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Oct. 13

Oct. 14

BETWEEN:

BUCKERFIELD'S LIMITED, GREEN VALLEY FERTILIZER & CHEMICAL CO. LTD., WESTLAND ELEVATORS LIMITED, and BURRARD TERMINALS LIMITED .....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Revenue—Income—Income tax—Associated companies—Control of corporation within meaning of s. 39(4)(b) of the Income Tax Act—Meaning of "group of persons" as used in s. 39(4) of the Income Tax Act—Income Tax Act, R.S.C. 1952, c. 148, s. 39(1),(2) and (4).

In 1961 two companies, Pioneer Grain Company Limited and Federal Grain Company, each owned one-half of the issued shares of the appellant companies, Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd. Federal Grain Company also held one-third of the shares of Westland Elevators Limited and The Alberta Pacific Grain Company (1943) Limited, a wholly owned subsidiary of Federal Grain Company, owned one-third of the shares of Burrard Terminals Limited. Searle Grain Company Limited held one-third of the shares of Westland Elevators Limited and Burrard Terminals Limited and Pioneer Grain Company Limited held the remaining one-third of the shares of these two companies.

The question to be decided is whether the appellants, Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd, in the one case, and Westland Elevators Limited and Burrard Terminals Limited in the other, are "controlled by the same . . . group of persons" within the meaning of those words in s. 39(4)(*b*) of the *Income Tax Act.*

Held: That the word "controlled" as used in s. 39 of the *Income Tax Act* 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.

2. That where, in the application of s. 39(4) of the *Income Tax Act,* a single person does not own sufficient shares to have control in the sense indicated in s. 39, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

3. That the phrase "group of persons", as used in s. 39(4)(*b*) of the *Income Tax Act,* is apt to encompass the companies holding the shares of Buckerfield's Limited and Green Valley Fertilizer & Chemical Co. Ltd. and the companies holding the shares of Westland Elevators Limited and Burrard Terminals Limited.

4. That the appeals are dismissed.

APPEALS under the *Income Tax Act.*

The appeals were heard by the Honourable Mr. Justice Jackett, President of the Court, at Ottawa.

H. H. Stikeman, Q.C. and *James Grant* for appellants.

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F. J. Cross and *D. G. H. Bowman* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

JACKETT P. at the conclusion of the argument (October 14, 1964) delivered the following judgment:

I shall deliver a single set of reasons for judgment in *Buckerfield's Limited v. Minister of National Revenue, Green Valley Fertilizer & Chemical Co. Ltd. v. Minister of National Revenue, Westland Elevators Limited v. Minister of National Revenue and Burrard Terminals Limited v. Minister of National Revenue.*

These four appeals are appeals against the assessments of the respective appellants under the *Income Tax Act* for the 1961 taxation year. The appellant in each case challenges the assessment on the ground that the Minister erred when, in making the assessment, he assumed that the appellant and another company were "associated with each other" in 1961 within the meaning of these words in subsection (2) of section 39 of the *Income Tax Act.*

As the Minister's assumption was that Buckerfield's Limited (hereinafter referred to as "Buckerfield's") was associated with Green Valley Fertilizer & Chemical Company Limited (hereinafter referred to as "Green Valley"), the questions in the appeals of those two companies are identical and those appeals were therefore heard together. Similarly, as the Minister's assumption was that Burrard Terminals Limited (hereinafter referred to as "Burrard") was associated with Westland Elevators Limited (hereinafter referred to as "Westland"), the questions in the appeals of those two companies are identical and those appeals were therefore heard together.

The argument submitted in support of the appeal is the same in all four cases.

In 1961, one-half of the issued shares of Buckerfield's belonged to Pioneer Grain Company Limited (hereinafter referred to as "Pioneer") and one-half belonged to Federal Grain Company (hereinafter referred to as "Federal"). The same two companies each owned one-half of the issued shares of Green Valley. The shares in Buckerfield's were acquired by Pioneer and Federal under written agreement dated December 24, 1951, under which they agreed in effect,

(a) that their share holdings in Buckerfield's were to be maintained at the same level,

(b) that, notwithstanding the number of shares held or controlled by either of them, each of them was to have "an equal voice...in the control and operation of Buckerfield's",

(c) that each of them was to be entitled to nominate 50 per cent of the Board of Directors of Buckerfield's,

(d) that "the management of Buckerfield's ... shall be such as shall at all times...be acceptable to both parties", and

(e) that each of them should have a right of first refusal in respect of the other's shares in Buckerfield's.

The parties had verbally agreed to the same terms in relation to Green Valley. Buckerfield and Green Valley were controlled in accordance with the respective agreements.

The basic facts in respect of Burrard and Westland were in substance the same as the basic facts that I have just recited in relation to Buckerfield's and Green Valley except that, in the case of Burrard, its shares were held one-third by Pioneer, one-third by The Alberta Pacific Grain Company (1943) Limited (a wholly owned subsidiary of Federal hereinafter referred to as "Alberta Pacific") and one-third by Searle Grain Company Limited (hereinafter referred to as "Searle"), and, in the case of Westland, its shares were held one-third by Federal, one-third by Pioneer and one-third by Searle.

Buckerfield's and Green Valley were each carrying on a business unrelated to the businesses of their shareholders. They both sold, among other things, fertilizer, and were in active competition with each other. There seems to have been no reason for acquisition of their shares by Pioneer and Federal except that the shares were regarded as a good investment. Burrard and Westland, on the other hand, operated terminal elevators and had facilities which, at certain seasons of the year, were of some considerable importance to the three companies which had acquired their shares.

Apart from their mutual interests in the appellant companies, the evidence is that Pioneer, Federal and Searle

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are vigorous competitors. They are each in the grain business in Western Canada and operate completely independently of each other. The evidence is further that, in three cases at least, the management of the appellants is left to the officers employed for the purpose and that there is, in fact, no control exercised over the management of the appellants by Pioneer, Federal or Searle or by any one or more of them acting in combination.

On these facts, the question to be determined in each appeal arises under section 39 of the *Income Tax Act* as applicable to the 1961 taxation year. That section reads in part as follows:

> 39. (1) The tax payable by a corporation under this Part upon its taxable income or taxable income earned in Canada, as the case may be, (in this section referred to as the "amount taxable") for a taxation year is, except where otherwise provided,
>
> (*a*) 18% of the amount taxable, if the amount taxable does not exceed $35,000, and
>
> (*b*) $6,300 plus 47% of the amount by which the amount taxable exceeds $35,000, if the amount taxable exceeds $35,000.
>
> (2) Where two or more corporations are associated with each other in a taxation year, the tax payable by each of them under this Part for the year is, except where otherwise provided by another section, 47% of the amount taxable for the year.
>
> * * *
>
> (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,

The question in the one set of appeals is simply whether Buckerfield's and Green Valley are "controlled by the same ...group of persons" within the meaning of those words in section 39(4)(*b*) and the question in the other set of appeals is whether Burrard and Westland are "controlled by the same...group of persons" within the meaning of those words in section 39(4)(*b*).

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.*[1] where Viscount Simon L. C., at page 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.

See also *Minister of National Revenue v. Wrights' Canadian Ropes Ld.*[2] per Lord Greene M.R. at page 118, where it was held that the mere fact that one corporation had less than 50 per cent of the shares of another was "conclusive" that the one corporation was not "controlled" by the other within section 6 of the *Income War Tax Act*.

Where, in the application of section 39(4) a single person does not own sufficient shares to have control in the sense to which I have just referred, it becomes a question of fact as to whether any "group of persons" does own such a number of shares.

In these appeals, there is no doubt that Pioneer and Federal, in the one pair of appeals, and Pioneer, Federal (including its subsidiary Alberta Pacific) and Searle, in the other pair of appeals, have control of the two appellants. If Pioneer and Federal are, in relation to the ownership of the shares of Buckerfield's and Green Valley, aptly described by the words, "group of persons", Buckerfield's and Green Valley are "associated with each other" within the meaning of those words in section 39(2). Similarly, if Pioneer, Federal (including its subsidiary Alberta Pacific) and Searle are, in relation to the ownership of the shares of Burrard and Westland, aptly described by the words "group of persons", Burrard and Westland are "associated with each other" within the meaning of those words in section 39(2).

[1] [1943] 1 A.E.R. 13.

[2] [1947] A.C. 109.

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The applicable sense of the word "group" as defined by the Shorter Oxford English Dictionary (1959) is

> 2. gen. An assemblage of objects standing near together, and forming a collective unity; a knot (of people), a cluster (of things). In early use there is often a notion of confused aggregation.

The only other sense that might be applicable is

> 3. A number of persons or things in a certain relation, or having a certain degree of similarity.

Counsel for the appellants referred to other dictionary definitions but I do not find any conflict among them. Apart from the argument on these appeals, the phrase "group of persons" is apt to encompass the companies holding the shares of Buckerfield's and Green Valley or the companies holding the shares of Burrard and Westland, within my understanding of the meaning of that phrase whether or not I seek the aid of dictionaries.

Counsel for the appellants, however, put forward two submissions. These two submissions, as I understand them, are

(a) that the word "group" in its ordinary sense does not include any number of persons less than four; and

(b) in section 39(4), the word "group" means a group of persons who come together to take advantage of the low rate of tax under section 39 and not a group of persons who come together for any other particular common purpose.

In support of the first of these two submissions, as I understand him, counsel submitted that, if Parliament had intended to include two, reference would have been made to a couple or a pair and, if it had intended to include three, reference would have been made to a trio. I cannot accept this submission. The word "group" in its ordinary meaning as I understand it, can refer to any number of persons from two to infinity. There is nothing in section 39(4) to suggest that there is any intention to omit any of them. Any omission of particular numbers would be, moreover, an obvious gap in the legislative scheme.

I have equal difficulty in appreciating the force of counsel's other submission. It is that, in section 39(4), "group" means a group of persons who come together to take advantage of the low rates of tax under section 39. I have difficulty in conceiving of a group of shareholders holding shares in two or more companies having joined

together in their share holdings in order to get the benefit of the lower tax rate in section 39. The course of action that section 39 has been designed to discourage is the multiplication of corporations carrying on a business in order to get greater advantage from the lower tax rate. If a group were a party to such activity, presumably it would, as a group, have controlled a single company carrying on the business before the business was divided among a number of companies each controlled by the group. In such a case, the group would not have come together for the purpose of getting the low rate under section 39. Indeed, I can conceive of no case in which the group would have come together for that purpose. In any event, I am unable to appreciate the cogency of the argument in support of the submission that such an artificial limitation should be read into section 39(4) so as to cut down the ambit of the clear words of that subsection.

The appeals are dismissed with costs.

Judgment accordingly.