Winnipeg 1967 June 28 Ottawa July 31

BETWEEN:

BARKMAN DEVELOPMENTS LTD. ..... APPELLANT;

AND

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

AND BETWEEN:

BARKMAN CONCRETE PRODUCTS LTD. ..... APPELLANT;

AND

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

AND BETWEEN:

BARKMAN MANUFACTURING LTD. ..... APPELLANT;

AND

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

*Income tax—Associated companies—Minister's power to direct companies associated—Whether exercisable after expiration of taxation year—Intention of Parliament—Income Tax Act, s. 138A(2), am. 1963, c. 21, s. 26(1).*

The power of the Minister of National Revenue under s. 138A(2) of the *Income Tax Act* to direct that two or more corporations shall in the circumstances therein specified be deemed to be associated with each other in the 1964 taxation year or subsequently may be exercised after the expiration of the taxation year which it affects.

INCOME TAX APPEALS.

*Walter C. Newman, Q.C.* for appellants.

*George W. Ainslie* and *J. R. London* for respondent.

CATTANACH J.:—These appeals from the appellants' assessment to income tax for their respective 1964 taxation years were heard by way of a special case stated for the opinion of the Court which reads, in part, as follows:

SPECIAL CASE FOR OPINION OF THE COURT

A. STATEMENT OF FACTS

1. The Appellants are each a body corporate duly incorporated under the laws of the Province of Manitoba.

2. The 1964 taxation year for each of the Appellants was from the 1st day of March 1963 to the 29th day of February 1964.

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3. On the 5th day of January, A.D. 1966, the Deputy Minister of National Revenue, pursuant to the provisions of subsection (2) of Section 138A of the *Income Tax Act*, directed that the Appellants be deemed to be associated with each other during their 1964 taxation year.

4. On the 6th day of April, A.D. 1966, the Appellants were assessed income tax for their 1964 taxation year and the Respondent computed the tax payable by each of the Appellants, pursuant to the provisions of Section 39 of the *Income Tax Act*, on the basis that all of the Appellants were associated with each other.

5. The Appellants filed Notices of Objections on the 24th day of May, A.D. 1966, and the Respondent, on the 26th day of June, A.D. 1966, confirmed the assessments and notified the Appellants.

B. QUESTION FOR THE COURT

6. The following question is submitted by the parties for the opinion of the Court:

> "Did the Minister of National Revenue have the authority under Section 138A(2) of the *Income Tax Act*, R.S.C. 1952 Chapter 148, as enacted by Chapter 21, S.C. 1963, to direct, on the 5th day of January, A.D. 1966, a time subsequent to the end of the Appellants' 1964 taxation year, that the Appellants be deemed to be associated with each other during their 1964 taxation year."

C. DISPOSITION

7. The parties agree that:

(*a*) if the answer to the question is in the affirmative, the appeals should be dismissed with costs;

(*b*) if the answer to the question is in the negative, the appeals should be allowed with costs and the assessments referred back to the Respondent for re-assessment on the basis that none of the Appellants were during their 1964 taxation year associated with each other.

Section 138A(2) reads as follows:

> . . .
>
> 138A. (2) Where, in the case of two or more corporations, the minister is satisfied
>
> (*a*) that the separate existence of those corporations in a taxation year is not solely for the purpose of carrying out the business of those corporations in the most effective manner, and
>
> (*b*) that one of the main reasons for such separate existence in the year is to reduce the amount of taxes that would otherwise be payable under this Act
>
> the two or more corporations shall, if the Minister so directs, be deemed to be associated with each other in the year.

The above subsection was added to the *Income Tax Act* by Statutes of Canada, 1963, chapter 21, section 26(1), assented to December 5, 1963, and by virtue of subsection (2) thereof, subsection (2) of section 138A was made applicable to the 1964 and subsequent taxation years.

The contention of counsel for the appellants was, as I understood it, that the authority conferred upon the Minister by section 138A(2) is a delegation of legislative power. He based this conclusion upon the circumstance that under the previously existing law, that is section 39 of the *Income Tax Act*, as it previously read and still reads, the appellants were not associated corporations and in order to become associated and taxed accordingly that status had to be changed by the Minister's exercise of the discretion conferred upon him by section 138A(2) which he did in 1966 applicable to the appellants' 1964 taxation years and assessed the appellants accordingly. He then referred to the well recognized rule of construction that statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject matter, or context shows that such was their object and contended that the rule applicable to retroactive legislation enacted by Parliament should be applicable with equal, if not greater force, to the exercise of delegated legislative authority which is retroactive in its effect.

Counsel for the appellants then referred to the use of the present tense of the verb "to be" throughout section 138A(2) and section 138A(3)(*b*)(ii) as contrasted with the alternative use of the past and present tenses in section 138A(1) and section 138(3)(*b*)(ii) and submitted that section 138A(2) does not give clear authority to the Minister to operate thereafter retroactively at his own free will and choice so to be able in 1966 to change the tax status of the appellants in 1964, but rather that Parliament, by the careful employment of the present tense throughout section 138A(2) intended to authorize the Minister to make a direction thereunder only in the same year as that in respect of which he formed his opinion and gave his direction and not with respect to prior years. It was his contention that the use of the past tense would have been more appropriate to give retroactive effect. He added that the submission for which he contended would not unduly hamper the administration of the *Income Tax Act* because the Minister and his departmental officers have available to them information respecting corporations for previous years from which it can be ascertained whether the circumstances will persist into the current year and a direction

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could be made accordingly. He also added that the *Income Tax Act* contains provisions whereby investigations can be conducted or additional or supplementary information can be required during the currency of the taxation year. He had in mind section 126 and the appropriate subsections thereof.

The obvious purpose for the enactment of section 138A(2) is to provide a further basis for determining that two or more corporations are associated with each other in a taxation year and so subject to a higher rate of tax than if they were not associated. The method of determining whether corporations were associated which prevailed prior to the enactment of section 138A(2), and which still prevails as a method of so determining, is dependent upon control within the meaning of section 39 which falls to be decided as a question of fact if and when the matter ultimately reaches the Court.

Section 138A(2) is a section which is intended to bring within the classification of associated corporations a class of corporations which under pre-existing law would be outside it and this is done by vesting in the Minister the right to make a discretionary determination upon being satisfied as to the existence of certain facts.

I have no doubt that section 138A(2) is not retrospective legislation. It received assent on December 5, 1963 and was specifically made applicable to the 1964 and subsequent taxation years. It does not purport to change the tax payable by the appellants in their 1963 and previous taxation years. That is the appellants' vested right. If an Act provides that as at a past date the law shall be taken to have been that which it was not then that Act would be retrospective. That is not the present case. Retrospective operation is one matter. Interference with existing rights is another. There is a presumption that an Act speaks only as to the future, but there is no corresponding presumption that an Act is not intended to affect existing rights. Most Acts of Parliament do just that. I do not think that the appellants are entitled to have their status as non-associated corporations under prior law preserved inviolate for the future when a subsequent and different law will be applicable to them. The legislation is therefore, prospective.

There is no question whatsoever that where the Minister is satisfied that when the circumstances contemplated by section 138A(2) subsist in the 1964 and subsequent taxation years he is vested with an absolute discretion to direct or not to direct that the corporations are deemed to be associated. If he so directs after the taxation year then certainly that direction is retroactive in its effect.

The question to be determined is whether Parliament intended to authorize him to make such a determination. To answer this question I must consider the language used in the section and consider that language in the context of the Act for the purpose of deciding what is its fair meaning.

The legislative scheme of the *Income Tax Act* is that taxes thereunder are imposed on a yearly basis. One of the two factors upon which the Minister must be satisfied in order to exercise his discretion under section 138A(2) is that one of the main reasons for separate corporate existences during the taxation year is to reduce the amount of tax payable. Clearly the Minister cannot determine what the amount of the tax payable by a corporation is, whether associated with another corporation or not, until the conclusion of the taxation years of all such corporations. In order to determine the amount of tax payable by a particular corporation he must have before him the return of income of that corporation and those with which it may be deemed to be associated to determine if the amount of tax is to be increased as well as other information which may be available to him as to the state of facts at some time during the currency of the year. Under section 44 of the *Income Tax Act* a corporation may file its return of income for a taxation year within six months from the end of that year. Different corporations may have different taxation years. It is therefore logical to conclude that Parliament, being aware of such provisions in the *Income Tax Act,* must have contemplated the Minister ordinarily exercising his discretion after the conclusion of the relevant taxation years.

In my opinion therefore the language of section 138A(2) clearly points to the legislative intent that the Minister in 1964 or subsequently, for any taxation year subsequent to

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a 1963 taxation year, if he is satisfied as to the state of facts contemplated by section 138A(2) for the year in question, can exercise the discretion vested in him prior to assessing or re-assessing.

I would, therefore, answer the question posed in the Special Case for the opinion of the Court in the affirmative and dismiss the appeals with costs.