêt: L'appel doit être rejeté.

Mettant en application les principes énoncés dans *M.N.R. v. Dworkin Furs Ltd.*, [1967] R.C.S. 223, lorsqu'il est établi qu'un groupe d'actionnaires possède une majorité des parts comportant le droit de vote d'une compagnie, et que le même groupe détient une majorité des parts semblables d'une seconde compagnie, ce fait est suffisant pour rendre ces deux compagnies associées dans le sens de l'art. 39 de la loi. De plus, lorsqu'il s'agit de résoudre la question du contrôle *de jure*, plus d'un groupe de personnes peuvent être à bon droit décrits comme étant «un groupe de personnes» dans le sens de l'art. 39(4)(b) de la loi. Peu importe que d'autres groupements d'actionnaires puissent posséder une majorité des parts comportant le droit de vote dans l'une ou l'autre compagnie, en autant que chaque groupement est en état de contrôler au moins une majorité des votes devant être donnés à une assemblée générale des actionnaires.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada¹, en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada¹, in an income tax matter. Appeal dismissed.

P. N. Thorsteinsson, for the appellant.

G. W. Ainslie and *L. R. Olsson*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The issue in this appeal is whether the appellant company was “associated” during the 1961 and 1962 taxation years with a second company, Stradwick's

¹ [1967] 1 Ex. C.R. 390, [1966] C.T.C. 566, 66 D.T.C. 5373.

Limited, within the meaning of s. 39 of the *Income Tax Act*, and as such not entitled to the lower tax rate on the first \$35,000 of taxable income provided for in the section. Paragraph (b) of subs. (4) of s. 39 provides that two corporations are associated with each other in a taxation year, if they are controlled by the same group of persons. That subsection reads as follows:

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39. (4) For the purpose of this section, one corporation is associated with another in a taxation year, if, at any time in the year,

* * *

(b) both of the corporations were controlled by the same person or group of persons.

In the relevant periods, the shareholders of Stradwick's Limited and their respective shareholdings were:

| | |
|---------------------------|----|
| John Stradwick, Sr. | 12 |
| John Stradwick, Jr. | 10 |
| W. L. Stradwick | 10 |
| H. D. McGilvery | 8 |
| <hr/> | |
| Total issued shares | 40 |

The shareholders of the appellant company and the respective shareholdings were:

| | |
|---------------------------|--------|
| John Stradwick, Jr. | 6,133 |
| W. L. Stradwick | 6,133 |
| H. D. McGilvery | 6,133 |
| Stradwick's Limited | 5,250 |
| Others | 16,351 |
| <hr/> | |
| Total issued shares ... | 40,000 |

The position of the respondent is that the group consisting of John Stradwick, Jr., W. L. Stradwick and H. D. McGilvery controlled Stradwick's Limited and it is common ground between the parties to the appeal that if this group controlled Stradwick's Limited, then it also controlled the appellant company. The appellant contends however that the said group did not control Stradwick's Limited and that Stradwick's Limited was controlled by a group consisting of John Stradwick, Sr., John Stradwick, Jr., and W. L. Stradwick.

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John Stradwick, Sr., is the father of John Stradwick, Jr., and W. L. Stradwick; H. D. McGilvery is a stranger in the tax sense. McGilvery became a shareholder in Stradwick's Limited in 1950, but, prior to that time, had become a shareholder, with the Stradwicks, in two other companies—the tax status of which is not in issue in this appeal. All three companies were engaged in the manufacture, wholesaling or retailing of floor and wall tile.

In 1956, John Stradwick, Jr., W. L. Stradwick, H. D. McGilvery and Stradwick's Limited acquired control of a fourth company—the appellant Vina-Rug (Canada) Limited—which also manufactured floor coverings.

During the 1961 and 1962 taxation years, there was a common management and administration for all the four companies referred to, and in each of those years the appellant company paid Stradwick's Limited \$5,000 for administrative services performed on its behalf.

John Stradwick, Jr., testified that the group of shareholders consisting of himself, his brother and his father in fact controlled Stradwick's Limited. It is perhaps not without significance that McGilvery attended and voted at all shareholders and directors' meetings of Stradwick's Limited, during the relevant periods, at which all resolutions were passed unanimously. However, in the view which I take of the issue in this appeal these facts are irrelevant.

The learned trial judge held that John Stradwick, Jr., W. L. Stradwick and H. D. McGilvery, who collectively owned more than 50 per cent of the shares of Stradwick's Limited, had at all material times a sufficient common connection as to be in a position to exercise control over Stradwick's Limited and therefore constituted a "group of persons" within the meaning of subs. (4) of s. 39 of the *Income Tax Act*. I am in agreement with that finding.

This Court considered the concept of "control" in *Minister of National Revenue v. Dworkin Furs Limited*². Hall J. in delivering the judgment of the Court said at p. 227:

The word *controlled* as used in this subsection was held by Jackett P. to mean *de jure* control and not *de facto* control and with this I agree. He said in *Buckerfield's Limited et al v. Minister of National Revenue*:

² [1967] S.C.R. 223, [1967] C.T.C. 50, 67 D.T.C. 5035, 60 D.L.R. (2d) 448.

Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials or the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that, in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.* (1943) 1 A.E.R. 13 where Viscount Simon L.C., at p. 15 says:

The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

Applying these principles, once it is established that a group of shareholders owns a majority of the voting shares of a company, and the same group a majority of the voting shares of a second company, that fact is sufficient, in my opinion, to constitute the two companies associated within the provisions of s. 39 of the *Income Tax Act*. Moreover, in determining *de jure* control more than one group of persons can be aptly described as a "group of persons" within the meaning of s. 39(4)(b). In my view, it is immaterial whether or not other combinations of shareholders may own a majority of voting shares in either company, provided each combination is in a position to control at least a majority of votes to be cast at a general meeting of shareholders.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: P. N. Thorsteinsson, Vancouver.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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