BETWEEN:

DONALD APPLICATORS LTD., *et al.* ....APPELLANTS;

AND

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

Ottawa
1966
March 17
March 21

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 39(4) and 103—General Rules and Orders of the Exchequer Court—Associated corporations—Examination for discovery—Appeals—Evidence—Application for second examination for discovery.

The matter under appeal was whether the ten appellant companies were associated corporations under the Act.

The Minister had already held an examination for discovery to attempt to establish for the purpose of section 39(4) of the Act, the identities of the shareholders by whom the 10 appellants were controlled but had been unsuccessful because the shareholders resided in the Bahamas. It was necessary for the Minister to obtain information regarding the manner in which certain shares of the companies were held. On examination for discovery the manager of the companies was unable to give such information.

The Minister made application to the Exchequer Court for an order granting leave to have a second eaxmination for discovery, this time of the directors of the appellant companies.

The appellants opposed the application on the ground that, the manager had been examined and his evidence was available to the Minister. That Rule 131, in conjunction with Rule 156(*b*)(1), indicated that one discovery is available to a party only where the opposite party is a body corporate or a joint stock company and under the Rules of The Exchequer Court, only one discovery was available to the Minister.

Held That leave should be granted the Minister to have a second examination for discovery of the appellants

2 That on the facts presented, it was apparent that the Minister had not obtained the discovery to which he was entitled.

3 That the Rules of the Court could not be construed as restricting the right of a party to the examination of one witness only where, as here, all the information required could not be obtained from the examination of the first witness.

4 That it was also ordered that the individual directors should be examined under Rule 135 at Nassau or elsewhere at a convenient date

APPLICATION by the Minister for an Order:

(*a*) granting leave to have a second examination for discovery and

(*b*) permitting a number of individuals to be examined for discovery as directors of the ten interconnected appellants.

1966

DONALD APPLICATORS LTD. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Maurice A. Regnier for appellants.

G. W. Ainslie for respondent.

NOEL J.:—This is an application by the respondent, the Minister of National Revenue, for an order pursuant to Rules 131 and 135 of the General Rules and Orders of this Court that:

(*a*) it be granted leave to have a second examination for discovery of the appellants (if such an order is required);

(*b*) that a number of individuals be examined for discovery as respective directors of the ten inter-connected appellant corporations whose trial by consent were ordered to be heard together on common evidence.

The application is opposed by counsel for the appellants on the ground that James G. Greenough, manager of each of the appellant corporations, was on September 29, 1965, examined for discovery by the respondent and that the evidence thus given is available to him; that Rule 131 read in conjunction with Rule 156(*b*)(1) indicates that one discovery is available to a party only when the opposite party is a body corporate or a joint stock company and, finally, that in any event if the appellants manager's answers were not satisfactory or if he could not give answers to the questions asked, counsel for the respondent could have and should have required him to inform himself on such matters.

The key issue in these appeals is whether the ten appellants are associated or not under subsection 4 of section 39 of the *Income Tax Act* and for the purpose of determining the above issue it is necessary for the respondent to obtain information with regard to the manner in which the outstanding Class A shares of the appellant corporations (the holders of which being the only shareholders entitled to elect or appoint directors) are held by a number of individuals residing in the Bahamas.

This information is essential to the respondent in order to be able to deal with the appellants' allegation 3 of their respective notices of appeal which reads as follows (the

individual names having been dropped as they vary in the ten appeals):

3. During the relevant taxation years, 2 Class "A" common shares were issued and outstanding, one having been registered in the name of, and being owned by, ... and the other having been registered in the name of, and being owned by, ...

Mr. Greenough, the appellants' manager, was examined in this regard at pp. 77 *et seq.* and pp. 89 to 96 of the examination for discovery, and although he was informed on matters dealing with the activities of the various Canadian appellant corporations involved in these appeals in Canada, did not know the holders of the Class "A" shares of the appellant corporations, nor could he give any satisfactory information on the manner in which they held these shares and particularly whether they were the legal holders thereof or whether the beneficial or equitable title resided in somebody else. From a complete examination of the discovery transcript, I am satisfied not only that Greenough has no personal knowledge regarding the manner in which the Class "A" shares are held but that it is doubtful that he could, if he was requested to, inform himself on such matters, obtain and give satisfactory information thereon having regard also to the fact that the shareholders all reside outside of the jurisdiction. The rule that a witness must inform himself on matters not within his knowledge is intended as a supplement to and not a substitute for discovery and I do not feel that in the present case the ends of justice would have been fully served if the manager of the appellant corporations had been instructed to inform himself.

On the facts herein it is apparent that the respondent has not obtained the discovery to which he is entitled and leave should therefore be granted for a second examination for discovery unless, as submitted by counsel for the appellants, the provisions of orders 131 and 156(*b*)(1) of the Rules of this Court prohibit such double discovery.

I do not believe that the above rules can be construed as restricting the right of a party to the examination of one witness only although in most cases the appointment of one member or officer of a corporation, fully informed, should be sufficient to allow the party examining him to obtain all the information required as to the facts or as to the admissions he is entitled to.

1966

DONALD APPLICATORS LTD. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Noël J.

It is only when the Court is satisfied that such a result cannot be obtained from the examination of the first witness that recourse should be had to the examination of a second witness. I should add that in no case should such a request be granted when it appears that it is made for the purpose of unnecessarily harassing the other party or of enquiring for ulterior business purposes and, finally, in some cases such an examination should be permitted only upon terms as to the matters to be investigated.

It therefore follows that a second discovery can be authorized only upon an order of the Court if a proper determination of its necessity or of the conditions under which it is to be conducted is to be assured. I am satisfied that the conditions required have been met in the present applications and leave will therefore be granted the respondent to have a second examination for discovery of the appellants; it is also ordered that the individual directors of the appellants, as agreed to between the parties, shall be examined for discovery in regard to each of the appellants under Rule 135 of the Rules of this Court and the said examinations for discovery shall take place either at Nassau, in the Bahamas Islands, or elsewhere at a convenient date. Should the parties have any difficulty in settling either the choice of the individuals to be examined, the place of examination or the terms of such examinations, the matter may be further spoken to. Costs in the cause.