1954
Mar. 29, 30
Mar. 31

BETWEEN:

JACOB MAYER & SONS LTD. .....APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 20(2)(a), 127(5)(a)—Capital cost allowance—Dealing at arms length—Meaning of "one of several persons" in s. 127(5)(a)—Agreement to control not a condition of applicability of section.

The appellant was incorporated in Alberta with an authorized capital of $60,000, divided into 600 shares of $100 each, the signatories to the memorandum of association being Jacob Mayer and two of his sons, each subscribing for one share. Jacob Mayer sold the assets of his business to the appellant for 294 shares of its capital stock and three promissory notes of $10,200 each made by his three sons who each became the owner of 102 shares. The appellant claimed capital cost allowances based on valuations of the assets made for or by it. The Minister considered that the transaction between the appellant and Jacob Mayer was not a dealing at arms length and that it was entitled only to capital cost allowances based on the cost of the assets to Jacob Mayer, their former owner, and assessed the appellant accordingly. The appellant appealed to the Income Tax Appeal Board which dismissed the appeal and the present appeal is from this decision.

Held: That while the precise limits of the application of the word "several" may not be possible to define it is clear that it means more than two or three but not many. It is limitative in its effect. But whatever may be the extent of the limitation implied in the word "several" it is plain that four persons would not be outside its range.

2. That it is not a necessary condition of the applicability of section 127(5)(*a*) of the Act that there should be an agreement between the several persons referred to in it that they should act in concert in directly or indirectly controlling the corporation. There is no such requirement in the section.

3. That Jacob Mayer was one of several persons by whom the appellant was controlled within the meaning of section 127(5)(*a*) and that the transaction between him and the appellant was not a dealing at arms length.

APPEAL from a decision of the Income Tax Appeal Board.

The Appeal was heard before the President of the Court at Edmonton.

A. W. Crossley for appellant.

D. B. MacKenzie Q.C. and *J. D. C. Boland* for respondent.

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

THE PRESIDENT, on the conclusion of the hearing, delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated May 26, 1953, dismissing the appellant's appeal against its income tax assessment for 1950.

While the actual issue in the appeal is a narrow one it is desirable to set out the facts in their chronological order. Prior to 1949 Jacob Mayer carried on business at Stoney Plain in Alberta as a garage operator under the name of J. Mayer & Sons. The business was entirely his and he owned all its assets. In the business he employed his three sons, Edward H. Mayer, Frederick W. Mayer and Jack O. Mayer. They were not satisfied with this arrangement but were anxious to have a share in the business. Jacob Mayer appreciated their views and generously fell in with them. Sometime in 1949 he entered into a partnership agreement with them whereby his business was to be carried on under the name, style and firm of J. Mayer & Sons. This agreement was subsequently put into writing by a deed of co-partnership, dated December 1, 1949. It was provided in this deed that Jacob Mayer should receive 50 per cent of the profits of the business and his sons 18, 16 and 16 per cent respectively. But it was expressly stated that the assets and liabilities should remain in the sole ownership and obligation of Jacob Mayer as they stood on January 1, 1949. The partnership arrangement was for the term of one year to be computed from January 1, 1949, but before it expired Jacob Mayer or Jacob Mayer and his sons decided

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to form a limited company. This step was decided upon after consultation with Jacob Mayer's solicitor and advice from Mr. Auxier on the advantages of incorporation over a co-partnership in the matter of income tax liability incidence. There was also the desire on the part of the sons to have a permanent share in the assets of the business as well as its profits and Jacob Mayer's desire to keep them in the business with him and his willingness to meet their wishes. Accordingly, Jacob Mayer and two of his sons, Edward H. Mayer and Jack O. Mayer, on December 21, 1949, signed a memorandum and articles of association for the incorporation of a company under the name of Jacob Mayer & Sons Ltd., the name of the appellant herein, with an authorized capital of $60,000, divided into 600 shares of $100 each, each of the signatories to the memorandum subscribing for one share. On January 16, 1950, the appellant was duly incorporated under The Companies Act of Alberta. The appellant then held its first meeting on February 4, 1950. At the first general meeting of the shareholders, consisting of Jacob Mayer and his two sons, Edward H. Mayer and Jack O. Mayer, they were elected as directors and the directors were authorized to negotiate with Jacob Mayer for the purchase of the business operated under the name and style of J. Mayer & Sons. A meeting of the directors followed immediately afterwards. At that meeting Jacob Mayer was elected President and Edward H. Mayer Secretary-Treasurer. According to the minutes of the meeting the Secretary advised that Edward H. Mayer, Jack O. Mayer and Fred W. Mayer had each applied for 102 shares of the capital stock and had agreed to tender in payment his promissory note for $10,200. The offer was accepted and the Secretary instructed to issue the shares on receipt of the notes. The minutes also stated that the Secretary advised that Jacob Mayer had agreed to sell the business operated under the name and style of J. Mayer & Sons, including the real property, stock, equipment, good will, accounts payable and receivable, to the Company for $60,000 and had agreed to accept the notes made in favour of the Company by his three sons in payment of $30,600, provided that the shares issued to them were deposited with him as collateral to the notes, together with 294 shares of the capital stock in payment of the balance. The sons

agreed to deposit the shares as collateral to their notes. The minutes also stated that it was agreed that the Company should purchase the assets of J. Mayer & Sons for the sum of $60,000 to be paid by the issue of 294 shares of the capital stock to Jacob and the assignment of the notes to him and the President and Secretary were instructed to make all necessary arrangements for carrying out the transaction and issuing the shares. At the same meeting Fred W. Mayer was added to the board of directors.

On February 4, 1950, the shares were issued to Jacob Mayer and his three sons in the amounts mentioned but no promissory notes were given to the Company by the sons. But on February 18, 1950, the three sons made promissory notes for $10,200 each payable to Jacob Mayer on demand. The sons have never paid Jacob Mayer anything on these notes but each year he has given each of them a credit of $1,000 so that the notes now stand at $6,200 each.

It is not entirely clear how the three sons came to be shareholders in the Company. While the minutes are as stated, the appellant wrote a letter to the Director of Income Tax at Edmonton which it attached to its income tax return for 1950, in which it was stated, *inter alia,* that "at the end of 1949 Jacob Mayer decided to incorporate, the three sons agreeing to buy from the father shares in the business, which it was agreed should be valued at $60,000." It may possibly be, and I do not have to decide the matter, notwithstanding the statement in the minutes, that the real transaction was that Jacob Mayer, being the owner of all the assets was entitled to all the shares and that in effect he turned them over to his sons, although they were issued directly to them instead of being issued first to him and then transferred to them. The making of the notes payable to him is consistent with this view of the matter.

On March 11, 1950, Jacob Mayer transferred the land, including the building, to the appellant for the expressed consideration of $24,500 and on the same date gave it a bill of sale of his other assets for the expressed consideration of $35,500.

The upshot of the matter was that Jacob Mayer, who had been the sole owner of all the property acquired by the appellant, was now the owner of 294 shares of its capital stock and the holder of three promissory notes of $10,200

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each given to him by his sons and that each of them was the owner of 102 shares of the capital stock, Jacob Mayer holding the said shares as collateral to the unpaid notes.

In its income tax return for 1950, dated April 5, 1951, the appellant claimed capital cost allowances on the property which it had acquired from Jacob Mayer and also on property acquired during 1950. We are not concerned here with the additional property. The appellant based its claim for an allowance on the garage building and building fixtures on $24,539 as undepreciated capital cost at the beginning of the year and the cost of additions during the year. The first figure is the amount of a valuation of the building made for the appellant by the Royal Trust Company, as appears from a letter dated January 23, 1950. The claim for an allowance on the machinery and equipment was based on $6,793.13 as undepreciated capital cost at the beginning of the year and the cost of additions during the year. The claim for an allowance on the furniture and fixtures was based on $3,000 as undepreciated capital cost at the beginning of the year. The figures of $6,793.13 and $3,000 were valuations made by Jacob Mayer and his sons.

The Minister in re-assessing the appellant took the position that the transaction between it and Jacob Mayer by which it acquired his property was not an arms length transaction between them and that it was consequently entitled only to capital cost allowances based on the capital cost of the assets to their former owner Jacob Mayer. He consequently cut down the allowances claimed by it and based them on the undepreciated cost of the assets to their former owner. These he put at $4,787.76 for the building, $1,790.07 for the machinery and equipment and $189.21 for the furniture and fixtures. The amounts of the claims for capital cost allowance which he thus disallowed were added to the amount of taxable income reported by the appellant on its return, as appears from notices of reassessment, dated February 2, 1952, and October 21, 1952. The details of the claims made by the appellant and the amounts allowed by the Department are set out in Exhibit 16.

In taking this action the Minister relied upon sections 20(2)(*a*) and 127(5)(*a*) of The Income Tax Act, Statutes of Canada, 1947-48, chapter 52. Section 20(2)(*a*) provides as follows:

> 20(2). Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms-length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section 11:
>
> (*a*) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner;

And Section 127(5)(*a*) deals with what is meant by arms-length as follows:

> 127(5). For the purposes of this Act,
>
> (*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled,
>
> * * *
>
> shall, without extending the meaning of the expression "to deal with each other at arms-length", be deemed not to deal with each other at arms length.

The Minister considered that Jacob Mayer was "a person or one of several persons" by whom the appellant was directly or indirectly controlled and that the transaction between him and the appellant was, therefore, a transaction between persons not dealing at arms-length, from which it followed that the capital cost of the property to the appellant must be deemed to be the amount that was the capital cost of it to its original owner, Jacob Mayer.

The appellant objected to the assessment and appealed to the Income Tax Appeal Board. The appeal was heard by the chairman of the Board, Mr. F. Monet, Q.C., who dismissed it. From this decision the present appeal is brought.

The only question in the appeal is whether the transaction between Jacob Mayer and the appellant by which it acquired his property was a transaction between a corporation and a person or one of several persons by whom it was directly or indirectly controlled within the meaning of section 127(5)(*a*) of the Act. And the narrow issue is whether Jacob Mayer was one of several persons by whom the appellant was directly or indirectly controlled.

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In my opinion, there is no difficulty in the case. Jacob Mayer was clearly one of several persons by whom the appellant was directly or indirectly controlled. I do not see how there can be any doubt about it.

The word "several" has a great many meanings but we are here concerned only with its meaning in the context in which it is used, which is clearly numerical in character. In this sense, the New English Dictionary, Vol. VIII, page 568, defines "several" as follows:

> A. 4. As a vague numeral: Of an indefinite (but not large) number exceeding two or three; more than two or three but not very many. (The chief current sense.)

Webster's New International Dictionary, Second Edition, gives this definition:

> 4. a More than one;—so construed in legal use. b Consisting of an indefinite number more than two, but not very many; divers; sundry; as, *several* persons were present. c Dial. Quite a large number.

And Funk & Wagnall's New Standard Dicitionary puts it as:

> 1. Being of an indefinite number, more than one or two, yet not large; divers; as, several visitors called today.

While the precise limits of the application of the word "several" may not be possible to define it is clear that it means more than two or three but not many. It is limitative in its effect. It is, therefore, not necessary to go as far in the application of section 127(5)(*a*) as the Income Tax Appeal Board appeared to think possible in *No. 112* v. *Minister of National Revenue* (1). In this view I am confirmed by the recent judgment of Fournier J. in *Miron & Frères Limitée* v. *Minister of National Revenue* (2).

But whatever may be the extent of the limitation implied in the word "several" it is plain that four persons would not be outside its range.

Counsel for the appellant argued that section 127(5)(*a*) should not apply in this case because there had never been any agreement between Jacob Mayer and his sons that they should vote together. I do not agree. It is not a necessary condition of the applicability of section 127(5)(*a*) of the Act that there should be an agreement between the

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several persons referred to in it that they should act in concert in directly or indirectly controlling the corporation. There is no such requirement in the section.

If section 127(5)(*a*) does not apply in the present case it is difficult to see where it could apply. Here, Jacob Mayer was the largest shareholder and had the largest salary: *vide* Exhibit 11. He was not a figure head. Mr. Bryan said that he was prepared to take 49 per cent of the stock, because, while he did not want two sons to out vote him, he was quite prepared to fall in if all his sons voted against him. But the fact is that while there have been differences of opinion Jacob Mayer always went along with his sons. They never out voted him or did anything that he did not agree with and they never made any major decision against his will. The fact is that they always worked together in harmony. There were four persons who controlled the appellant and Jacob Mayer was one of them. He was, therefore, one of several persons by whom the appellant was controlled within the meaning of section 127(5)(*a*). The transaction between him and the appellant was, therefore, not a dealing at arms-length, so that section 20.(2)(*a*) applied and the Minister was right in basing capital cost allowances on the capital cost of the assets to Jacob Mayer, their previous owner.

The appeal herein must, therefore, be dismissed with costs.

Judgment accordingly.