STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ELIAS H. ATTEA, JR. AND KAREN ATTEA	:	DECISION DTA Nos. 815201
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1990 and 1991.	:	and 815202

Petitioners Elias H. Attea, Jr. and Karen Attea, 294 Ed Harris Road, Ashland City, Tennessee 37015-3009, filed an exception to the determination of the Administrative Law Judge issued on August 13, 1998. Petitioners appeared by Gary D. Borek, P.C. (Gary D. Borek, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Gary Palmer, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on May 20, 1999.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation bears the burden of proof in this matter.

II. Whether petitioners were carrying on a trade or business in New York and, if so, whether the Division of Taxation properly subjected the income from such trade or business to taxation by the State of New York.

III. Whether the doctrines of collateral estoppel or equitable estoppel should be invoked to prevent the Division of Taxation from disputing that petitioner Elias Attea sold tobacco products exclusively to Native Americans residing and doing business on Indian reservations.

IV. Whether petitioner Elias Attea's income from his tobacco products business is exempt from taxation by the State of New York because that income was attributable to his trade with Native Americans under his Indian Trader license.

V. Whether petitioner Elias Attea's income is not subject to taxation by the State of New York by virtue of the provisions of 15 USC § 381 *et seq.*

VI. Whether imposition of personal income tax upon petitioners by New York violates the Due Process Clause or the Commerce Clause of the United States Constitution.

VII. Whether certain written and oral statements made by or on behalf of former Attorney General Koppell in a prior judicial proceeding involving petitioner Elias Attea constitute a binding admission by the Division of Taxation that petitioner, Elias Attea, for the subject years, sold tobacco products exclusively to Native Americans residing on Indian reservations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4" and "19" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On or about April 15, 1991, Elias H. Attea, Jr., and Karen Attea filed a joint Federal income tax return and a joint New York State nonresident income tax return for the tax year 1990. On their 1990 nonresident return, they allocated to New York $117,946.00 of the $995,264.00 shown on their Federal return as their Federal adjusted gross income.[1]

On or about April 15, 1992, Elias H. Attea, Jr., and Karen Attea filed a joint Federal income tax return for the year 1991. Elias H. Attea, Jr., filed a nonresident New York State return while Karen Attea filed a resident return for the tax year 1991; each return was filed under the status "married filing separate return." On his 1991 nonresident return, petitioner allocated to New York State $225,744.00 of the $4,223,227.00 shown on petitioners' Federal return as Federal adjusted gross income.

Prior to the filing of their returns for the years at issue, petitioners' accountant and tax return preparer, Mathew M. Vecere, requested an advisory opinion from the Division of Taxation ("Division") with respect to whether the net profits of a hypothetical wholesaler of Canadian tobacco products would be subject to income taxation by New York State. On April 5, 1991, William Faure, Tax Technician II in the Division's Technical Service Bureau, wrote a letter to Mr. Vecere in response to his request for an advisory opinion. Mr. Faure concluded that commission income earned by a nonresident intermediary between the manufacturer and customers located in New York State was not subject to taxation by the State of New York.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

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[1]Karen Attea is a party to this proceeding solely by virtue of having filed a joint nonresident New York State return for 1990. All references to "petitioner" shall, therefore, relate solely to Elias H. Attea, Jr.

> For the years at issue, i.e., 1990 and 1991, petitioner was not a domiciliary or a statutory resident of New York; he was a resident of and was domiciled in the State of Tennessee. Shipping documents in the record show an address for J.R. Attea Wholesale, 2323 Saunders Settlement Road, Sandborn, New York (Exhibit "M"). J.R. Attea Wholesale is a d/b/a for petitioner. Sometime during 1990, petitioner Karen Attea moved to New York and, as previously noted, filed as a New York State resident for the tax year 1991.[2]

In or about February 1993, the Division commenced an audit of petitioners' returns for the years 1990 and 1991. The Division's initial inquiries concerned petitioners' residency. Various records were requested by and were supplied to the Division. By letter dated September 1, 1994, petitioners' former representative, Tune, Entrekin & White, P.C. (F. Clay Bailey, Esq., of counsel) was advised by the Division's Buffalo District Office that petitioner Elias H. Attea, Jr., was found not to have been a New York resident for 1990 and 1991. However, the Division requested that petitioner provide it with the method used to allocate his Federal Schedule C income to New York on the 1990 and 1991 nonresident returns as well as a state-by-state breakdown of Schedule C gross sales (based upon where goods were shipped) for each of these years. The Division was thereupon referred to petitioner's accountant in Buffalo, New York. A letter from petitioner's accountant stated that there was no method used to allocate income to New York. Instead, the income allocated to New York from Schedule C was derived from commissions from Milhem Attea & Bros., Inc., pursuant to forms 1099-MISC. The letter further stated that petitioner was an Indian trader and a nonresident of New York and that any other earnings from his business activities were not subject to New York State income tax since they were derived from sources not within the State but within Indian reservations. The Division then

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[2]We modified this finding of fact to more accurately reflect the record.

contacted petitioner directly to request additional records for the purpose of conducting an audit of his Federal form 1040, Schedule C.

Petitioner's former representative (F. Clay Bailey, Jr., Esq.) responded by stating that, based upon the absence of legal authority for New York to impose tax on a nonresident vendor who has no presence in New York, it would be improper for him to advise petitioner to submit himself or any of his business or tax records to examination by the Division. The Division's Buffalo District Office, by section head Jorge L. Reyes, replied to Mr. Bailey by letter dated February 10, 1995 which stated that a determination regarding the taxability of petitioner's income, as reported on his Federal return, could not be made until an audit was conducted wherein the Division had an opportunity to review petitioner's books and records to substantiate his contentions regarding the transactions with the Indians and their nexus with New York. This letter further stated that since the statutory period for the assessment of tax would soon be expiring and that there was insufficient time for a thorough examination of all of the audit issues, it would be necessary for consent forms extending the period of limitation of assessment of taxes for both 1990 and 1991 to be executed (the letter noted that consent forms had previously been sent to petitioner but had not been returned). Petitioner's representative was advised that unless such consent forms were executed, an assessment for tax due, plus penalty and interest, would automatically be issued.

By letter dated February 24, 1995, petitioner's former representative enclosed samples of invoices and Federal customs charges for 1990 and 1991 "which document Mr. Attea's method of delivery to customers on the reservation." The letter stated that "[a]ll of such documentation for 1990-1991 is available to you on request." Mr. Bailey's letter further stated that "[w]e will

expeditiously provide you whatever proof you consider reasonably relevant to prove the absence of any nexus as to this cigarette business." However, the letter again noted Mr. Bailey's objections to forcing Mr. Attea "through threats as[sic] assessments and penalties to subject himself to New York tax jurisdiction." The consent forms previously sent to petitioner and his representative were not executed and returned to the Division.[3]

On March 1, 1995, the Division issued a Statement of Personal Income Tax Audit Changes to both petitioners for the tax year 1990 and to petitioner Elias H. Attea, Jr., for the tax year 1991. For 1990, the Division asserted additional tax due in the amount of $63,406.90, plus interest of $20,378.36 (computed to March 20, 1995), for a total due of $83,785.26. This additional tax was imposed on corrected New York State taxable income of $956,025.00. For the tax year 1991, additional tax in the amount of $297,960.50 was asserted, plus interest of $61,641.77 (computed to March 2, 1995), for a total amount due of $359,602.27. The tax was imposed on corrected New York State taxable income of $4,211,051.00.

On March 16, 1995, a Notice of Deficiency was issued to petitioners, Elias H. Attea, Jr., and Karen Attea, in the amount of $63,406.90, plus interest, for a total amount due of $84,042.72 for the year 1990.

On March 20, 1995, a Notice of Deficiency was issued to petitioner Elias H. Attea, Jr., in the amount of $297,960.50, plus interest, for a total amount due of $361,023.62 for the year 1991.

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[3]A consent extending the period of limitation for assessment of tax for the year 1990 was executed on petitioner's behalf by Mr. Bailey on February 1, 1994. This consent extended the period for assessment for 1990 until April 15, 1995.

Petitioner is, and has been since 1986, an Indian Trader licensed by the United States Department of the Interior, Bureau of Indian Affairs.

The income at issue in this matter was derived from petitioner's sale of tobacco products. These tobacco products were manufactured in Canada and were then shipped to a Federal foreign trade zone. This was done because the Federal Trade Commission of the United States required that the Canadian tobacco products be labeled with the appropriate health warnings before they could enter the United States for wholesale distribution. The tobacco products were shipped to the Federal foreign trade zone by a U.S. Customs Broker (in many instances, by A.N. Deringer, Inc.). After admission to the foreign trade zone, the tobacco products were transferred to customs territory upon the signature of an officer or employee of the foreign trade zone (usually by Jodyne R. Morphy, vice president of the foreign trade zone).

The orders for tobacco products which are the subject of this proceeding were filled by shipment or delivery from a point outside the State.

Exhibit "M" purports to be every invoice along with related transaction documents for the tobacco product sales at issue in this matter. While Exhibit "M" was examined in its entirety, the contents of the first set of documents contained in Part 2 of Exhibit "M", selected at random, will be more particularly set forth as an illustrative sample of the content of the remaining documents in Exhibit "M". These documents relate to a transaction occurring from November 1990 to January 1991. In this example, 200 cases of cigarettes were purchased, on November 23, 1990, by petitioner's business, J.R. Attea Wholesale, from Phoenicia Ship Supplies Ltd. of Montreal,

Quebec, Canada.[4] Intercity Truck Lines was the carrier which transported the product through U.S. Customs to the Foreign Trade Zone. The tobacco products were shipped from Canada to the foreign trade zone by a "customs broker" (in this and many other transactions at issue, by A.N. Deringer, Inc., a U.S. Customs Broker). The importer of record in this transaction is J.R. Attea Wholesale of Ashland City, Tennessee. An Application for Foreign Trade Zone Admission and/or Status Designation is signed by a person "as attorney" and "vice president" on November 28, 1990. From an examination of the form, it appears (as petitioner contends) that this person is an employee of the United States government at the Foreign Trade Zone. Thereafter, the tobacco products were released from the Foreign Trade Zone on a Notification to Constructively Transfer Foreign Trade Zone Merchandise, dated December 3, 1990. The consignee was J.R. Attea Wholesale. Finally, there is an invoice to "Joe Anderson," dated January 5, 1991. It is unclear as to who prepared the invoice (it does not have a name on the invoice) and there are no documents which indicate how and where the products were received by Mr. Anderson and who transported the products from the Foreign Trade Zone. It is also unclear as to whether Mr. Anderson received the tobacco products on January 5, 1991 or whether that was simply the date of the invoice. If not received until January 5, 1991, there is no documentation showing the whereabouts of the tobacco products from early December 1990 until January 5, 1991.

While Exhibit "M" contains hundreds of invoices relating to petitioner's sale of tobacco products, none of the transactions examined by the Administrative Law Judge provided any

[4]The invoice from Phoenicia Ship Supplies Ltd. states that the cigarettes were sold to North American Trading & Drayage, Inc. The names "J.R. Attea Wholesale" and "Foreign Trade Zone No. 34" also appear on the invoice. Presumably, Phoenicia Ship Supplies Ltd. was the seller of the cigarettes although the name of the company leaves some doubt.

indication as to the method of transporting the tobacco products from the Foreign Trade Zone to the ultimate customer of petitioner. In all cases, it is unclear as to the place at which the products were transferred to the customer, i.e., whether the customer took possession at the Foreign Trade Zone, at the Indian reservation or at another location. With respect to many of the subject transactions, there are no invoices which indicate the name and address of the customer to whom petitioner sold the tobacco products.

Petitioner submitted two affidavits (both sworn to on August 11, 1997) as part of his evidence. The first affidavit, Exhibit "C", sets forth petitioner's explanation of his method of doing business and of preparing his Federal Schedule C and his New York State returns.

In particular, petitioner's affidavit (Exhibit "C") stated as follows:

> 4. During 1990 and 1991 I did not have any employees, agents, or representatives in New York State in connection with J.R. Attea Wholesale or any of my other various businesses.
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> 5. During 1990 and 1991, I did not maintain or operate an office, warehouse, desk space, shop, store, factory, agency or any other place in New York State in connection with J.R. Attea Wholesale or any of my other various businesses.
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> 6. During 1990 and 1991, I did not systematically or regularly carry on the affairs of J.R. Attea Wholesale, or the affairs of any of my other various business [sic], in New York State.
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> 7. During 1990 and 1991, I did not have an office, warehouse, desk space, or other real property in New York State in connection with J.R. Attea Wholesale or any of my other businesses.
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> * * *
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> 12. The Canadian tobacco products were delivered to my customers through the federal Free Trade Zone because of the Federal Trade Regulations and applicable laws that required health

> warnings to be placed on Canadian tobacco products prior to entering commerce in the United States.
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> * * *
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> 15. With respect to the transactions at issue in this case, my customers were Native Americans living on Indian reservations contiguous to or surrounded by the borders of the State of New York.

The second affidavit was attached to Exhibit "M", Part 1, and explains what documents are contained in Exhibit "M" and further states that Joe Anderson was one of his customers who ordered tobacco products and that Joe Anderson is a Native American who resided on and did business on an Indian Reservation.

On August 24, 1995, Jorge L. Reyes, section head of the personal income tax section of the Division's Buffalo District Office, and Constance A. Nicastro, Tax Auditor I, of the Division's Buffalo District Office (the auditor who was assigned to the audit of petitioners in February 1993), each executed affidavits wherein they stated that during the course of the audit of petitioners, they did not travel to the State of Tennessee for any purpose.

Along with their reply brief filed on February 27, 1998, petitioners moved to reopen the record for the submission of five additional documents. The basis for this motion was to provide "evidence of the extensive knowledge the Division possesses of Petitioners' wholesale tobacco business that is contradictory of the statements and positions taken by the Division in its brief in this matter." By order dated May 28, 1998, three additional exhibits were accepted into evidence, to wit: Exhibit "N", certain portions of the transcript of an oral argument before the United States Supreme Court in ***Department of Taxation & Fin. of New York v. Milhelm Attea & Bros.*** (512 US 61, 129 L Ed 2d 52); Exhibit "O", portions of New York State's petition for

writ of certiorari to the United States Supreme Court in the aforementioned case; and Exhibit "R", copies of letter rulings of the Federal Trade Commission.

Exhibit "N" is a portion of the transcript of the oral argument of G. Oliver Koppell, New York State Attorney General, before the United States Supreme Court in ***Department of Taxation & Fin. of New York v. Milhelm Attea & Bros****. (supra)*, wherein he stated that petitioner "sells only on Indian reservations."

We modify finding of fact "19" of the Administrative Law Judge's determination to read as follows:

> Exhibit "O" consists of various portions (including attachments) of the State of New York's petition for writ of certiorari to the United States Supreme Court in ***Milhelm Attea & Bros****. (supra)*, including:
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> a. in the "statement of the case" in the petition for writ of certiorari, a sentence which states that "[r]espondent Elias H. Attea, Jr. ('Elias') is also in the business of selling cigarettes at wholesale on Indian reservations but is not licensed as either a cigarette tax agent or wholesale dealer of cigarettes";
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> b. the opinion of the Appellate Division, Third Department, in ***Milhelm Attea & Bros. v. Department of Taxation & Fin. of the State of New York et al.*** (Action No. 1) and ***Elias H. Attea, Jr. v. Department of Taxation & Fin. of the State of New York et al.*** (Action No. 2) which provides in part that "[p]laintiff in action No. 2, Elias H. Attea, Jr., also sells cigarettes wholesale to Indians on Indian Reservations in New York"; and
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> c. the opinion of the New York State Supreme Court, County of Albany, in ***Milhelm Attea & Bros. (supra)***, and in ***Elias H. Attea, Jr., (supra)***, which states that "plaintiff, Elias H. Attea, Jr. is also engaged in the wholesale distribution and sale of cigarettes. Mr. Attea's business is exclusively with the Indians on Indian Reservations within

> the territorial boundaries of the State of New York." This opinion was issued in 1989 and does not relate to the same time periods as the present matter.[5]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge rejected petitioner's argument that the burden was on the State, i.e., the Division, to prove that the income from petitioner's sale of tobacco products was subject to tax. The Administrative Law Judge noted that for each of the years at issue, a New York State nonresident return was filed by petitioner. The Division may require any person, by regulation or notice served upon that person, to make his or her returns or to keep such records as it may deem sufficient to show whether or not such person is liable for tax under Article 22 of the Tax Law (Tax Law § 658[a]; 20 NYCRR 158.1). Having received returns from petitioner, the Division was entitled, for the purpose of ascertaining the correctness of the returns, to examine or cause to have examined by its agent or representative, any books, papers, records, etc. bearing upon the matters required to be included in the returns (Tax Law § 697[b]).

The Administrative Law Judge pointed out that petitioner filed a nonresident return for each of the years at issue and, in so doing, admitted that he had New York source income for these years. Therefore, the Administrative Law Judge found that the Division was within its rights to request from petitioner all applicable returns, schedules, books and records in order to determine the correctness of the returns, as filed.

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[5]We modified finding of fact "19" of the Administrative Law Judge's determination to clarify that the State Supreme Court and subsequent proceedings in ***Milhelm Attea & Bros.*** (***supra***) and in ***Elias H. Attea, Jr.*** (***supra***) do not relate to the same time periods that are at issue in this proceeding. These court proceedings collectively are sometimes referred to, *infra,* as "the prior judicial proceedings."

The Administrative Law Judge noted that in any case seeking review of a personal income tax deficiency, the burden is on the petitioner to show that the deficiency was erroneous (Tax Law § 689[e]; ***Matter of Delia v. Chu***, 106 AD2d 815, 484 NYS2d 204).

Having concluded that petitioner had the burden of proof, the Administrative Law Judge addressed whether petitioner had met that burden. With respect to the proof submitted by petitioner, a review of the record disclosed that petitioner (on the advice of his former representative), refused to provide the Division with his business or tax records. Subsequently, petitioner's former representative submitted samples of invoices and Federal customs charges for the years at issue and, in the covering letter accompanying these samples stated that all of the documentation for 1990 and 1991 was available upon request. However, since neither petitioner nor his former representative would execute a consent extending the period for assessment of tax, notices of deficiency were issued by the Division.

Subsequently, however, before the Division of Tax Appeals, petitioner submitted, as his Exhibit "M," what he acknowledged is more than 1,000 pages of documents purporting to represent each and every transaction giving rise to the income at issue for 1990 and 1991. However, the Administrative Law Judge found that an examination of these documents disclosed nothing relating to the delivery of the tobacco products to petitioner's customers. Quoting our decision in ***Matter of Greenwald*** (Tax Appeals Tribunal, November 24, 1993), the Administrative Law Judge noted, "it was petitioners who elected, for whatever unexplained reason, not to submit supporting documentation to the Division and any unanswered questions which arise as the result of our review of petitioners' evidence must necessarily weigh against them."

The Administrative Law Judge pointed out that the voluminous evidence submitted by petitioner in Exhibit "M" did not include any documentation indicating whether the tobacco products were transported to the customer or whether the customer picked them up at the Foreign Trade Zone. There was no indication as to the whereabouts of the transfer to the customer and the method, if any, of transportation utilized by petitioner to deliver the goods. Moreover, the Administrative Law Judge noted there was no documentary evidence in the record to show that the tobacco products were sold to Native Americans residing and doing business on Indian Reservations.

Petitioner claimed that the Division should be collaterally estopped from even raising the issue in this proceeding. The Administrative Law Judge stated that it was unclear whether petitioner sought to invoke the doctrine of collateral estoppel or that of equitable estoppel, so he addressed both.

Collateral estoppel, the Administrative Law Judge noted, is a legal doctrine which precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***see***, ***Ryan v. New York Tel. Co.,*** 62 NY2d 494, 478 NYS2d 823).

In order for the doctrine of collateral estoppel to apply: (1) the issue as to which preclusion is sought must be identical with that in the prior proceeding; (2) the issue must have been decided in the prior proceeding; and (3) the litigant who will be held precluded in the present matter must have had a full and fair opportunity to litigate the issue in the prior

proceeding (***see***, ***Staatsburg Water Co. v. Staatsburg Fire Dist.***, 72 NY2d 147, 531 NYS2d 876; ***Capital Tel. Co. v. Pattersonville Tel. Co.***, 56 NY2d 11, 451 NYS2d 11).

Petitioner contended that the Division should be collaterally estopped from raising the issue of whether petitioner was selling his tobacco products to Native Americans residing and doing business on Indian reservations based upon certain oral and written statements and representations made in various State courts and, subsequently, in pleadings before the United States Supreme Court in ***Department of Taxation & Fin. of New York v. Milhelm Attea & Bros.*** (***supra***). That case challenged certain State cigarette tax regulations on the basis that such regulations were pre-empted by the Indian Trader Statutes (25 USC §§ 261 *et seq*.). The Administrative Law Judge rejected petitioner's claim that collateral estoppel applied here, since the issue in the instant matter related to personal income tax and had nothing whatsoever to do with cigarette tax regulations.

Next, the Administrative Law Judge addressed the doctrine of equitable estoppel. Equitable estoppel, usually referred to simply as estoppel, is not, as a general proposition, available as a defense to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (***see***, ***Matter of Sheppard-Pollack, Inc. v. Tully***, 64 AD2d 296, 409 NYS2d 847). This rule applies particularly to a taxing authority because sound public policy favors full enforcement of the Tax Law (***Matter of Turner Constr. Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78). Exceptions to the doctrine have been rare and limited to unusual fact situations.

Citing ***Matter of Consolidated Rail Corp.*** (Tax Appeals Tribunal, August 24, 1995, ***confirmed Matter of Consolidated Rail Corp. v. Tax Appeals Tribunal***, 231 AD2d 140, 660

NYS2d 459, ***appeal dismissed*** 91 NY2d 848, 667 NYS2d 683), the Administrative Law Judge noted that the Tax Appeals Tribunal has:

> embraced a three-part test to determine applicability of the doctrine to specific cases. We ask if petitioner had the right to rely on the Division's representation; whether, in fact, there was such a reliance; and whether such reliance was to the detriment of petitioner (***Matter of AGL Welding Supply Co.***, Tax Appeals Tribunal, May 11, 1995, ***affd Matter of AGL Welding Supply Co. v. Commissioner of Taxation & Fin.***, 238 AD2d 734, 656 NYS2d 502, ***lv denied*** 90 NY2d 808, 664 NYS2d 270; ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988).

The Administrative Law Judge determined that the statements (both written and oral) upon which petitioner sought to invoke estoppel were made not by the Division, but by the then Attorney General of the State of New York, by members of his legal staff who prepared legal arguments and by justices of the State Supreme Court and of the Appellate Division of the State Supreme Court. The Administrative Law Judge noted that even if those statements could be imputed to the Division, petitioner has made no showing that he had a right to or did, in fact, rely on any of these statements to his detriment. The Administrative Law Judge found that petitioner failed to show that he relied on any statements made by the Division (or other State) personnel and, more significantly, that he had the right to rely thereon. The Administrative Law Judge then concluded that the doctrine of estoppel was inapplicable in this proceeding.

Petitioner maintained that the unanswered evidence submitted left no doubt that he was selling tobacco products exclusively to Native Americans on Indian reservations. In support of his position, petitioner pointed to the invoices in Exhibit "M" along with the affidavits of petitioner. With regard to the invoices in Exhibit "M," the Administrative Law Judge determined that there was no proof as to how or where the tobacco products were actually

transferred to petitioner's customers. The Administrative Law Judge concluded that Exhibit "M" did not sustain petitioner's burden of proving that the sales at issue were made to Native Americans residing on Indian reservations. Since the Administrative Law Judge earlier decided that the Division was not estopped from raising this issue in the present matter, absent any other evidence, it was petitioner's affidavits standing alone, which must suffice for petitioner to sustain his burden of proof on this issue.

The Administrative Law Judge noted that affidavits are admissible in an administrative proceeding (***see, Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990; 20 NYCRR 3000.10[d]), however, the finder of fact is not required to find facts based upon the contents of an affidavit (***Matter of Orvis Co. v. Tax Appeals Tribunal***, 86 NY2d 165, 630 NYS2d 680). With respect to the issue of whether petitioner was engaged in exclusively selling tobacco products to Native Americans residing and doing business on Indian reservations, the Administrative Law Judge determined that the documentary evidence did not support petitioner's statement in his affidavit wherein he states that "[w]ith respect to the transactions at issue in this case, my customers were Native Americans living on Indian reservations contiguous to or surrounded by the borders of the State of New York" (Exhibit "C," ¶ 15). The Administrative Law Judge found that this general allegation, unsupported by any other evidence, did not suffice as proof which would warrant finding it as a fact. Therefore, based upon the absence of documentary evidence in the invoices and having rejected the general conclusory statement in petitioner's affidavit, the Administrative Law Judge found that petitioner had failed to sustain his burden of proving that, with respect to the transactions at issue, all of his customers were Native Americans residing and doing business on Indian reservations.

Next the Administrative Law Judge addressed the issue of whether petitioner was carrying on a trade or business in New York State.

The Division maintained that based upon the records submitted by petitioner concerning his business activities (***see***, Exhibit "M"), it must be concluded that virtually all of petitioner's business activities took place within New York State.

In reviewing the documentation submitted by petitioner, the Administrative Law Judge failed to find any evidence as to how and where the tobacco products were transferred to petitioner's customers. The Administrative Law Judge noted that although petitioner's documentary proof was quite detailed and complete up to the point of the release of the products from the foreign trade zone, thereafter, the only proof offered by petitioner was the conclusory statements contained in his affidavit. The Administrative Law Judge noted that petitioner offered no explanation for the lack of documentary evidence relating to the means and manner of transfer of the tobacco products to the customers. While petitioner maintained that his affidavit should suffice to prove that he had no employees or agents in the State, that he did not have an office, a warehouse or other real property in the State, and that he transferred the products to his customers through the Federal free trade zone, the Administrative Law Judge found that this was not the case. The Administrative Law Judge determined that there was no evidence relating to the transfer of the tobacco products other than a bare invoice listing the name of the customer (in many cases, "Joe Anderson"). The Administrative Law Judge noted that petitioner offered no explanation for his failure to provide such evidence. The Administrative Law Judge stressed that an unfavorable inference may be drawn when a party fails to produce evidence which is within his control and which he is naturally expected to produce if he is to prevail on an issue. It

is logical, the Administrative Law Judge said, to infer that this evidence was withheld because it would have proven unfavorable (Richardson, Evidence § 92 [Prince 10th ed]).

Further, the Administrative Law Judge determined that since petitioner failed to sustain his burden of proving that all of his customers were Native Americans residing and doing business on Indian reservations, his business activities must be more closely examined in order to determine whether they would constitute the carrying on of a business within New York State, thereby subjecting petitioner to the State personal income tax. A business is carried on within the State if activities within the State in connection with the business "are conducted in New York State with a fair measure of permanency and continuity" (20 NYCRR former 131.4). Based on the number of invoices relating to the income at issue, the Administrative Law Judge found that during the years at issue, petitioner's activities were conducted with both permanency and continuity. The regulation further stated that if a taxpayer pursues an undertaking "continuously as one relying on the profit therefrom for such taxpayer's income or part thereof," he is carrying on a business or occupation in New York (20 NYCRR former 131.4). For the years 1990 and 1991, the amount of income at issue was $956,025.00 and $4,211,051.00, respectively. This income represented almost all of petitioner's income for each year. In sum, the Administrative Law Judge noted, "an enterprise is carrying on business in New York, for tax purposes, where there exists a reasonably systematic and continuous transactional nexus between this State and the enterprise" (***Matter of Ausbrooks v. Chu***, 66 NY2d 281, 496 NYS2d 969, 972). Therefore, the Administrative Law Judge found that unless otherwise proven to be exempt from New York State income taxation, petitioner's income from his activities with J.R. Attea

Wholesale constituted income from a business, trade or occupation carried on in this State and, accordingly, was subject to the New York State personal income tax.

Petitioner presented several arguments why his income should not be subject to tax. The Administrative Law Judge considered each one separately.

Citing ***Warren Trading Post Co. v. Arizona State Tax Commn.*** (380 US 685, 14 L Ed 2d 165), petitioner urged that, since the subject income was derived from his trade with Native Americans under his Indian Trader license, it is not subject to tax by the State of New York. This case, decided in 1965, involved a 2 percent tax, levied by the State of Arizona on a trading post company's gross proceeds of sales, or gross income, derived from a retail trading business with reservation Indians on a Navajo Indian Reservation. The Court held that the tax could not validly be imposed since "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders" (***Warren Trading Post Co. v. Arizona State Tax Commn.***, ***supra***, 14 L Ed 2d, at 168).

The Administrative Law Judge distinguished the ***Warren Trading Post*** case from the present matter and focused on ***Cotton Petroleum Corp. v. New Mexico*** (490 US 163, 104 L Ed 2d 209), a case decided in 1989, or approximately 24 years after ***Warren Trading Post***. The Court in ***Cotton Petroleum*** noted the change in its approach to the issue of whether a state could tax on-reservation oil production by non-Indian lessees. At one time, the Court stated, such a tax was invalid unless expressly authorized by Congress; more recently, however, this type of tax has been upheld unless expressly or impliedly *prohibited* by Congress. The Court stated:

> In sum, it is well settled that, absent express congressional authorization, a State cannot tax the United States directly [citation omitted]. It is also clear that the tax immunity of the United States

> is shared by the Indian tribes for whose benefit the United States hold reservation lands in trust [citation omitted]. *Under current doctrine, however, a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe* [citations omitted] (***Cotton Petroleum Corp. v. New Mexico*** (***supra***, 104 L Ed 2d, at 226, emphasis added).

Petitioner does not claim to be a member of any Indian nation nor does he claim to be acting on behalf of any nation. The tax at issue in the present matter is simply an income tax imposed upon a private individual who claims to have Native American customers. The Administrative Law Judge noted that petitioner contended, but did not prove, that his customers were Native Americans residing and doing business on Indian reservations. Petitioner did not allege that he maintained a place of business on a reservation, and he has not demonstrated that his tobacco products were delivered to an Indian reservation. The Administrative Law Judge noted that whether any or all of the tobacco products were subsequently sold on a reservation to Native Americans was entirely speculative. Petitioner's evidence, the Administrative Law Judge found, lacks any documentation showing transportation of the tobacco products from the foreign trade zone and receipt by his customers.

Moreover, the Administrative Law Judge noted that in ***Department of Taxation & Fin. of New York v. Milhelm Attea & Bros.*** (***supra***), a case in which petitioner was a party, the Court, in citing ***Central Mach. Co. v. Arizona State Tax Commn.*** (448 US 160, 65 L Ed 2d 684, ***cert denied*** 481 US 1042, 95 L Ed 2d 823), stated, "Although language in *Warren Trading Post* suggests that no state regulation of Indian traders can be valid, our subsequent decisions have 'undermined' that proposition" (***Department of Taxation & Fin. of New York v. Milhelm***

Attea & Bros., ***supra***, 129 L Ed 2d, at 62). ***Central Machinery Co.,*** a case decided in 1980, held that the State of Arizona had no jurisdiction to impose a tax on an Arizona corporation's sale of farm machinery to an Indian tribe, *where the sale took place on an Indian reservation*. Therefore, the Administrative Law Judge concluded that petitioner's possession of a Federal Indian Trader license, alone, did not exempt his income, derived from the sale of tobacco products, from New York State personal income tax.

The Administrative Law Judge next addressed petitioner's claim that his income from his tobacco products business is not subject to taxation by New York State by virtue of the provisions of 15 USC § 381 *et seq.*

Petitioner argued that even if the facts and law are construed most favorably to the Division, the most that can be concluded is that petitioner shipped tobacco products he had purchased in Canada to customers in New York State. Further, petitioner claims that his only contact with New York was the transportation of the tobacco products over its roads, since neither the Federal foreign trade zone nor the Indian reservation are within the boundaries of New York State for jurisdictional tax purposes. The Division urged that given the lack of documentation as to how the products left the foreign trade zone and where they were transferred (sold), petitioner cannot, as a matter of law, avail himself of the protection afforded by 15 USC § 381.

The Administrative Law Judge concluded previously that petitioner had failed to sustain his burden of proof to show that he had no vehicles, warehouse, employees, etc. in New York. The Administrative Law Judge agreed with the Division that the lack of documentation as to how the products left the foreign trade zone and where they were transferred precluded the application

of 15 USC § 381. This conclusion is based on the Administrative Law Judge's determination that petitioner's income from his activities with J.R. Attea Wholesale constituted income from a business, trade or occupation carried on in this State based upon "a fair measure of permanency and continuity" as well as a continual reliance on the profit from the business.

The Administrative Law Judge noted that 15 USC § 381 makes clear its intent to prevent a state from imposing a tax on the income of one whose *sole* activities within the state are to solicit orders for sales of tangible personal property when such orders are sent outside the state for approval or rejection. The Administrative Law Judge concluded that the provisions of this statute did not apply to a taxpayer, such as petitioner, who has been found to have income from a business, trade or occupation in the State.

Petitioner also maintained that his only contact with New York was the transportation of the tobacco products over the roads running through New York, because neither the Federal foreign trade zone nor the Indian reservations are within the boundaries of New York State for jurisdictional tax purposes. Petitioner states that New York does not have jurisdiction to impose taxes on transactions occurring within a Federal free trade zone.

The Administrative Law Judge found that none of the cases cited by the parties shed any light on whether possession or control of goods within a foreign trade zone, located within the geographical boundaries of a state, would be sufficient to subject a person to that state's income tax. The Administrative Law Judge did not find further discussion of this issue to be warranted especially since there was no indication that possession or control of the tobacco products by petitioner was the basis for imposing the tax at issue. Instead, the Administrative Law Judge found that it was the overall failure of petitioner to sustain his burden of proof to show that he

did not have the requisite New York presence that led to the imposition of the income tax by New York.

Lastly, petitioner argued that pursuant to the Due Process Clause and the Commerce Clause of the United States Constitution, his income from the sale of his tobacco products was not subject to tax by the State of New York. In support of his position, petitioner relied upon ***Quill Corp. v. North Dakota*** (504 US 298, 119 L Ed 2d 91, ***cert denied*** 510 US 859, 126 L Ed 2d 132).

The Administrative Law Judge found petitioner's arguments regarding the Due Process Clause and the Commerce Clause without merit. As to the Due Process Clause, the Court in ***Quill*** held that "if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State" (***Quill Corp. v. North Dakota***, ***supra***, 119 L Ed 2d, at 103). Here, petitioner has failed to prove that all of his customers were Native Americans residing and doing business on Indian reservations. In any event, the Administrative Law Judge noted, all of the sales which are the subject of this proceeding were made to customers who resided in or did business within the geographical boundaries of New York. The Administrative Law Judge found that whether petitioner had a physical presence in New York, by virtue of the holding in ***Quill,*** is irrelevant; it is sufficient to satisfy the requirements of the Due Process Clause that petitioner availed himself of the economic market in New York. The Administrative Law Judge concluded that under this set of facts, the imposition by New York of a personal income tax upon petitioner does not violate the Due Process Clause of the United States Constitution.

Petitioner's Commerce Clause argument also relied upon the decision in ***Quill***. The Court stated:

> we will sustain a tax against a Commerce Clause challenge so long as the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State' [citation omitted] (***Quill Corp. v. North Dakota***, ***supra***, 119 L Ed 2d, at 105).

The Administrative Law Judge determined that petitioner's business had a substantial, if not exclusive, nexus with New York. The Administrative Law Judge noted that petitioner failed to put forth any argument that the tax was not fairly apportioned. With regard to the issue of discrimination against interstate commerce, the Administrative Law Judge held that petitioner did not show that an income tax levied on his income by the State of New York could have or did have any bearing on interstate commerce. As to whether the tax was fairly related to the services provided by New York, the Administrative Law Judge regarded the evidence as clear that New York's roadways were utilized to transport petitioner's wares and all of the orders were received from New York. The Administrative Law Judge concluded that there was no showing that the personal income tax imposed upon petitioner by the State of New York violated the Commerce Clause of the United States Constitution.

ARGUMENTS ON EXCEPTION

Petitioner contends, as he did below, that:

a. Since the Division seeks to impose an income tax liability on a nonresident, it bears the burden of proof in this matter;

b. Petitioner's income from his wholesale tobacco products business is not subject to taxation by New York because that income is attributable solely to his trade with Native Americans under petitioner's Indian Trader license;

c. Pursuant to 15 USC § 381 *et seq.,* petitioner's income from his wholesale tobacco products business is not subject to tax since none of the orders at issue were placed or approved in New York and none of the orders were filled in New York;

d. Petitioner's income from his wholesale tobacco products business is not subject to taxation by New York by virtue of the Due Process Clause and the Commerce Clause of the United States Constitution; and

e. The Division is collaterally estopped from denying that petitioner sold tobacco products exclusively to Native Americans residing on Indian reservations based upon certain admissions in open court and in pleadings in other cases.

Petitioner also takes exception to the claimed failure of the Administrative Law Judge in ignoring the Attorney General's judicial admissions in the prior judicial proceedings. Petitioner urges that even in the absence of an estoppel, the statements made by the Division's attorney to the New York Courts and the United States Supreme Court are competent evidence to prove the truth of the matters stated therein, because they are admissions of a party opponent.

OPINION

We affirm the determination of the Administrative Law Judge. The Administrative Law Judge thoroughly and correctly addressed each of the arguments presented by petitioner. We can see no basis to modify the determination below. However, we will address petitioner's argument on exception relating to admissions of a party.

Petitioner maintains that the Administrative Law Judge failed to adequately address his argument that he should not be required to prove that he sold cigarettes exclusively to Indians residing on Indian reservations during 1990 and 1991, because the Attorney General, on the Division's behalf, admitted these facts in an earlier judicial proceeding.

Generally, in proceedings before the Division of Tax Appeals the petitioner carries the burden of proof by clear and convincing evidence ***(Matter of Meskouris Bros. v. Chu,*** 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully,*** 85 AD2d 858, 446 NYS2d 451; ***Matter of Tavolacci v. State Tax Comm.***, 77 AD2d 759, 431 NYS2d 174; Tax Law § 689[e]).

Petitioner urges, in essence, that he is relieved of that burden based on statements made by Attorney General Koppell in oral arguments, and briefs and applications filed with the courts by his office, in the prior court proceedings. According to petitioner, the Attorney General's statements constitute an admission of a party opponent and constitute evidence binding on the Division here.

Petitioner is correct that informal judicial admissions are recognized in New York. "Facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit. . . . are not conclusive, though they are 'evidence' of the fact or facts admitted" (***Matter of Liquidation of Union Indemnity Ins. Co. v. American Centennial Ins. Co.***, 89 NY2d 94, 651 NYS2d 383, 387, ***citing*** Prince, Richardson on Evidence § 8-219, at 529 Farrell 11th ed]).

Pleadings in another civil action which contain admissions of a material fact can also be used against the pleader in a subsequent action, where it is shown that the facts were alleged with

the pleader's knowledge or under his direction (Fisch on New York Evidence § 804 [2d ed]; ***Carter v. Kozareski***, 39 AD2d 703, 331 NYS2d 875, ***appeal dismissed*** 31 NY2d 779, 339 NYS2d 106). "It must first be shown, however, by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction" (***Cook v. Barr,*** 44 NY 156).

For the following reasons, we regard petitioner's argument as without merit. An attorney's legal argument, by brief or orally, is not the same thing as a "statement made by a party as a witness" (***Matter of Liquidation of Union Indemnity Ins. Co. v. American Centennial Ins. Co., supra***) or in a deposition, bill of particulars or affidavit. While both a statement by a party and statements by a party's attorney may be deemed an admission, more is required in the case of a statement by a party's attorney. For us to treat the statements of the Attorney General in the prior proceeding as an admission binding on the Division in this case, petitioner would have had to come forward with evidence showing that the statements were made with the Division's knowledge, under its direction or with its sanction (***Cook v. Barr, supra; Matter of Liquidation of Union Indemnity Ins. Co. v. American Centennial Ins. Co., supra***). Once that showing was made, it would be "irrelevant that the admissions were made in part by counsel" on behalf of the party or "that they were contained in affidavits or briefs" (***Matter of Liquidation of Union Indemnity Ins. Co. v. American Centennial Ins. Co., supra***, 651 NYS2d, at 387). Petitioner has produced no such evidence in this case.

Without addressing the substance of the statements made in prior proceedings, it is clear that none of the statements, by the Attorney General or by the various courts, have any bearing on the time period involved in this case. The ***Milhelm Attea*** case did not involve the same years as

are in dispute here. Since petitioner put no evidence in on the issue, we can only speculate on whether or not petitioner had a change in the way he conducted his business from the earlier period to the one in dispute here.

Petitioner relies on ***Satra Ltd. v. Coca-Cola Co.*** (252 AD2d 389, 675 NYS2d 348). In ***Satra Limited*** there was "evidence in the record, consisting of a letter from Coca-Cola, which is admissible as an admission of a party opponent. . . ." (***Satra Ltd. v. Coca-Cola Co.***, ***supra***, 675 NYS2d, at 349). Petitioner also relies on ***R.M. Newell Co. v. Rice*** (236 AD2d 843, 653 NYS2d 1004, ***lv denied*** 90 NY2d 807, 664 NYS2d 268) where an unsigned depostion of a party was deemed admissible. Both of these cases deal with statements by a party to the action, not the party's attorney, and are clearly distinguishable for that reason.

To prevail in this matter, petitioner had the burden of coming forward with evidence that was equal to his strong legal arguments, i.e., he had the burden of proving by clear and convincing evidence that, during 1990 and 1991, he sold cigarettes exclusively to Indians residing on Indian reservations.[6] Petitioner's evidence, contained in Exhibit "M," contains many shipping documents which show cigarettes being transported into the foreign trade zone. Moreover, there are documents showing that the cigarettes, after having the tax stamps applied, are delivered back into petitioner's custody. There the document trail ends. There are no delivery tickets to final customers in the record, no transportation or other documents showing delivery to a final customer and no proof *where the sales of cigarettes occurred or to whom.* Petitioner makes no explanation for the failure to provide such evidence at audit, or at this

[6]The fact that petitioner is not licensed, and should not be selling cigarettes to non-Indians in New York, does not relieve him of the burden of coming forward with affirmative proof showing where and to whom such sales were made.

proceeding. Consequently, we find that petitioner has failed to carry his burden of proof (Tax Law § 689[e]).

We also briefly address petitioner's claim that he was not carrying on a trade or business in New York. Petitioner offered as evidence his affidavit[7] which states, *inter alia*, that:

> "5. During 1990 and 1991, I did not maintain or operate an office, warehouse, desk space, shop, store, factory, agency or any other place in New York State in connection with J.R. Attea Wholesale or any of my other various businesses."

However, an examination of petitioner's Exhibit "M" indicates otherwise and, in fact, appears to contradict petitioner's affidavit. Petitioner's Exhibit "M" contains numerous shipping documents that identify the consignee as J. R. Attea Wholesale having an address at 2323 Saunders Settlement Road, Sandborn, New York. This certainly appears to be a New York business address. Here again, petitioner offered no explanation. In the absence of any explanation of this apparent discrepancy between petitioner's claims and his evidence, the Administrative Law Judge was justified, in addition to the other reasons stated in his determination, to conclude that petitioner had failed to prove that he was not doing business in the State of New York during 1990 and 1991. Petitioner's failure to explain this evidence also negatively impacts his constitutional claims, which he raised premised on his alleged lack of nexus to New York State.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The petitions of Elias H. Attea, Jr. and Karen Attea, are denied;

2. The determination of the Administrative Law Judge is affirmed;

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[7]Exhibit "C"

3. The exception of Elias H. Attea, Jr. and Karen Attea, is denied; and

4. The notices of deficiency issued to petitioners on March 16, 1995 and March 20, 1995 are sustained.

DATED: Troy, New York
November 18, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner