

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Matthews and Chipman, JJ.A.

Cite as: Nova Scotia (Finance) v. Continental Seafoods, Ltd., 1993 NSCA 66

BETWEEN:

THE MINISTER OF FINANCE)	John D. Wood
)	for the Appellant
)	
- and -)	
)	Harvey L. Morrison
)	for the Respondent
CONTINENTAL SEAFOODS LIMITED)	
)	
)	Appeal Heard:
)	April 2, 1993
)	
)	
)	Judgment Delivered:
)	April 2, 1993
)	

THE COURT: Appeal allowed dismissing claim of respondent for a refund of Health Services Tax, per oral reasons for judgment of Clarke, C.J.N.S., Matthews and Chipman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.;

The issue in this appeal is whether the respondent, Continental Seafoods Limited, is entitled to claim a refund of health services tax from the Provincial Tax Commission of Nova Scotia in the amount of \$58,791.02.

In 1988-89, Continental built a pickling plant in Shelburne to produce pickled whole herring for export to European markets. The refrigeration system was built by J. H. Lock & Sons Limited under a contract with Continental which required Lock to pay all government taxes including health services tax. Germain Mechanical & Electrical Limited performed some of the work under a subcontract with Lock and other work including plumbing, mechanical and wiring under contract with Continental. The chambers judge found Lock and Germain paid health services tax. The record does not indicate they made any claim for a refund. At no time did Continental pay health services tax. Continental sought a refund of health services tax based on its argument that its plant equipment was exempt because it was (paraphrasing the **Act**) tangible personal property used or to be used in the manufacture or production of goods for sale.

The statute material to this appeal was the then **Health Services Tax Act**, R.S.N.S. 1967, c. 126, as amended (**The Act**). Sections which are relevant to the issues before us include the following:

4 If a person sells any tangible personal property at a retail sale in the Province to a person who alleges that he is not purchasing it for consumption or use, he shall nevertheless require such person to pay the tax, but such payment shall be refunded by the Minister on receipt of satisfactory evidence that the tax was wrongly paid.

...

18 (1) Where a person considers that he is not liable to taxation under this Act or disputes liability for the amount assessed against him by the Commissioner under subsection (2) of Section 32, he may personally or by his solicitor, within sixty days of the date of the mailing of a

notice under Section 32, serve on the Commissioner a notice of objection in duplicate setting out the reason for objection and all relevant facts.

(2) Where a vendor disputes liability for the amount stated in any notice received or delivered to him under Section 6 or Section 17, he may personally or by his solicitor, within sixty days from the date of mailing of such notice, serve on the Commissioner a notice of objection in duplicate setting out the reasons for the objection and all relevant facts.

(3) A notice of objection under this Section may be served by registered letter addressed to the Commissioner.

(4) Upon receipt of the notice of objection, the Commissioner shall within sixty days reconsider the matter and vacate, confirm or vary the estimate, valuation or assessment and he shall thereupon notify the vendor or purchaser, as the case may be, of his action by registered mail.

(5) If the person who served or caused to be served a notice of objection pursuant to this Section is dissatisfied with the decision of the Commissioner under subsection (4), he may within thirty days of the receipt of such decision appeal from such decision to the Minister.

(6) An appeal to the Minister shall be instituted by serving upon the Minister and the Commissioner by registered mail a notice of appeal setting out the grounds of the appeal and stating briefly all the facts relevant thereto.

(7) Upon receipt of the notice, the Minister shall consider the matter and may affirm, vary or reverse the decision of the Commissioner and shall forthwith give the appellant written notice of his decision by registered mail.

19 (1) If the appellant is dissatisfied with the decision of the Minister, he may appeal therefrom to a judge of the Supreme Court or to a judge of the County Court of the District in which the appellant resides or carries on business.

(2) The appellant shall, within sixty days from the date of the giving of the notice of the decision complained of, serve upon the Minister and the Commissioner a written notice of his intention to appeal to a judge of the Supreme Court or County Court, as the case may be, which notice shall be signed by the appellant or by his solicitor or agent, and shall set forth the grounds of the appeal.

(3) Within fourteen days after the service upon the Commissioner of the notice of appeal, the appellant shall apply to the judge for the appointment of a time and place for the hearing of the appeal, and shall serve upon the Minister and the Commissioner not less than fourteen days before the hearing a written notice of the time and place appointed for the hearing.

(4) The judge shall hear the appeal and the evidence adduced before him by the appellant and Her Majesty in a summary manner, and shall decide the matter of the appeal. Upon the request made to the judge by any party to the appeal, the hearing may be held **in camera**.

(5) The Minister and the Commissioner shall cause to be produced before the judge on the hearing of the appeal all papers and documents in their possession affecting the matter of the appeal.

(6) The costs of the appeal shall be in the discretion of the judge, and he may make an order respecting them in favour of or against Her Majesty, and may fix the amount thereof.

(7) The Minister or the appellant may appeal from the decision of the judge to the Appeal Division of the Supreme Court upon any point of law raised upon the hearing of the appeal, and the rules governing appeals to that Court from a decision of a judge of the Supreme Court or a judge of the County Court, as the case may be, shall apply to appeals under this subsection.

The Commission disallowed Continental's claim. The Provincial Tax

Commissioner allowed \$14,467.43 and dismissed the remainder. The Minister of Finance dismissed the appeal by upholding the decision of the Commissioner. The chambers judge allowed Continental's entire claim for refund, relying upon the exempt status provided by the **Act**. The Minister of Finance appeals from the decision of the chambers judge.

It is our unanimous opinion that the appeal is allowed. The reason is that there is no statutory authority under the **Act** to claim a refund where no tax has been paid nor any assessment made. There is nothing to vary, affirm or amend. Continental does not fall under section 4 because it was never required to pay health services tax and cannot claim to have "wrongly paid". The common sense meaning of a refund is to pay back or to restore or, in this case, to return an excess of tax paid to the Provincial Tax Commission. None of this applies to Continental because it never paid tax nor was it liable to taxation. There being no authority under the statute to permit a refund in these circumstances caused the chambers judge to fall into an error of law.

The issue of Continental's non-eligibility for a refund was argued before the chambers judge. Continental was put on notice that it would be. The chambers judge decided that it was a new ground that had not been submitted to the Provincial Tax Commissioner, or to the Minister of Finance; therefore, he refused to consider it. He considered his status was the same as a Court of Appeal. With respect, we do not agree in the circumstances that exist here. Although section 19(4) refers to the judge hearing "the appeal", it quite clearly

provides that a judge shall hear the evidence adduced before him by the appellant and Her Majesty in a summary manner and then decide the issue. Thus the scope of the proceeding before the judge of the Supreme or County Court is very broad. The judge may hear evidence unlike the traditional function of an appeal court. The word "appeal" in section 19(4) is a misnomer in the traditional appeal court sense because the breadth and thrust of the section empowers the judge to conduct a proceeding more akin to a trial de novo. The submission of the appellant that the **Act** does not permit Continental to seek a refund was raised before the chambers judge, as it could be. That he rejected the submission does not prohibit the appellant from advancing it as a ground of appeal to this Court.

In summary, the grant of a refund must be authorized by the **Health Services Act**. In our opinion that authority in circumstances such as exist here is not provided by the **Act**. Therefore, the appeal is allowed and the decision of the chambers judge and the order based thereon is set aside.

Costs of \$1,500.00 are awarded to the appellant, inclusive of both chambers and this appeal.

C.J.N.S.

Concurred in:

Matthews, J.A.

Chipman, J.A.

