

BETWEEN :

VINELAND QUARRIES AND }
CRUSHED STONE LIMITED . }

APPELLANT;

Toronto
1966
Jan. 11-12
Feb. 7

AND

THE MINISTER OF NATIONAL }
REVENUE

RESPONDENT.

*Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 39(2), (3), (4), (5)—
“Associated corporations”—Control by same group—Meaning of control—Indirect control—Control through intermediate companies—
To control by corporation equivalent to control by individual who controls corporations.*

The appellant was one of a group of three corporations which the Minister regarded as “associated corporations” within the meaning of section 39 of the Act.

The relationship among the three corporations was as indicated as follows:

Half the shares of the appellant were owned by a Mr. Sauder and the other half by Bold Investments (Hamilton) Ltd., all of whose shares were owned by a Mr. Thornborrow.

Half the shares of Sauder and Thornborrow Ltd. were owned by Mr. Thornborrow and the other half by McMaster Investments Ltd., all of whose shares were owned by Mr. Sauder.

The shares of Verben Tank Lines Ltd. were held equally by Mr. Sauder and Mr. Thornborrow.

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The Minister decided that the appellant, Sauder and Thornborrow and Verben were associated companies, being controlled by the same group of persons, namely Messrs. Sauder and Thornborrow, notwithstanding the interposition of the corporations controlled by one or other of them, as indicated.

Held: That "controlled" in section 39(4)(b) contemplated and included such a relationship as, in fact, brought about a control by virtue of majority voting power, no matter how that result was effected, that is, either directly or indirectly.

2. That it is not appropriate to end the inquiry after looking at the share registers of the appellant and Sauder and Thornborrow Limited.
3. That it is proper and necessary to look at the share registers of Bold Investments (Hamilton) Limited and Sauder and Thornborrow Limited to obtain an answer to the inquiry whether the appellant and the other two companies are controlled by the same "group of persons".
4. That the Minister was right in assuming, as he did when assessing the appellant, that the appellant company was controlled by Benjamin Sauder and Vernon Thornborrow and that Sauder and Thornborrow Limited was controlled by Benjamin and Vernon Thornborrow as was Verben Tank Lines Limited.
5. That accordingly the appellant company, Sauder and Thornborrow Limited and Verben Tank Lines Limited were associated corporations within the meaning of section 39(2) by virtue of subsections (4)(b) and (5) of section 39.
6. That the appeals are dismissed.

APPEAL from assessments of the Minister of National Revenue.

F. E. Labrie for appellant.

M. A. Mogan and *L. M. Little* for respondent.

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

Prior to the hearing the parties agreed upon a statement of facts which is reproduced hereunder:

AGREED STATEMENT OF FACTS

The Appellant and the Respondent hereby admit the several facts respectively hereunder specified but these admissions are made for the purpose of this appeal only and may not be used against either party on any other occasion or by any other than the Appellant and the Respondent. The parties reserve the right to object to the admissibility of any or all of the said facts on the ground that they are not relevant or material to any of the issues to be determined in this appeal:

1. In this agreed Statement of Facts the parties will refer to five different corporations and their names will be abbreviated as follows:

- (a) VINELAND QUARRIES AND CRUSHED STONE LIMITED (hereinafter referred to as "Vineland");
- (b) SAUDER AND THORNBORROW LIMITED (hereinafter referred to as "S. & T.");
- (c) VERBEN TANK LINES LIMITED (hereinafter referred to as "Verben");
- (d) McMASTER INVESTMENTS LIMITED (hereinafter referred to as "McMaster"); and
- (e) BOLD INVESTMENTS (HAMILTON) LIMITED (hereinafter referred to as "Bold").

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2. Vineland adopted the 31st day of December in each year as the end of its fiscal period, and its taxation years 1961 and 1962 are under appeal herein. All references with respect to the ownership of shares in any or all of the above five corporations will relate to the taxation years of Vineland which are under appeal herein: namely, the calendar years 1961 and 1962.

3 Vineland was incorporated under the laws of the Province of Ontario on the 13th day of December, 1957, having its head office in the City of Hamilton in the Province of Ontario.

4. At all relevant times, there were issued 2,400 preference shares of Vineland and 25,000 common shares of Vineland. The non-voting preference shares were registered in the name of and beneficially owned by Benjamin Sauder as to one-half (1,200) and Vernon Thornborrow as to one-half (1,200). During 1961 and 1962, the voting common shares of Vineland were owned as to one-half (12,500) by or for the benefit of Benjamin Sauder; and the remaining one-half (12,500) were owned by or for the benefit of Bold.

5. Bold was incorporated under the laws of the Province of Ontario on the 28th day of December, 1959 and, throughout 1961 and 1962, Bold was controlled by Vernon Thornborrow through his ownership of more than one-half of its voting share capital. During 1961 and 1962, all of the issued shares of Bold were owned by or for the benefit of Vernon Thornborrow.

6. S. & T. was incorporated under the laws of the Province of Ontario on the 27th day of December, 1950, having its head office in the City of Hamilton in the Province of Ontario.

7. At all relevant times, there were issued 4,000 voting common shares of S. & T. During 1961 and 1962, the voting common shares of S. & T. were owned as to one-half (2,000) by or for the benefit of Vernon Thornborrow; and the remaining one-half (2,000) were owned by or for the benefit of McMaster.

8. McMaster was incorporated under the laws of the Province of Ontario on the 12th day of February, 1959 and, throughout 1961 and 1962, McMaster was controlled by Benjamin Sauder through his ownership of more than one-half of its voting share capital. During 1961 and 1962, all of the issued shares of McMaster were owned by or for the benefit of Benjamin Sauder.

9. Verben was incorporated under the laws of the Province of Ontario on the 9th day of March, 1959, having its head office in the City of Hamilton in the Province of Ontario.

10. At all relevant times, there were issued 1,000 voting common shares of Verben. During 1961 and 1962, the voting common shares of

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Verben were owned as to one-half (500) by or for the benefit of Benjamin Sauder; and the remaining one-half (500) were owned by or for the benefit of Vernon Thornborrow.

11. Vernon Thornborrow referred to in paragraphs 4, 5, 7 and 10 above is one and the same person. Benjamin Sauder referred to in paragraphs 4, 8 and 10 above is one and the same person. Vernon Thornborrow and Benjamin Sauder are not related in any way and more particularly are not related persons within the meaning of the Income Tax Act, R.S.C. 1952, Chapter 148, as amended.

12. Vineland carries on the business of extracting gravel and crushed stone from quarries in Ontario for processing and sale.

13. S. & T. carries on the business of distribution and sale of fuel oil for domestic and commercial use.

14. Verben carried on the business of leasing tank trucks for the delivery of fuel oil. In terms of gallonage, about 95% of Verben's total business in 1961 and 1962 was derived from the leasing of tank trucks to S. & T. Verben did not employ any individuals in 1961 and 1962 other than Benjamin Sauder and Vernon Thornborrow.

15. By Notices of Assessment dated May 12, 1964, the Minister of National Revenue assessed income tax against Vineland for the 1961 and 1962 taxation years on the basis that Vineland was associated with Verben and S. & T. within the meaning of subsections (2), (3), (4) and (5) of Section 39 of the Income Tax Act, R.S.C. 1952, Chapter 148.

16. Attached hereto as Exhibit 1 and forming part of this Agreed Statement of Facts is a true copy of an agreement made the 15th day of December, 1960, between Benjamin Sauder, Bold and Vernon Thornborrow. The Appellant and the Respondent agree to admit Exhibit 1 as part of the evidence without formal proof upon the hearing of this appeal.

17. Attached hereto as Exhibit 2 and forming part of this Agreed Statement of Facts is a true copy of an agreement made the 15th day of December, 1960, between Vernon Thornborrow, McMaster and Benjamin Sauder. The Appellant and the Respondent agree to admit Exhibit 2 as part of the evidence without formal proof upon the hearing of this appeal.

18. Attached hereto as Exhibit 3 and forming part of this Agreed Statement of Facts is a true copy of an agreement made the 15th day of December, 1960, between Benjamin Sauder and Vernon Thornborrow. The Appellant and the Respondent agree to admit Exhibit 3 as part of the evidence without formal proof upon the hearing of this appeal.

19. Attached hereto as Exhibits 4(a) and 4(b) and forming part of this Agreed Statement of Facts are the financial statements of S. & T. for the taxation years 1961 and 1962 respectively. The Appellant and the Respondent agree to admit Exhibits 4(a) and 4(b) as part of the evidence without formal proof upon the hearing of this appeal.

20. Attached hereto as Exhibits 5(a) and 5(b) and forming part of this Agreed Statement of Facts are the financial statements of Verben for the taxation years 1961 and 1962 respectively. The Appellant and the Respondent agree to admit Exhibits 5(a) and 5(b) as part of the evidence without formal proof upon the hearing of this appeal.

THE PARTIES HERETO reserve the right to call such further and other evidence as Counsel may advise.

Appended to the Agreed Statement of Facts were exhibits 1, 2 and 3 being agreements between (1) Benjamin Sauder, Bold Investments (Hamilton) Limited and Vernon Thornborrow, (2) Vernon Thornborrow, McMaster Investments Limited and Benjamin Sauder, and (3) Benjamin Sauder and Vernon Thornborrow. Each of the three agreements is dated December 15, 1960.

The agreement being Exhibit 1, relates to the appellant company, the agreement being Exhibit 2, relates to Sauder and Thornborrow Limited and the agreement being Exhibit 3, relates to Verben Tank Lines Limited.

Also appended to the Agreed Statement of Facts are Exhibits 4(a) and (b) and Exhibits 5(a) and (b) being the financial statements of Sauder and Thornborrow Limited for its 1961 and 1962 fiscal years and the financial statements of Verben Tank Lines Limited for its 1961 and 1962 fiscal years respectively.

The three agreements are substantially identical to all intents and purposes. Each agreement contains a clause that no party thereto shall vote or cause to be voted as to cause any resolution to be passed or by-law enacted or business to be transacted by the Company to which the agreement relates except with the consent and approval of all parties thereto. If a breach occurs it is provided that the offending party shall be responsible in damages.

Each agreement also includes provisions respecting the purchase of shares held by the other natural party and provisions for cross-insurance.

The question for determination in respect of each appeal is whether the appellant is "associated" with Sauder and Thornborrow Limited and Verben Tank Lines Limited within the meaning of the word "associated" as used in section 39 of the *Income Tax Act* so as to authorize the Minister to assess the appellant by depriving it of the lower income tax rate on its first \$35,000 of income in each of the years in question.

The pertinent provisions of section 39 of the *Income Tax Act*, as applicable to the 1961 and 1962 taxation years, read as follows:

39. (1) The tax payable by a corporation under this Part upon its taxable income for taxable 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,

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- (a) 18 per cent of the amount taxable, if the amount taxable does not exceed \$35,000, and
- (b) \$6,300 plus 47 per cent 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 per cent 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.
- (5) When two corporations are associated, or are deemed by this subsection to be associated, with the same corporation at the same time, they shall, for the purpose of this section, be deemed to be associated with each other.

The Minister, in assessing the appellant as he did, acted on the following assumptions:

- (a) one-half of the voting shares of the Appellant company were during 1961 and 1962 owned by or for the benefit of Benjamin Sauder; and the other half of the voting shares of the Appellant company were during 1961 and 1962 owned by or for the benefit of Bold Investments (Hamilton) Limited;
- (b) during 1961 and 1962, more than one-half of the voting shares of Bold Investments (Hamilton) Limited were owned by or for the benefit of Vernon Thornborrow;
- (c) during 1961 and 1962, the Appellant company was controlled by a group of persons consisting of Benjamin Sauder and Vernon Thornborrow;
- (d) one-half of the voting shares of Sauder and Thornborrow Limited were during 1961 and 1962 owned by or for the benefit of Vernon Thornborrow; and the other half of the voting shares of Sauder and Thornborrow Limited were during 1961 and 1962 owned by or for the benefit of McMaster Investments Limited;
- (e) during 1961 and 1962, more than one-half of the voting shares of McMaster Investments Limited were owned by or for the benefit of Benjamin Sauder;
- (f) during 1961 and 1962, Sauder and Thornborrow Limited was controlled by a group of persons consisting of Benjamin Sauder and Vernon Thornborrow;
- (g) the Appellant company and Sauder and Thornborrow Limited were associated corporations as contemplated by Section 39(4)(b) of the Income Tax Act because they were both controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow;
- (h) one-half of the voting shares of Verben Tank Lines Limited were during 1961 and 1962 owned by or for the benefit of Benjamin Sauder; and the other half of the voting shares of Verben Tank Lines Limited were during 1961 and 1962 owned by or for the benefit of Vernon Thornborrow;

(i) the Appellant company and Verben Tank Lines Limited were associated corporations as contemplated by Section 39(4)(b) of the Income Tax Act because they were both controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

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The Minister contends that:

(1) the Appellant corporation and Sauder and Thornborrow Limited were associated corporations by virtue of paragraph (b) of subsection (4) of Section 39 of the Income Tax Act because both companies were controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

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(2) the Appellant corporation and Verben Tank Lines Limited were associated corporations by virtue of paragraph (b) of subsection (4) of Section 39 of the Income Tax Act because both companies were controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

(3) Sauder and Thornborrow Limited and Verben Tank Lines Limited were associated corporations by virtue of subsection (5) of Section 39 of the Income Tax Act and by virtue of paragraph (b) of subsection (4) of Section 39 of the Income Tax Act because both companies were controlled by the same group of persons consisting of Benjamin Sauder and Vernon Thornborrow.

The appellant contends that it is not controlled by the same group of persons that controls Verben Tank Lines Limited and Sauder and Thornborrow Limited. Basically the contention of the appellant is (1) that it is controlled by Benjamin Sauder and Bold Investments (Hamilton) Limited, and not by Benjamin Sauder and Vernon Thornborrow (as alleged by the Minister,) even though the shares of Bold Investments (Hamilton) Limited are owned 100 per cent by Vernon Thornborrow, and (2) that Sauder and Thornborrow Limited is controlled by Vernon Thornborrow and McMaster Investments Limited and not by Vernon Thornborrow and Benjamin Sauder (as alleged by the Minister) even though the shares of that company are owned 100 per cent by Benjamin Sauder. There is no question, and it is readily conceded, that Verben Tank Lines Limited is controlled by Vernon Thornborrow and Benjamin Sauder.

The narrow question here involved is whether the Court may as a matter of law "look through" Bold Investments (Hamilton) Limited and McMaster Investments Limited and recognize that the voting control capable of being exercised by those two companies over the appellant corporation and Sauder and Thornborrow Limited respectively, is subject to the control of Vernon Thornborrow and Benjamin Sauder, respectively.

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In order for the Minister to succeed, the facts above recited must establish that the appellant corporation and Sauder and Thornborrow Limited are "controlled" by Benjamin Sauder and Vernon Thornborrow. If such is the case it follows that the three corporations, (1) the appellant, (2) Sauder and Thornborrow Limited and (3) Verben Tank Lines Limited are "associated" within the meaning of section 39(2) by virtue of subsections (4) and (5) of section 39.

This case turns on the meaning of the words "controlled by the same group of persons" in the context in which they are used in section 39(4)(b) of the *Income Tax Act*.

The President of this Court had recent occasion to consider the meaning of these very words in *Buckerfield's Ltd. v. M.N.R.*¹ where he said at page 302:

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 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 Ltd.* ([1947] A.C. 109) 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*.

In this same decision the President also determined that a "group of persons" can consist of as few as two persons.

However, such unequivocal definition of the word "controlled" in its context does not resolve the present issue. I am still faced with the problem of deciding whether control of Bold Investments (Hamilton) Limited by Vernon Thornborrow (the registered and beneficial owner of 100 per cent of the shares in that company) and the control of

¹ [1965] 1 Ex. C.R. 299.

McMaster Investments Limited by Benjamin Sauder (the registered and beneficial owner of 100 per cent of the shares in that company) vests the control of the appellant and Sauder and Thornborrow Limited in Benjamin Sauder and Vernon Thornborrow or whether the share registers of the appellant company and Sauder and Thornborrow Limited are conclusive in that they show Bold Investments (Hamilton) Limited and McMaster Investments Limited as being the owners of 50 per cent of the shares in the appellant and Sauder and Thornborrow Limited respectively and that therefore, these two companies together with Benjamin Sauder in the one instance and with Vernon Thornborrow in the other instance are the group of persons who have control.

I am not here concerned with the proposition that a corporation is a distinct legal entity separate from its shareholders, nor with any question of corporate capacity or power. I readily accept the undisputed proposition that no shareholder, even though he holds all the shares in a corporation, has any property, legal or equitable, in the assets of the corporation and the proposition that a corporation is not, as such, the agent or trustee for its shareholders.

The question here is who "controlled" the appellant and Sauder and Thornborrow Limited. Is it Benjamin Sauder and Vernon Thornborrow, or is it Benjamin Sauder and Bold Investments (Hamilton) Limited and Vernon Thornborrow and McMaster Investments Limited.

Were it necessary for me to answer this question uninstructed by authorities the solution which commends itself to me, would be to reply that it is Benjamin Sauder and Vernon Thornborrow. This is also the solution which appears to be dictated by the authorities.

In *British American Tobacco v. I.R.C.*¹ the question was whether one body corporate had a "controlling interest" in another body corporate. It was held that Company No. 1 can have a controlling interest in Company No. 3 by owning all the shares in Company No. 2 which in turn owns all the shares in Company No. 3. It was contended that in order that one company (or in this case a natural person) should have a "controlling interest" in another, it must be the beneficial owner of a requisite number of

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¹ [1943] 1 All E.R. 13.

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shares in that other company, either in its own name or in the names of its nominees; and that if Company No. 1 owns all the shares in Company No. 2 which in turn owns all shares in Company No. 3, Company No. 1 has no interest, controlling or otherwise, in Company No. 3.

These contentions were rejected as unsound by each tribunal which in turn dealt with the matter. In delivering the decision of the House of Lords, Viscount Simon, L.C. said at page 15:

It is true that in such circumstances company No. 1 owns none of the assets of company No. 2, and *a fortiori* owns none of the assets of company No. 3, and in that sense neither owns, nor has an interest in, company No. 3. But that is to treat the phrase "controlling interest" as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. The word "interest", however, as pointed out by LAWRENCE, J., is a word of wide connotation, and I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company. If, for example, the appellant company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellant company will none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter.

In my opinion this is the meaning of the word "interest" in the enactment under consideration, and, where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act. I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company.

It is apparent from the language of Viscount Simon that the words "controlling interest" were interpreted by him as being synonymous with the words "control of a company" and I am unable to attribute any different meaning to the word "controlled" as used in section 39(4)(b) of the *Income Tax Act*.

In the *British American Tobacco case* the "person" before Viscount Simon was an incorporated company, the British American Tobacco Co. Ltd., but it seems to me that the language quoted is equally applicable to the case where an individual person was, by having the requisite voting power in a company, able to determine all the ultimate decisions of that company.

I was then referred to *I.R.C. v. J. Bibby & Sons Ltd.*¹ which was also decided by the House of Lords. The words there to be interpreted were "the directors whereof have a controlling interest therein". The relevant facts in the *Bibby case* were that the directors of the company between them and in their own right held less than 50 per cent of the total voting shares; but three of the directors (who were brothers) in the capacity of trustees of a marriage settlement of their sister were the registered joint holders of further shares in the company. The total of the shares held by the directors in their own right and those held by three of the directors as trustees for their sister was more than a majority of the shares carrying voting rights.

In the *Bibby case* it was in the company's interest to contend that its directors had a controlling interest in it and accordingly it advanced the simple proposition that as the directors were the registered holders of a majority of the voting shares, they therefore, had a controlling interest in the company. For the Crown it was contended that the interest of the three directors who were trustees could not count because they did not have the beneficial interest in those shares and, therefore, could not vote them as they wished but must abide by their trust obligations.

The contention of the tax paying company prevailed in the Court of Appeal and in the House of Lords.

Lord Russell of Killowen, said at page 669:

When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words "controlling interest" is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from subsect. (9)(a) and include it in (9)(b), is the voting power of its directors, not their beneficial interest in the company.

For the purpose of such a test the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast *vis-à-vis* the company, and the resolution until rescinded would be binding on it. The contention that upon the wording of sect. 13 the interest must be confined to beneficial interests appears to me to be but a repetition of the argument which was rejected by this House in the case of *British American Tobacco Co. v. C.I.R.* in relation to National Defence Contribution and the Finance Act, 1937.

¹ [1945] 1 All E.R. 667.

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It should be noted that Lord Russell states that he was following the principles laid down by the House of Lords in the *British American Tobacco case*.

Lord Simonds in his speech in the *Bibby case* said at pages 672 and 673:

What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company.

From this result the Crown seeks an escape by the contention that shares held by a director as trustee should not be included for the purpose of computing the controlling interest. In the appellants' argument in this House and in their formal reasons this absolute veto is qualified by the suggestion that, if the director has not only the legal ownership of shares but also a predominating beneficial interest in them, they may be brought into the count.

My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be.

The contention of the appellant in the present case shorn of its refinements essentially amounts to the reasoning in the *Bibby case*, i.e. that the matter is concluded by reference to the share register; but this would be subject to the reasoning in the *British American Tobacco case* that where the registered shareholder is a body corporate it is permissible, for certain purposes, to look beyond the register and seek the individuals who themselves control that body corporate.

There is no conflict between the *British American Tobacco case* and the *Bibby case* in that both reject the test of beneficial shareholding interest.

In *I.R.C. v. Silverts, Ltd.*¹ and *S. Berendsen Ltd. v. I.R.C.*² Lord Evershed, M.R. was faced with the problem of reconciling the two decisions of the House of Lords in the *British American Tobacco case* and the *Bibby case*, or to put it more accurately a correct appreciation of the scope of those decisions. He had this to say in the *Silverts case* at page 709:

¹ [1951] 1 All E.R. 703.

² [1958] 1 Ch. Div. 1.

In neither case was the question the general one: "Who controls the company?" In the *British American Tobacco* case the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised, not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: "Has company B controlling interest in company C?" an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the *British American Tobacco* case. So, in the *Bibby* case and in the present case, the question: "Have the directors a controlling interest in the company?" falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company.

The suggestion in the language of Lord Evershed, above quoted that company B can have a controlling interest in company C consistent with the finding in the *British American Tobacco* case that company A has a controlling interest in company C was what was held by Cameron J. in *Vancouver Towing Co., Ltd. v. M.N.R.*¹ He held that regardless of the facts that the managing director, by reason of very extended powers conferred upon him by the articles of association had ultimate control of the appellant company and complete control over its board of directors as well as having an indirect control of the appellant company by owning the shares in a company which in turn held the majority of the shares of the appellant company, nevertheless, the appellant company also had a controlling interest.

In my view the word "controlled" in section 39(4)(b) contemplates and includes such a relationship as, in fact, brings about a control by virtue of majority voting power, no matter how that result is effected, that is, either directly or indirectly.

Here the inquiry is directed to whether Benjamin Sauder and Vernon Thornborrow control the appellant company and Sauder and Thornborrow Limited.

It would seem pointless to me to call a halt on finding in the share register of the appellant company and the share register of Sauder and Thornborrow Limited that in each instance 50 per cent of the shares are held respectively by Bold Investments (Hamilton) Limited and McMaster Investments Limited when an examination of the share register of Bold Investments (Hamilton) Limited and McMaster Investment Limited reveals that all (or nearly

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 VINELAND
 QUARRIES
 AND
 CRUSHED
 STONE
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattnach J

¹ [1946] Ex. C.R. 623.

1966
 VINELAND
 QUARRIES
 AND
 CRUSHED
 STONE
 LTD
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 ———
 Cattanach J.
 ———

all) the shares in those companies are held by Vernon Thornborrow and Benjamin Sauder respectively.

On the authority of the *British American Tobacco case*, I do not think it is appropriate to end the inquiry after looking at the share registers of the appellant and Sauder and Thornborrow Limited. It is proper and necessary to look at the share registers of Bold Investments (Hamilton) Limited and Sauder and Thornborrow Limited to obtain an answer to the inquiry whether the appellant and the two other companies are controlled by the same "group of persons". Where the registered shareholder in the first instance is a body corporate, you must look beyond the share register.

It therefore follows that the Minister was right in assuming, as he did when assessing the appellant, that the appellant company was controlled by Benjamin Sauder and Vernon Thornborrow and that Sauder and Thornborrow Limited was controlled by Benjamin and Vernon Thornborrow as was Verben Tank Lines Limited. Accordingly the appellant company, Sauder and Thornborrow Limited and Verben Tank Lines Limited were associated corporations within the meaning of section 39(2) by virtue of subsections (4)(b) and (5) of section 39.

The appeals are, therefore, dismissed with costs.