

Toronto
1966
Sept. 7 & 8
Ottawa
Sept. 22

BETWEEN:

FLOOR & WALL COVERING DIS-
TRIBUTORS LIMITED and
VINA-RUG (CANADA) LIM-
ITED

APPELLANTS;

AND

THE MINISTER OF NATIONAL
REVENUE

RESPONDENT.

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 39(2), 4(b)—“Associated corporations”—More than one group in position to control corporation—Determination of group in control.

The matter for decision in each of these appeals was whether each of the appellants was associated with a company known as Stradwick's Limited within the meaning of section 39 of the Act. The shareholdings of relevant corporations were as summarized below:

	<i>Floor & Wall</i>	<i>Vina-Rug</i>	<i>Stradwick Ltd.</i>	<i>Stradwick Industries Ltd.</i>
<i>Voting Shares</i>				
Father	nil	nil	12	25,500
Two sons	4,478	12,266	20	nil
Associate	1,121	6,133	8	9,500
Stradwick Ltd. .		5,250		
Others	4,401	16,351		15,000
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	10,000	40,000	40	50,000

The respondent submitted that Stradwick's Ltd. was controlled by “the group” composed of the two sons and an associate which group similarly controlled the two appellants, whereas the appellants submitted that Stradwick's Ltd. was controlled by the “related group” comprising father and sons which group, alone, was not in a position to control either of the appellants.

Held, That the determination of what persons constitute a “group” within the meaning of the section is a question of fact; and that each of the two named groups was a “group” that could control Stradwick's Ltd.; and that while it was open to the appellants to seek to establish that the “group” claimed by the respondent was in fact the “group” that controlled the corporation, the appellants did not succeed in doing so.

2. That the Minister's assumption not having been proven wrong, the appeals were dismissed.

APPEALS under the *Income Tax Act*.

P. N. Thorsteinsson for appellants.

L. R. Olsson and *G. V. Anderson* for respondent.

GIBSON J.:—These appeals were tried together because the same evidence and argument was applicable to each.

The matter for decision in each appeal is whether each of the appellants was associated with a company known as Stradwick's Limited within the meaning of s. 39(2) of the *Income Tax Act*.

Specifically, the determination of which "group of persons" of two possible groups controlled this company within the meaning of s. 39, s-s. 4, para. (b) of the Act during the taxation years 1961 and 1962 is the issue in each appeal.

In each case the assessments appealed from were made on the assumption that each of the appellant companies was associated with each other and each was also associated with Stradwick's Limited and Stradwick Industries Limited.

The owners and the number of shares of all the outstanding common shares (and there were no other voting shares issued in any of these companies) at all material times of each appellant company and of these two other companies were as follows:

Floor & Wall Covering Distributors Limited

J. C. Stradwick, Sr.	nil
J. C. Stradwick, Jr.	2,239
W. L. Stradwick	2,239
H. D. McGilvery	1,121
Others	4,401
	<hr/>
Total issued shares	10,000

Vina-Rug (Canada) Limited

J. C. Stradwick, Sr.	nil
J. C. Stradwick, Jr.	6,133
W. L. Stradwick	6,133
H. D. McGilvery	6,133
Stradwick's Limited	5,250
Others	16,351
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Total issued shares	40,000

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1966	<i>Stradwick's Limited</i>	
FLOOR & WALL	J. C. Stradwick, Sr.	12
COVERING	J. C. Stradwick, Jr.	10
DISTRIBUTORS	W. L. Stradwick	10
LTD. AND	H. D. McGilvery	8
VINA-RUG (CANADA)		<hr/>
LTD.		
v.	Total issued shares	40
MINISTER OF NATIONAL REVENUE		

Stradwick Industries Limited

Gibson J.	J. C. Stradwick, Sr.	25,500
	J. C. Stradwick, Jr.	nil
	W. L. Stradwick	nil
	H. D. McGilvery	9,500
	Others	15,000
		<hr/>
	Total issued shares	50,000

The J. C. Stradwick, Sr. referred to is the father of J. C. Stradwick, Jr. and W. L. Stradwick. H. D. McGilvery is a stranger in the tax sense, and is and has been for many years a business associate of Stradwick Sr. and the sons. The others referred to are strangers in the tax sense.

Considering the business activities of all of these companies together during the relevant period such could be described as the manufacture and sale at both the wholesale and retail levels of floor and wall tile and many allied products used as building materials.

The factual questions to be decided are two, namely: (1) was Stradwick's Limited at the material times controlled by (a) the two Stradwick sons and McGilvery, as submitted by the respondent, or (b) by Stradwick Sr. and his two sons, as submitted by the appellants; and (2) depending on which group referred to in (1) above is chosen, whether such group is a "group of persons" within the meaning of s. 39(4)(b) of the *Income Tax Act*.

As judicially decided in this court in such cases as *Buckerfield's Limited et al. v. The Minister of National Revenue*¹; *Yardley Plastics of Canada Limited v. The Minister of National Revenue*²; and *Aaron's (Prince Albert) Limited et al. v. The Minister of National Revenue*³

¹ [1965] 1 Ex. C.R. 299.

² [1966] C.T.C. 215.

³ [1966] C.T.C. 330.

“control” in this subsection means the right to control by ownership of voting shares, not *de facto* control. What is done at any time with such right to control is therefore not necessarily material.

In this connection the appellants, as they were entitled to do, following the dictum of Noël J. in *Yardley Plastics of Canada Limited v. The Minister of National Revenue* above cited, sought to establish in evidence that the “group of persons” consisting of Stradwick Sr. and the two sons, as opposed to the group consisting of the Stradwick sons and McGilvery, did in fact control Stradwick’s Limited. In my opinion the appellants failed to do so.

In my opinion also, without detailing the indicia which is clear from the evidence, each of these groups of persons are a “group of persons” within the meaning of s. 39(4) para. (d) of the Act, in that they had at all material times a sufficient common connection as to be in a position to exercise control of Stradwick’s Limited.

In the result therefore, the appellant has not established that the assumption of the respondent is wrong, namely that the “group of persons” consisting of the Stradwick sons and McGilvery at material times controlled Stradwick’s Limited within the meaning of s. 39(4)(b) of the Act; or that because of this, that this group of persons by this indirect method also controlled Vina-Rug (Canada) Limited.

Whether or not within the meaning of s. 39(4) para. (d) of the Act Stradwick Sr. and the Stradwick sons, also during the same material times, controlled Stradwick’s Limited, I do not have to decide, but it is clear from the circumstances of this matter that such is the case.

In the result therefore each appellant falls within the provisions of s. 39, s-s. 2 of the Act and is not entitled to get the greater advantage from the lower tax rate provided in s. 39(1)(a) of the Act.

The appeals are dismissed with costs.

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