
1960

May 30, 31
June 1

Sept. 14

BETWEEN:

M. GELLER INCORPORATED AND NU-WAY LAMBSKIN PROCESSORS LIMITED ..... SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Excise Tax Act R.S.C. 1927, c. 179, s. 80A and 105(6)—Recovery of money paid as excise taxes under mistake of law and fact—"Person who by mistake of law or fact actually paid"—Status of eventual claimant when no taxes due—Limitation in Act not applicable when no taxes due.

Section 80A of the *Excise Tax Act* R.S.C. 1927, c. 179, and amendments reads:

"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.

. . ."

Section 105(6) of the Act reads:

"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."

Suppliant M. Geller Inc. seeks to recover from respondent money paid by it for excise taxes on processed sheepskins, erroneously classed as furs by respondent's agents, this money having been paid to the Customs and Excise Branch of the Department of National Revenue at Montreal, Quebec, by advancing the same to its regular dyers and dressers Nu-Way Lambskin Processors Ltd. the second suppliant herein which company paid it to respondent's agents. M. Geller Inc. also seeks recovery of other payments made direct to the Customs and Excise Branch.

Respondent contends that the alleged excise impost objected to was claimable from the dresser or dyer, and was in fact paid by it to the customs officials.

Held: That suppliant M. Geller Inc. is entitled to recover the money paid as excise taxes since that money was disbursed in the mistaken assumption of paying an excise tax when no tax existed.

2. That M. Geller Inc. is the "Person who by mistake of law or fact" actually "paid to Her Majesty any moneys which have been taken to account as taxes imposed by this Act . . .", s. 105(6) of the Excise Tax Act.

3. That the status of an eventual claimant, in contingencies where no taxes were due, is unrestricted and fully available to "any person" who pays and subsequently claims a refund in the circumstances and limitations laid out in subs. (6) of s. 105 of the *Excise Tax Act*.

4. That Nu-Way Lambskin Processors Ltd. not having complied strictly with the provisions of s. 105(6) of the Act is barred from any redress.

PETITION OF RIGHT to recover money allegedly paid as excise taxes under mistake of law and fact.

1960

M. GELLER INC. *et al.* *v.* THE QUEEN

The action was tried before the Honourable Mr. Justice Dumoulin at Montreal.

J. J. Spector, Q.C. and *S. Leon Mendelsohn, Q.C.* for suppliants.

B. A. Lewandoski, Q.C. and *Edouard Martel* for respondent.

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

DUMOULIN J. now (September 14, 1960) delivered the following judgment:

The firm of M. Geller Inc., prime suppliant in this case, is a dealer in sheepskins with its head office in the City of Montreal. During a period extending from June 15, 1951 to November 9, 1953, this concern paid to the Customs and Excise Branch of the Department of National Revenue at Montreal, through the instrumentality of its regular dyers and dressers, Nu-Way Lambskin Processors Limited, sums of money aggregating $20,011.72 for alleged excise taxes on processed sheepskins, erroneously classified as furs by the respondent's agents. Between November 15, 1952 and November 9, 1953, Geller Inc. also made direct payments, for similar reasons, of $945.02. The total amount sought and claimed as a proper refund from the respondent adds up to $20,956.74.

Sections 3 and 4 of the Petition set out quite accurately the gist of this action. They read as follows:

> 3. Due to error of fact and law, the officers of the Department of National Revenue, a department of Her Majesty's Government of Canada, wrongfully and illegally insisted upon exacting, and exacted, an excise tax; under Section 80A of the Excise Tax Act, R.S.C. 1927, Chapter 179, as amended, on sheepskins worked on as aforesaid or imported into Canada by your Suppliant M. Geller Inc., and which sheepskins were not subject to such excise tax;
>
> 4. As a consequence of the said wrongful and illegal position assumed by the officers of the said Department of National Revenue, your said Suppliant, M. Geller Inc., was compelled to pay a sum totalling the amount of $20,956.74, levied as excise tax as aforesaid.

To this, respondent objects that no "lien de droit" (cf. Defence, s. 19) exists between the parties, i.e. respondent and suppliants, since M. Geller Inc. owed and paid no tax as "owner" of sheepskins and "is not entitled to refund for money it did not pay" (Defence, s. 20).

This statement and the entire defence are based upon the consequential explanation suggested by s. 21 hereunder:

21. Pursuant to Section 80A of the Excise Tax Act (Chapter 179 R.S. 1927) the excise tax was payable by the dyer or dresser at the time of delivery, namely the other Suppliant from and for whom it was paid.

These dyers and dressers, Nu-Way Lambskin Ltd., having made no application in writing within two years for a refund, "as prescribed by s. 105(6) of the Excise Tax Act", (s. 22 of the Defence), would then have lost any right they might have had to an eventual reimbursement.

Now, reverting anew to the Petition of Right, section 8 alleges that:

8. On June 4th, 1953, your said Suppliant M. Geller Inc. made demand for refund with respect to the amount of $17,818.57, paid within a period of the preceding two years, and it was agreed and understood between your said Suppliant M. Geller Inc. and the authorized agents of Her Majesty that the said notice would avail for all future payments exacted from your said Suppliant M. Geller Inc., and that the payment of refund would be deferred, and would abide the result in the last instance of a test case submitted to this Honourable Court in the matter of Her Majesty the Queen and The Universal Fur Dressers & Dyers Ltd. . . .

In the latter case, the Supreme Court of Canada[1] reversing a decision of the trial Court, unanimously ruled that sheepskin was not fur within the meaning of the Excise Act and insofar tax free.

This written demand for a refund emanated from the M. Geller company because, as will be more fully shown, "all such excise taxes were paid with your said suppliant M. Geller Inc.'s own money" (Petition, s. 11).

Exhibit 2 constitutes the formal notice in writing sent to respondent by registered mail, and should be reproduced *in extenso*, I quote:

Montreal 1 Que. June 4, 1953

David Sims Esq.,
Deputy Minister of Customs and Excise,
Department of National Revenue,
Connaught Bldg.,
Ottawa, Ont.
Dear Sir:

Over the past two years this Company has made payments of $17,818.57 by way of Excise Tax under Section 80A of Excise Tax Act, which we are now claiming refund of under Section 105 of Excise Tax Act.

[1] [1956] S.C.R. 632.

1960

M. GELLER INC. *et al.* *v.* THE QUEEN

Dumoulin J.

We assert that these moneys have been paid to you by mistake on our part by reason of the fact that the sheepskin, in our opinion is not a fur within the meaning of Section 80(A) of the Act, and in any event this Section does not provide for the various processes used in connection with sheepskins, and which are not used in the processing of furs.

We therefore wish to advise, that any further payments of such moneys is to be made with protest from this date.

Yours truly,
(signed) M. Geller Inc.
(per) M. Geller
Pres.

Exhibit 3, dated June 9, 1953, signed: J. Mitchell for Deputy Minister, acknowledges receipt of Mr. Geller's communication and expresses complete disagreement with the opinion and request formulated in suppliant's letter of June 4 (ex. 2).

According to the evidence given by Mr. Vernon Nauman, now retired, but Assistant Deputy Minister of National Revenue, Excise Branch, until approximately 1953, refunding demands such as that made by M. Geller Inc. were at that time held in abeyance pending the decision of the Court of last resort in the *Universal Fur Dressers and Dyers'* case, already mentioned, a judgment eventually rendered on June 11, 1956. An exchange of correspondence (cf. exhibits 6, 7 and 8) between Mr. J. J. Spector, Q.C. and National Revenue, would bear out Mr. Nauman's opinion, albeit not dealing nominally with the issue at bar.

Mr. Nauman added that he "really does not recall any refunds being allowed, save, of course, to Universal Fur Dressers & Dyers in compliance with the Supreme Court's decision."

The moot question before this Court raises a clear-cut controversy. Suppliant, on the one hand, contends, subject to confirmatory proof, that it advanced to the processors, Nu-Way Lambskin Ltd., every dollar of the $20,011.72, supposedly owing as excise taxes in connection with the dyeing and dressing of raw sheepskins, so punctually and accurately that any neglect to do so would have entailed the dresser's refusal to deliver the "glamorized" goods.

On the other hand, respondent resorting to a literal, but under the circumstances somewhat dubious interpretation, attempts to overlook any shadow of right in suppliant's petition, since the alleged excise impost objected to was claimable from the dresser or dyer, and, in fact, was handed out by the latter to the regular customs officials. And we have seen that Nu-Way Lambskin Ltd., through the lapse of the legal delay, is precluded from its otherwise permissible recourse.

Regarding the moneys involved, it was admitted by respondent's counsel that Nu-Way Lambskin Processors Limited, from June 15, 1951 to November 30, 1954, paid $20,049.57 (less credits in the sum of $37.85, leaving a balance of $20,011.72) to Canadian Customs and Excise Branch on the score of excise dues. Also admitted was a direct payment of $945.02 by M. Geller Inc. to the same party for skins processed in the United States. In the event of a finding conformable to the suppliant's conclusion the refund would then amount to $20,956.74.

The first statutory enactment to be considered is section 80A of chapter 179 (R.S.C. 1927 and amendments) providing 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. . . .

Before reporting briefly the practice obtaining in the fur trade as between the three parties concerned: owner, dyer or dresser and the excise tax collectors, mention should be made (notwithstanding respondent's admission) that

1960

M. GELLER INC. *et al.* v. THE QUEEN

Dumoulin J.

Messrs. Moses Geller and Saul Tenenbaum, respectively President of M. Geller Inc. and of Nu-Way Lambskin Processors Ltd. swore, the former, to having reimbursed the processors, at all material times, a supposed excise tax of $20,049.57, the latter, to due receipt from M. Geller Inc. of such sums handed over to the local Customs Branch. Numerous cheques in favour of Nu-Way Lambskin Processors Ltd. attached to the corresponding vouchers, filed as exhibit 10, substantiate these assertions. Mr. Paul Harkin, representing the Montreal firm of "Commercial Customs Brokers Ltd.", next testified to a total outlay of $945.02, incurred for similar reasons by his company on behalf of suppliant Geller, who made good this payment. Exhibit 10 consists of a whole sheaf of departmental forms or tax bills in the above totals, countersigned by some officers of Customs and Excise, Messrs. Crevier and Ranger.

The similarity of the sheepskins, imported by the first suppliant and processed by the second, with those specifically exempted from the fiscal reach of section 80A by the Supreme Court's judgment *"supra"*, was attested by both Moses Geller and Saul Tenenbaum. All the lambskins in question belonged to the commonest class, the Garden and Barnyard varieties. Moreover, the respondent raised no issue on this point.

The Excise Tax Supervisor and Appraiser at the Port of Montreal from 1951 to 1954, Mr. Henri Crevier, and also Messrs. Geller and Tenenbaum related in detail the regular process resorted to in appraising and acquitting the 25% tax that the law levies on "furs". It is a very simple matter so far as this case is concerned, consisting initially in filling two forms: E-162 (ex. 4) and E-163 (ex. A), on which appear under separate headings the required particulars and information. Mr. Crevier explained that form E-162 (ex. 4) was issued by his department in triplicate, one copy to the processors (dyers and dressers), a second to the owner of those goods, the third copy remaining in the possession of port entry authorities. When all incidental details had been inserted on these forms, regarding the price of raw skins, the cost of processing labour, etc., twenty-five per cent of the total was added for tax requirements and presented by the dresser or dyer to the client, owner of the furs, in this instance M. Geller Inc., for payment antecedent to the

delivery of the merchandise. On this point, an appropriate paraphrase of Geller's and Tenenbaum's corroboratory statements would be: "No payment of tax by the owner, no delivery of the processed goods to him". Within the next 24 hours, as said above, the dyer and dresser, here Nu-Way Lambskin Ltd., were obligated by law to settle with National Revenue for every dollar of the relevant dues.

Moses Geller, cross-examined, agreed that on two or three occasions, out of approximately ninety (90) deliveries of dressed skins, Nu-Way Ltd., might have advanced the amount of the supposed impost for a matter of a few days at the longest. It should also be noted, Tenenbaum's evidence is to this effect, that the only immediate payment insisted on by him related to the tax, a thirty days' respite being granted for the price of technical or chemical work.

Once a week, Crevier or some other appraiser, visited the processing plants and minutely checked the accuracy of all reports made on forms E-162, comparing the latter with form E-163 (ex. A), which applied to incoming material and was the first to be completed by processors.

The evidence adduced on suppliants' part, supplemented by a joint admission of amounts paid, did not induce the respondent to vary or in the least modify the legal stand initially taken. It persisted to deny any "lien de droit" between parties, because the immediate payer, "pursuant to Section 80A of the Excise Tax Act (Chapter 179 R.S. 1927)" had been the other suppliant, Nu-Way Lambskin Processors Ltd., who laid no claim to a refund within the rigidly prescribed period of two years.

The view I take of the case, consonantly, I trust, with proved facts and pertinent statutory law, leads me to believe that such a contention can flow only from a misconstruction of the former (i.e. the facts) and a misreading of the latter (i.e. the law).

Section 21 of the Defence (reproduced verbatim at the start of these notes) would carry some legal weight only if, in the given set of facts, it so happened that an excise tax were exigible "from the dyer or dresser at the time of delivery" pursuant to s. 80A.1(ii).

1960

M. GELLER INC. *et al.* *v.* THE QUEEN

Dumoulin J.

The obligation of refunding, which might then accrue, would be that foreseen by s. 105(6) of our Act, wherein some error partially or *pro tanto* vitiates payment of an otherwise validly extant impost.

A totally different situation presently occurs, however, in which no excise duty attaches to commodities such as those (raw sheepskins) imported by M. Geller Inc. and processed for it by Nu-Way Lambskin Ltd.

In other words, considerable sums of money were disbursed in the mistaken assumption of paying an excise tax when no tax existed, a complication solved by s-s. (6) of s. 105 hereunder:

> 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 status of an eventual claimant, in contingencies where no taxes were due, appears to be unrestricted and fully available to "any person" who pays and subsequently claims a refund in the circumstances and limitations laid out in s-s. (6) of s. 105.

The above analysis of the legal provisions constitutes, I believe, a literal construction of this fiscal statute.

There now remains to determine a question of fact, namely, identifying the "person who by mistake of law or fact" actually "paid . . . to Her Majesty any moneys which have been taken to account as taxes imposed by this Act. . ."

On this score, in addition to Geller's and Tenenbaum's uncontroverted averments, previously mentioned, the Petition of Right, *inter alia,* urges in s. 14 a would-be subrogation produced as exhibit 11, purporting to invest M. Geller Inc. with ". . . any and all claims to any refunds for excise taxes paid to Her Majesty the Queen, in connection with sheepskin processed mouton by us for the said M. Geller Inc. prior to March 18, 1954, and subsequent to the said date, and we hereby acknowledge that all excise tax in connection with all such sheepskin processed mouton has been paid by us with funds received from the said M. Geller Inc. for said purpose . . . (signed) Nu-Way Lambskin Processors Ltd., per S. Tenenbaum."

Dated October 5, 1956, some two years after the last payment to Customs and Excise, this instrument, in the light of art. 1155(1) of the Civil Code, could not operate as a valid conventional subrogation on account of its tardiness, but should, nevertheless, constitute an explicit reassertion in written form that M. Geller Inc. defrayed out of its own funds each and every instalment of those alleged excise duties.

Respondent's counsel, at trial, hesitatingly alluded to the passing on of this tax to Geller's clients. Albeit, commercially viewed, this suggestion is tantamount to a certainty, I fail to see how the respondent's title to these moneys could be enhanced by a random recourse to unspecified third party rights.

Evidence, written and oral, conclusively singles out M. Geller Inc. as "payer", through the customary channel of its processors, of $20,011.72, and, by direct payment to Customs and Excise, of $945.02, in all an undue outlay of $20,956.74. This suppliant's written request for a refund and protest regarding future tax instalments (ex. 2) duly safeguarded its recourse.

As for the second or alternate suppliant, Nu-Way Lambskin Processors Ltd., although the literal wording of the statute doubtless afforded it, at the very least, a *prima facie* action in the matter, its non-compliance with the stringent conditions imposed by s. 105(6), those of (a) a written application, (b) within two years, peremptorily bars the way to any redress, quite apart from the facts revealed by the evidence.

Save for the governing precedents of *Universal Fur Dressers and Dyers Ltd. v. Her Majesty the Queen, supra,* and of *Beaver Lamb & Shearling Co. v. Her Majesty the Queen*[1], the several other decisions quoted mostly dealt with the distinguishing traits of direct and indirect taxation or the precluding effect of prescription, topics of slight assistance actually.

For the reasons preceding, this Court doth order and adjudge:

[1] [1960] S.C.R. 505.

1960

M. GELLER INC. *et al.* *v.* THE QUEEN

Dumoulin J.

(a) that suppliant M. Geller Inc. is entitled to recover from Her Majesty the Queen, respondent, a total sum of $20,956.74, being the relief sought in its Petition of Right herein, and costs to be taxed;

(b) and doth further order and adjudge that the other suppliant, Nu-Way Lambskin Processors Ltd., is not entitled to relief sought by this Petition, and that Her Majesty the Queen recover from the said Nu-Way Lambskin Processors Ltd. her costs to be taxed, if any.

Judgment accordingly.