

HER MAJESTY THE QUEEN APPELLANT;

1963

*Mar. 18
Oct. 1

AND

M. GELLER INCORPORATED RESPONDENT.

Taxation—Excise Tax—Tax paid on dressed sheepskins not legally owing—Petition of right to recover amount paid—Whether refundable to dresser or to dealer who reimbursed dresser—Statutory delay for claim—Excise Tax Act, R.S.C. 1927, c. 179, ss. 80A, 105(6).

Pursuant to s. 80A of the *Excise Tax Act*, N Co. paid some \$20,000 in excise tax on dressed sheepskins delivered to the respondent G Co., a dealer in sheepskins. Shortly before that time, this Court had ruled in another case that “mouton” was not a fur within the meaning of s. 80A. By petition of right both companies claimed a refund of the tax, now admitted not to have been legally owing. It was admitted also that G Co. had reimbursed to N Co. the tax which the latter had paid.

The trial judge dismissed the petition of N Co. on the ground that the claim was not within the two-year period provided by s. 105(6) of the Act, but maintained the petition of G Co. because “the right to claim a refund is open to any person who has paid moneys which have been taken to account as taxes imposed by the Act.” The Crown appealed to this Court, but N Co. did not.

Held: The appeal should be allowed, except for a small amount admitted to have been paid by the respondent on imports.

Under the Act, the person obliged to pay the tax is the dresser and the person entitled to a refund is the dresser if the tax has been erroneously paid. In this case, the dresser’s claim had been rightly denied by the Exchequer Court in view of the terms of s. 105(6) of the Act.

The respondent, G Co., had no legal right to claim a refund, even though it reimbursed the dresser for the tax paid. The arrangements between the two companies were *res inter alios acta* and could not affect the rights of the Crown.

APPEAL by the Crown from a judgment of Dumoulin J. of the Exchequer Court of Canada¹, maintaining a petition of right claiming a refund of excise tax paid. Appeal allowed.

Paul Ollivier, Q.C., for the appellant.

J. J. Spector, Q.C., and *S. L. Mendelsohn, Q.C.*, for the respondent.

The judgment of the Court was delivered by

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Judson JJ.

¹[1960] Ex. C.R. 512, 60 D.T.C. 1189.

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TASCHEREAU J.:—Section 80A, c. 179 (R.S.C. 1927 and amendments) provides that:

80A. 1. There shall be imposed, levied and collected, an excise tax equal to twenty-five per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—

- (i) imported into Canada, payable by the *importer* or transferee of such goods before they are removed from the custody of the proper customs officer; or
- (ii) dressed, dyed, or dressed and dyed in Canada, payable by the *dresser* or *dyer* at the time of delivery by him.

2. Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.

3. The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made. . . .

The respondent M. Geller Inc. is a dealer in sheepskins, and some of this material was dressed in Canada by Nu-Way Lambskin Processors Ltd., both firms operating in the city and district of Montreal.

Nu-Way, as dresser was responsible for the payment of the tax under s. 80A, and paid \$20,011.72 to Her Majesty the Queen, and on March 8, 1957, the present respondent and Nu-Way filed a Petition of Right claiming from Her Majesty the Queen the sum of \$20,956.74. It is argued that the tax imposed on dressed furs in Canada is illegal because sheepskin is not a fur falling within the meaning of the Act. It is admitted by all parties that M. Geller Inc. reimbursed to Nu-Way the sum of \$20,956.74 paid to Her Majesty the Queen by the latter.

Both Nu-Way and the respondent M. Geller Inc. claimed a refund of the amount paid. The respondent in the present case alleged that it was the only one that was required to pay the tax, that it paid the tax through the intermediary of Nu-Way Lambskin and that, having made a demand for refund in writing within two years from the date of payment, as required by the Act, it was entitled to such a refund.

The learned trial judge¹ dismissed the Petition of Right of the suppliant Nu-Way Lambskin on the ground that it

¹[1960] Ex. C.R. 512. 60 D.T.C. 1189.

failed to apply for a refund within the statutory delay. Section 105(6) provides as follows:

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105(6) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The claim of the respondent however was maintained on the ground that the right to claim a refund is open to any person who has paid moneys which have been taken to account as taxes imposed by the Act and that the evidence established that the respondent is in fact the person who paid the moneys in question to Her Majesty.

It is clear and admitted that the said sum of \$20,956.74 was paid as tax and that it was not legally owing, as this Court decided in several cases and particularly in *Universal Furs Dressers and Dyers Ltd. v. Her Majesty the Queen*¹. In that case it was held by this Court that mouton was not fur and, therefore, not taxable under s. 80A of the *Excise Tax Act*. Before this Court Nu-Way did not appeal, and we are concerned therefore only with the appeal of Her Majesty the Queen against the present respondent.

I have reached the conclusion that this appeal should be allowed and the Petition dismissed in part.

The person obliged to pay the tax is the dresser, and the person entitled to a refund is the dresser if the tax has been paid through mistake of law or fact. In the present case, the tax was paid by the dresser Nu-Way and it was the sole person entitled to a refund. This was denied by the Exchequer Court, and rightly in view of the terms of s. 105, para. 6.

The respondent has no legal right to claim. It is true that M. Geller Inc. reimbursed Nu-Way, but this payment does not give a right of action to the former, which the law denies.

The arrangements made between Geller and Nu-Way are of no concern to the appellant. They are "res inter alios acta" and cannot affect the rights of the Crown.

The appeal must therefore be allowed with costs, and the Petition dismissed except as to an amount of \$945.02. It is

¹[1956] S.C.R. 632, 56 D.T.C. 1075.

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conceded by the appellant that this sum was paid as excise duty on imports brought into Canada from the United States of America, and that it must be refunded.

The appellant will pay the costs in the Exchequer Court.

Appeal allowed with costs.

Solicitor for the appellant: E. A. Driedger, Ottawa.

Solicitors for the respondent: J. J. Spector and S. L. Mendelsohn, Montreal.
