

CASE NO.

VOLUME

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Cite as: Johnson v. Nova Scotia (Attorney General), 1998 NSCA 204

STANLEY JOHNSON, ROBERT
JOHNSON, GENEVIEVE JULIAN
and JOHN BERNARD

THE ATTORNEY GENERAL OF
NOVA SCOTIA, representing Her
Majesty the Queen in Right of the
Province of Nova Scotia

- and -

(Appellants)

(Respondent)

C.A. No. 146791

Halifax, N.S.

FLINN, J.A.

APPEAL HEARD:

November 17, 1998

JUDGMENT DELIVERED:

December 30, 1998

SUBJECT:

**Health Services Tax Act, R.S.N.S. 1967, c. 126 (as amended) -
unauthorized pre-collection system - claim for statutory rebate,
rebate by virtue of implied in fact contract or restitution**

SUMMARY:

Between 1985-89 the consumption and use of tobacco products was taxed under the **Health Services Tax Act**. Although the tax was the responsibility of the ultimate user to pay - and the retail vendor to collect - a collection system was set up whereby that tax was pre-collected at the wholesale level. Further, in 1985, to prevent abuses to the system, s. 10A of the **Act** was enacted to prevent vendors from determining exempt status of certain purchasers. The retail vendor paid an amount equivalent to the tax to the wholesaler. If the ultimate purchaser was exempt the purchaser who paid the tax applied for a rebate. The appellants were all status Indians and retail vendors. Between 1985-89 they purchased, for re-sale, tobacco products from wholesalers, on which they paid amounts equivalent to tax of over \$400,000.00. In 1990 the Nova Scotia Court of Appeal decided that there was no legislative authority in the **Health Services Tax Act** to provide for the collection system at the wholesale level. The appellants claimed a statutory rebate of the monies under s. 10A; alternatively, a rebate on the basis of an implied in fact contract; and alternatively, for restitution. The trial judge dismissed the claims.

RESULT:

Appeal dismissed. The claims for statutory rebate, and implied in fact contract, both fail because they rely on the rebate provisions of s. 10A. The rebate provisions of s. 10A do not apply to retail vendors who purchased for resale.

The claim for restitution fails because, as the trial judge found, the

appellants suffered no loss. They recouped the payment under the unauthorized collection system when they sold to the ultimate purchaser. Even if the trial judge was wrong; and the appellants did suffer a loss, because they did not collect the tax from the ultimate purchaser, in that case their loss arises from unlawful conduct (breach of statutory provisions) and not from the unauthorized collection system. Equity would deny restitution.

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