



HIGH COURT OF AUSTRALIA

Public Information Officer

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BRITISH AMERICAN TOBACCO (AUSTRALIA) LTD v STATE OF WESTERN AUSTRALIA AND COMMISSIONER OF STATE TAXATION (WESTERN AUSTRALIA)

British American Tobacco (formerly Rothmans of Pall Mall (Australia) Ltd) had a right to proceed in an action against Western Australia to recover almost \$7 million worth of tobacco licence fees, the High Court of Australia held today.

In August 1997 in the *Ha v New South Wales* decision, the High Court found similar licence fees imposed by New South Wales were excise duties, therefore unconstitutional, as under section 90 of the Constitution excise could only be imposed by the Commonwealth.

Following the *Ha* decision, Rothmans commenced action in the WA Supreme Court, claiming a declaration that WA licence fees were also excise duties, and seeking an order for the repayment of \$6,957,528.30 paid by Rothmans three weeks before *Ha* was handed down. Negotiations between Rothmans and the WA government failed to resolve the issue and Rothmans gave notice in April 1998 under section 6 of WA's Crown Suits Act 1947 that it proposed to commence action.

Section 5 of the Act provides that the Crown (the State of WA) may sue and be sued in the same manner as a subject but section 6 provides that no right of action lies against the Crown unless the party proposing the action gave written notice as soon as practicable or within three months (whichever was longer). Rothmans' cause of action had accrued by August 1997 but the company did not give notice until April 1998, so there was no compliance with section 6. The Full Court of the WA Supreme Court entered summary judgment for the State and the State Tax Commissioner.

The issue in the appeal to the High Court was whether sections 5 and 6 were relevant, bearing in mind that the WA Supreme Court was exercising federal jurisdiction.

The High Court unanimously ordered that the summary judgment be set aside to allow Rothmans, as British American Tobacco, the right to proceed against the State. The Court held sections 5 and 6 of the Crown Suits Act did not apply.

The decision only dealt with the right to proceed. It did not deal with the legal merits of the claim for recovery of the taxes. The case was remitted to the WA Supreme Court to deal with that issue.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*