

Calgary
1966
Apr. 5
Ottawa
June 6

BETWEEN:

BERT ROBBINS EXCAVATING }
LIMITED

APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE

RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, section 39(4)(b)—“Associated corporations”—Control by same person—Meaning of “control”—Casting vote of chairman—Effect of casting vote.

This appeal was heard following that of *Alpine Drywall and Decorating Ltd. and The Minister of National Revenue*, ante p. 1148. The issue being substantially the same.

The disposition of this action was whether the right was giving to the chairman, as president, to exercise a casting vote in case of a tie, conferring on him the “control” of the corporation “associated” with another which was admittedly controlled by the same shareholder.

Held, That the fact that the casting vote had never been exercised in practice was immaterial.

2. That the power to exercise a casting vote did not constitute “control” within the meaning of section 39. It followed that the appellant was not controlled by the shareholder in question and was not “associated” with the other corporation.
3. That the appeal is allowed with costs.

APPEAL from assessments of the Minister of National Revenue.

R. A. F. Montgomery for appellant.

Bruce Verchère for respondent.

CATTANACH J.:—These are appeals against assessments by the Minister under the *Income Tax Act* of the appellant for its 1961, 1962 and 1963 taxation years.

By agreement the evidence respecting these appeals was heard immediately following the evidence with respect to the appeals of Alpine Drywall Construction Limited, upon completion of which argument was heard on each set of appeals because the issues involved in each set of appeals were substantially the same, subject only to minor variations consequent upon minor differences in facts.

The appellant company was incorporated pursuant to the laws of Alberta in 1956, at the instigation of Bert Robbins and William Jager and as its corporate name indicates, engaged in that phase of the construction industry involving the moving of earth.

At all times material to these appeals 100 shares of the appellant's authorized capital stock, each of which entitles the holder thereof to one vote, were issued and outstanding of which 60 shares were issued to William Jager and 40 shares were issued to Bert Robbins.

In November 1958 William Jager transferred 59 of the shares held by him to Jager Holdings (Calgary) Ltd. which company had been incorporated at the behest of William Jager as a convenient vehicle in which to vest the shares formerly held by him in the various construction enterprises in which he was interested. The remaining share of the original 60 shares in the appellant held by William Jager was retained in his own name but was beneficially held for Jager Holdings (Calgary) Limited.

Again it was common ground that William Jager controlled Jager Holdings (Calgary) Limited in which he held 51 shares of its 100 shares of issued capital stock and his wife held the remaining 49 shares.

In December 1960 Bert Robbins purchased 10 shares of the appellant from Jager Holdings (Calgary) Limited so that from January 1, 1961 forward the shareholding in the appellant was as follows; Bert Robbins 50 shares, Jager Holdings (Calgary) Limited 49 shares and William Jager 1 share.

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 Cattanach J.

Bert Robbins and William Jager were the only directors of the appellant company and William Jager was the duly appointed representative of Jager Holdings (Calgary) Limited to vote the 49 shares held by that company at all meetings of the appellant.

William Jager was elected President and Bert Robbins was elected Secretary-Treasurer at the inception of the appellant which offices they held throughout the taxation years in question.

The Articles of Association of the appellant herein and those of Alpine Drywall & Decorating, Ltd. were identical and by reason of which William Jager, as President and Chairman of all meetings, was vested with a casting vote in the event of an equality of votes upon any question arising for determination at any meeting of the Company.

Here, again, the actual business operations of the appellant were conducted by Bert Robbins without interference or direction from William Jager. Bert Robbins and William Jager were not related. Neither of them had read the Articles of Association and neither were aware that William Jager could cast a second vote and, of course, he did not do so at any time.

Again, as in Alpine Drywall, the work done by the appellant for the Jager companies was not the only work undertaken by it, but a lesser percentage and it obtained work from those companies only when its competitive bids were lowest.

In these appeals, as in the appeals of Alpine Drywall & Decorating Ltd., the sole question is whether the appellant is associated with Jager Holdings (Calgary) Limited within the meaning of the word "associated" as used in section 39 of the *Income Tax Act*.

The question of whether the appellant was associated with Jager Holdings (Calgary) Limited depends upon whether the appellant was controlled by William Jager, who controlled Jager Holdings (Calgary) Limited, in accordance with section 39(4)(b) which reads as follows:

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 ...
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In view of the conclusion I reached in *Vineland Quarries & Crushed Stone Limited v. M.N.R.*¹ it is permissible to "look through" the share register of Jager Holdings (Calgary) Limited and to ascertain that William Jager controls that company.

The shares in the appellant were held in the following proportions, 50 by Bert Robbins, 49 by Jager Holdings (Calgary) Limited and 1 by William Jager in trust for Jager Holdings (Calgary) Limited. On the authority of the *Bibby case*² the share held by William Jager in trust is to be considered as being held by him and enquiry is not to be made as to the beneficial ownership thereof. On the authority of *British American Tobacco Co. Ltd. v. I.R.C.*³, the 49 shares held by Jager Holdings (Calgary) Limited are to be taken as representing the will and voice of William Jager. Therefore, the 100 shares of the appellant are held, 50 by Bert Robbins and, to all intents and purposes, 50 by William Jager.

Therefore, the question resolves itself into whether the second or casting vote held by William Jager vests the control of the appellant company in him.

For the reasons expressed in the appeals of Alpine Dry-wall & Decorating Ltd., which are being filed concurrently herewith, I must conclude that it does not.

The appeals are, therefore, allowed with costs.

¹ [1966] C.T.C. 69.

² [1945] 1 All E.R. 667.

³ [1943] 1 All E.R. 13.