STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ELIAS H. ATTEA, JR.	:	
for Redetermination of a Deficiency or Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1992 and 1993.	:	DECISION DTA NO. 820371

Petitioner, Elias H. Attea, Jr., filed an exception to the determination of the Administrative Law Judge issued on November 13, 2006. Petitioner appeared by Schultz-Zarcone, LLP (Kelly V. Zarcone, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner filed a brief in support of the exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was heard on June 20, 2007 in Troy, New York.

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

ISSUE

Whether the imposition of additional personal income taxes determined by the Division of Taxation to be due for the years 1992 and 1993 on petitioner's income from the sale of cigarettes within the State of New York is preempted by Federal laws governing Foreign Trade Zones (***see***, 19 USC § 81 et seq.) and Licensed Indian Traders (***see***, 25 USC § 261 et seq.).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On or about April 11, 1993, petitioner filed a New York State Nonresident Income Tax Return for the year 1992 in which he allocated to New York $244,841.00 of the $7,779,513.00 set forth as his Federal adjusted gross income for that year.

On or about April 15, 1994, petitioner filed a New York State Nonresident Income Tax Return for the year 1993 in which he allocated to New York $190,827.00 of the $3,766,896.00 set forth as his Federal adjusted gross income for the same year.[1]

For both years in issue, petitioner was a nonresident of New York State who owned a business called "JR Attea Wholesale" located in Ashland, Tennessee, which had a separate address and tax identification number from petitioner, but accounted for its profits and losses on Schedule "C" attached to petitioner's Federal income tax return for both years in issue.

Petitioner was a federally licensed Indian Trader who did not have a license from New York to operate a tobacco products wholesale or warehouse business. Further, petitioner received bills and trade documents at the Ashland Tennessee business address.

The years in issue were originally included in the prior audit together with the years 1990 and 1991, but a separate case number was later assigned to the years in issue because the earlier years, 1990 and 1991, had to be assessed sooner due to the expiration of the applicable statute of limitations on assessment.

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[1]The primary source of the income allocated to New York for both years was stated to be commission income.

Due to the fact that all four years were originally part of the same case, the same letter was used to request petitioner's books and records for all years. Since the issue of petitioner's domicile and his statutory residency were not in issue, the only remaining issue for the years 1992 and 1993 was the proper allocation of petitioner's Federal Schedule "C" income from his tobacco activities.

In a letter to petitioner, dated December 28, 1994, the Division of Taxation ("Division") informed him that it believed the income reported on Schedule "C" and derived from wholesale tobacco sales to a reservation physically located within New York State was New York source income and should have been allocated to New York. The letter proceeded to state:

> In addition, please call this office immediately upon receipt of this letter so that a mutually convenient audit appointment can be scheduled. Failure to do so will result in an assessment based on the information at hand at this time.
>
> We will concentrate our audit efforts on your reported Schedule C business expenses. As such, we require the following items:
>
> 1) Supply a copy of your 1992 and 1993 Form 1040, as originally filed.
> 2) Supply a copy of your 1992 and 1993 Form IT-203.
> 3) You did not report the components of gross profit on your 1991 Schedule C. Supply a complete breakdown of Schedule C gross profit (gross receipts less cost of goods sold) for 1991. If you failed to indicate the breakdown on your 1992 and 1993 Schedule C, supply the same for each year.
> 4) We will require all relevant books, records and documents required to compute the three factor allocation percentage for each year under audit. We will also require any back-up (i.e. invoices, receipts . . .) that you have maintained to support all expenses claimed on Schedule C for each year under audit.

In addition to this request for books and records, the Division made several additional requests which went unheeded by petitioner. Petitioner failed to submit bank statements and any books of original entry, including sales journals, balance sheets, ledgers, invoices or expense receipts, trial balances, adjusting entries and income statements.

Pursuant to the auditor's log associated with the audit years in issue, petitioner was represented by no less than four individuals between 1997 and January 2004, to wit: Mr. Bailey, Mr. Cosgrove, Mr. Borek and Mr. Kanaley. None of these representatives produced the books and records requested by the Division prior to the issuance of the statutory notice herein.

By letters dated November 4, 2002 and April 18, 2003, the Division requested Mr. Borek to schedule an audit appointment to produce records which demonstrated how petitioner prepared his Schedule C. The record indicated that Mr. Borek did not respond to these requests.

The auditor's log indicated that on February 8, 2001, the Division was considering assessing tax for the years 1991 through 1997 and prepared an assessment for those years which included additional tax for 1992, 1993 and 1994 Schedule C income and disallowed Schedule C losses and net operating losses for the years 1995, 1996 and 1997. However, on January 15, 2002, the Division "changed course" and decided to assess only the years 1992 and 1993, which addressed the same issues addressed in the prior case involving 1990 and 1991.[2] The Division received word of petitioner's last legal appeal on November 4, 2002. Prior to this time, the Division was holding the 1992-1993 audit in abeyance pending the outcome of the 1990-1991 legal appeals.

The auditor met with Mr. Gary Kanaley, petitioner's representative, on October 3, 2003 and January 5, 2004 and was presented with some shipping documentation which could not be tied into the Federal Schedule C's. The auditor was told that the expenses for the tobacco business were not accurately presented on the Schedule C and that some of the expenses listed

[2] ***Attea v. Tax Appeals Tribunal***, 288 AD2d 701[2001] ***lv denied*** 98 NY2d 606 [2002]. Petitioner's appeals ended on June 13, 2002 in the prior case with respect to 1990 and 1991.

may have been for an unrelated horse farm business. The auditor also met with one Mr. Robert Haas at the January 5, 2004 appointment. Mr. Haas died prior to hearing.

Mr. Robert Haas was employed by A. N. Derrringer Company, a customs broker, located in New York State which prepared documentation for, calculated and paid duty on behalf of importers on goods imported through the foreign trade zone ("FTZ") in Hamburg, New York.

Mr. Haas became familiar with petitioner's importation of cigarettes and specific issues related to the "manipulation" of the cigarettes, i.e., the affixation of government required health warnings. Since this "manipulation" process was causing delays at the FTZ, in the fall of 1991, petitioner caused Mr. Haas to be hired by the FTZ in Grand Island, New York, owned by Daniel Shea and also referred to as "Site 5". In addition to his wage from the FTZ, Mr. Haas also received a salary of $500.00 per week or $2,000.00 per month from petitioner. Petitioner's 1993 Federal Schedule "C", which was filed for his wholesale cigarette business, indicated $54,675 in wage expenses on line "26" while the Schedule "C" for 1992 did not list any wages paid by JR Attea Wholesale.

Mr. Daniel Shea was the owner of Danason's Border Services, Inc. ("Danason's") and the operator of FTZ, Site 5 in Grand Island, New York. The auditor visited the site and interviewed Mr. Shea. Mr. Shea operated a public warehouse business as well as a foreign trade zone in which product on which duty had not been paid was housed at FTZ 23. Mr. Shea maintained duty paid and unpaid product in separate areas separated by a white line in accordance with U. S. Customs regulations. Mr. Shea's largest customer was JR Attea Wholesale. He maintained a product from only a few small customers other than petitioner. There was no written contract between Mr. Shea and petitioner and most communications between them were by telephone.

Tobacco products were shipped directly to the FTZ in Grand Island, New York from outside the United States and other FTZs. Products from other FTZs were shipped to U. S. Customs in Buffalo, New York where Customs entry was made and then were sent to the FTZ in Grand Island. The latter shipments from U. S. Customs were marked with a "D" after their zone lot numbers. Since these would have been segregated from product on which duty had not been paid, they were housed in the public warehouse maintained by Mr. Shea at Site 5. Mr. Shea explained in an affidavit dated January 24, 2006, two days prior to hearing, that all records with regard to these "D" shipments were believed destroyed, but estimated that 20 to 30 percent were "D" shipments. However, the auditor's review of documents while visiting Site 5 in November or December of 2005 yielded an estimate of 30 to 60 percent. This figure was confirmed in petitioner's documentation submitted at hearing which, for 1992, indicated that over 62 percent of the product shipped out by Mr. Shea could be traced to product which came to him with excise tax paid. The result was that this product went to his public warehouse for later shipment or customizing.

Other than warehousing the product in a segregated area, Mr. Shea also performed the additional service for petitioner of breaking down petitioner's shipments in order to fill custom orders for customers which involved unloading, repackaging and reloading product onto delivery trucks. Petitioner's product on which duty had been paid was stored in Mr. Shea's warehouse, from which it was either shipped "as is" or broken down and reconstituted as a custom order. While remaining in the public warehouse, the product constituted inventory of petitioner located in New York State. Although he maintained an inventory, petitioner did not disclose any information on inventory on his Federal Schedule "C" for 1992 or 1993. Petitioner also failed to

state any information with respect to his cost of goods sold on those schedules or in any other document he provided to the auditor during the period of the audit.

Petitioner's trades generally involved importing tobacco products from outside of the United States through the aforementioned FTZ and then trucking the product by U. S. Custom's bonded common carrier to federally recognized Indian reservations. Two former U. S. Customs inspectors, Robert Rugnetta and Timothy Regan, observed documentation that indicated petitioner imported goods through the FTZ which was destined for Indian reservations and that they were not aware of shipments by petitioner to other locations within New York State.

In processing shipments on which duty had been paid in New Jersey, the Grand Island FTZ gave said shipments a designation number beginning with "D", indicating that duty had been paid prior to arriving at the FTZ. As noted above, this product was segregated from other product in a public warehouse on the same premises operated by Mr. Daniel Shea and located within New York State.

On audit, it was established that petitioner made sales and shipped goods within the boundaries of New York State and used the public warehouse at FTZ, Site 5 to store his product until ready to ship. However, on the basis of the shipping documents produced by petitioner, the Division was unable to "tie-in" to the gross receipts or purchases figures. The Division was never able to establish the cost of goods sold from the records produced or that all shipments went to Indian reservations. The expenses listed "below the line" of gross receipts could not be substantiated for the same lack of documentation.

Without adequate documentation to substantiate petitioner's income or expenses stated on his Schedule C's for 1992 and 1993, the Division issued a Statement of Personal Income Tax Audit Changes ("Statement"), dated February 19, 2004, which set forth an additional tax liability

for 1992 of $716,291.32 and an additional tax liability for 1993 of $359,361.98. On the last page of the Statement, the Division set forth the following explanation of its adjustments:

> We have concluded that the income reflected on your Federal Schedule C has been generated from a business, trade, profession or occupation carried on in this state and therefore considered New York source income, taxable to you as a nonresident pursuant to Section 631 of the Tax Law. You have failed to meet your burden of proving that any of the income should be allocated to sources outside of New York.
>
> Regulation Sec. 132.4 states, in part, "A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, not withstanding [sic] the occasional consummation of isolated transactions without New York State. This definition is not exclusive. Business is carried on within New York State if activities within New York State in connection with the business are conducted in New York State with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit within New York State and yet not be engaged in a trade or business within New York State. If a taxpayer pursues an undertaking continuously as one relying on the profit there from [sic] for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation."
>
> It is our opinion that your activities as a seller of tobacco products are systematically and regularly carried on as a trade or business in this state with a fair amount of permanency and continuity. As such, this income would be subject to New York tax regardless of whether or not the activities were exclusively attributable to trade with Native Americans under your Indian Trader license.
>
> Further, since you failed to provide substantiation for the expenses claimed on the Federal Schedule C, these items have been disallowed.

On April 22, 2004, the Division issued to petitioner a Notice of Deficiency for the years 1992 and 1993 which stated that it was based upon a recent audit of petitioner's records and that additional tax was being assessed in accordance with the Statement of Proposed Audit Changes referred to above. The amounts of tax and interest due for each year was set forth as follows:

Tax Period	Tax	Interest	Penalty	Payments	Balance Due
1992	$716,291.32	$836,047.37	0	0	$1,552,338.69
1993	$359,361.98	$374,092.91	0	0	$733,454.89
Totals	**$1,075,653.30**	**$1,210,140.28**	**0**	**0**	**$2,285,793.58**

Following the issuance of the Notice of Deficiency on April 22, 2004, petitioner submitted voluminous documentation to the Division which sought to demonstrate that his returns accurately represented the income reported. Specifically, petitioner submitted handwritten notes of Robert Haas which purported to show "cigarette shipments delivered".[3]

Petitioner also submitted summary sheets, applications for FTZ admission and shipping information for what was purported to be all imports by petitioner for 1992 and 1993. The documentation was broken down by zone lot numbers and contained detailed information on import dates, cases of product entering, purchase price, duty paid, number of cases shipped, shipment destination and date. However, the Division was unable to use the documentation received from Mr. Kanaley or the documents received at hearing to "tie into" or confirm petitioner's gross receipts, purchases or cost of goods sold.

It was established that inventory remained at Mr. Shea's FTZ from less than a day to more than 40 days; that goods upon which excise tax had been paid were received by FTZ 23, Site 5 and placed in the public warehouse, segregated from non-taxed goods in the FTZ.

[3]The Haas notes were submitted by his lawyer, Edward Cosgrove, who averred that Mr. Haas had kept these notes of petitioner's trades in 1992 and 1993, although petitioner, in his affidavit, stated that he could not locate the Haas records for 1993. Further, in the 118 pages of the notes there is no mention or reference to petitioner or his business.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner was conducting a business, trade or profession in New York State and that although shipping documents were submitted by petitioner, it was impossible to confirm the accuracy of petitioner's tax returns in the absence of such records as sales journals, bank statements, general ledgers, balance sheets, expense receipts or invoices and income statements. Moreover, the Division was found to be justified in allocating all of petitioner's income to New York in the absence of information on which to base a more precise allocation. In the circumstances, the Administrative Law Judge found it unnecessary to reach petitioner's principal legal argument that Federal law preempts state taxation of his activities in New York State.

ARGUMENTS ON EXCEPTION

Petitioner argues in support of his exception that under the legal doctrine of preemption, the Division cannot impose tax on his activities in New York State because those activities are subject to pervasive regulation under Federal laws governing Foreign Trade Zones (***see***, 19 USC § 81 et seq.) and Licensed Indian Traders (***see***, 25 USC § 261 et seq.) thus leaving no room in which state tax law might operate. Petitioner also asserts that unlike his prior case, here it was demonstrated through the introduction into evidence of bills of lading and affidavits of customs inspectors that his shipments went to Indian reservations.

The Division argues in opposition that petitioner failed to meet his burden of proof by demonstrating that he sold cigarettes only to tribal members on Indian reservations. Since petitioner failed to provide a complete set of books and records to be audited, it was impossible, according to the Division, to determine whether he sold only to Indians. The evidence introduced on this issue is said to be "incomplete and inadequate".

OPINION

The Supremacy Clause of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding (U.S. Const. Art. VI, cl. 2).

Under this clause, Federal law may preempt state law through express preemption by statute, implied preemption through "occupation of the field" of law, or conflict between state and Federal regulation.

There are several cases in which the laws of New York were held to be preempted by the Federal laws governing foreign trade zones or similar duty-free areas (***see, Hostetter v. Idlewild Bon Voyage Liquor Corp***, 377 US 324 [1964]; ***see also, McGoldrick v. Gulf Oil Corp.***, 309 US 414 [1940]); ***Ammex Warehouse Co, Inc. v. Procaccino***, 85 Misc. 2d 327 [Sup Ct, New York County, 1976]).

More recently, in ***Xerox Corp. v. County of Harris, Texas***, 459 US 145 [1982], the Supreme Court held that state property taxes on imported goods stored under bond in a customs warehouse and later exported from the United States are preempted by Congress's "comprehensive regulation of customs duties". In ***R. J. Reynolds Tobacco Co. v. Durham County, North Carolina***, 479 US 130, 152 [1986], however, the Court limited the holding of ***Xerox*** to goods destined for transshipment in foreign commerce and held that "consistent with the Supremacy Clause, a State may impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale". The Court stated in part as follows:

> [T]he crucial issue is whether Congress has exercised its power under the Supremacy Clause to pre-empt ad valorem state taxation of imported goods that are stored in customs-bonded warehouses and that are destined for domestic markets . . . . In determining whether Congress has invoked this pre-emption power, we give primary emphasis to the ascertainment of congressional intent. This may be manifested in several ways. Chief among the indications of an intent to pre-empt is where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. Pre-emption may also be found where state legislation would impede the purposes and objectives of Congress. In undertaking this analysis, however, we must be mindful of the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons–either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained" (479 US, at 140, citations omitted).

The Court went on to apply these standards to the facts before it, stating as follows:

> It is difficult . . . to believe that the purposes in forming the customs-bonded warehouse scheme identified by the Court in *Xerox* would be disserved by the imposition of ad valorem property taxes on Reynolds' imported tobacco. It makes sense to conclude that state property taxation may discourage an importer whose goods are destined for transshipment in foreign commerce from using American ports and facilities, particularly when the same importer is granted an exemption from customs duties on all goods exported. Similar taxation would hardly deter an importer who, like Reynolds, stores goods in customs-bonded warehouses for up to two years for domestic manufacture and consumption . . . (479 US, at 144)

Even more recently, the United States Court of Appeals for the Ninth Circuit in ***United States v. 4,432 Mastercases of Cigarettes, More or Less***, 448 F.3d 1168 [9th Cir. 2006], relied on the Supreme Court's analysis in ***R. J. Reynolds*** in holding that the Foreign Trade Zone statute did not preempt the imposition of the California cigarette tax on cigarettes in a Foreign Trade Zone that were destined for domestic consumption. The court expressly distinguished the cases involving New York which are cited above, stating as follows:

> All of these cases addressed state regulation or taxation of goods that were in the stream of foreign commerce, as opposed to goods like [the cigarettes in this case] that were destined for domestic consumption. Moreover, all of

> these case pre-date the Supreme Court's opinion in *R. J. Reynolds*. We believe that, post-*R. J. Reynolds*, the operative framework is the transhipment/domestic consumption dichotomy, and we will straightforwardly follow it. Because [the cigarettes in this case] were bound for domestic consumption and there is not "any suggestion that taxation here would conflict with the central purpose" of our country's system of foreign trade zones, *R. J. Reynolds,* 479 U.S. at 148, we fail to see any conflict between imposition of the California cigarette tax and the goals of the FTZ Act (448 F. 3d, at 1193-1194).

Based on these cases, we do not think that the Foreign Trade Zone statute preempts the application of the personal income tax in the present case for two reasons. First, the cases stand for the proposition that state taxation is preempted only where the goods in transit enjoy a permanent exemption because they are to be re-exported but not where the benefits of Federal law represent merely a deferral until the goods enter the domestic market. In the present case, the cigarettes were not re-exported but were sold and consumed within the United States. There is no reason to think that the Congressional purpose of encouraging international trade and the use of United States ports as transshipment locations would be frustrated by the imposition of tax in the present circumstances. Second, the personal income tax will apply to the income realized on the sale of the cigarettes unless, as discussed below, the imposition of tax is preempted by the Federal laws governing licensed Indian traders. It is not the presence of the cigarettes in the Foreign Trade Zone that gives rise to the tax at issue.

We now turn to the question whether the application of the personal income tax to petitioner is preempted by the Federal statutes governing licensed Indian traders, 25 USC § 261 et seq. The leading case on this subject is ***Warren Trading Post Co. v. Arizona State Tax Commn.*** (380 US 685 [1965]), in which the Supreme Court held that a generally applicable nondiscriminatory occupational tax on gross receipts could not be applied to income from sales to tribal members on a reservation realized by a person who was a licensed Indian trader under

Federal law and therefore subject to regulation by the Bureau of Indian Affairs of the United States Department of the Interior. The Court explained its holding in part as follows:

> 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.
>
> * * *
>
> This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax. Insofar as they are applied to this federally licensed Indian trader with respect to sales made to reservation Indians on the reservation, these state laws imposing taxes cannot stand (380 US 690-692, footnotes omitted).

While the sweeping language of ***Warren Trading Post*** has been applied by the Court in a more tailored way in subsequent cases, those cases do not detract from the central holding of ***Warren Trading Post***–*viz.* a tax on a licensed Indian trader on receipts from dealings with tribal members on a reservation is preempted by Federal law. For example, in ***Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.***, 512 US 61 [1994], the Court held that the Division was not preempted from applying a regulatory scheme to Indian traders in order to assure the collection of cigarette taxes on non-Indian purchasers of cigarettes on reservations. The Court's discussion of ***Warren Trading Post***, however, confirms the continuing vitality of that case as preventing a state "from imposing a tax on the income or gross sales proceeds of licensed Indian traders dealing with reservation Indians" (512 US, at 70).

The most recent Supreme Court case on this subject is ***Wagnon v. Prairie Band Potawatomi Nation***, 546 US 95 [2005]. There, the Court permitted the application of a state motor fuel tax to the receipt of fuel by off-reservation non-Indian distributors who subsequently

delivered the fuel to Indian owned gas stations on a reservation because the tax was imposed on the receipt of fuel by the non-Indian distributor outside the reservation and not on the sale and delivery of the fuel on the reservation. By contrast, in the present case the personal income tax would be imposed on income which is realized only upon the sale of cigarettes. The issue here, on which petitioner has the burden of proof, is where and to whom the cigarettes were sold.[4]

The determination of the Administrative Law Judge found that it was unnecessary to address the question whether the imposition of the personal income tax in the present case is preempted by Federal law because petitioner had failed to provide books and records to the Division's auditor as required by the Division's regulations. It may be questioned whether the Division should be permitted, in effect, to prescribe the standard of proof by which it will be determined whether the Division is precluded by Federal law from imposing tax. We conclude that the Division may properly require petitioner to maintain and provide books and records proving by clear and convincing evidence that he is an Indian Trader whose sales are exclusively to Indians on Indian reservations (Tax Law § § 658[a]; 697 [b]; 20 NYCRR 158.1).

In ***Department of Taxation and Finance v. Milhelm Attea & Bros.(supra)***, the Supreme Court held that licensed Indian traders are not immune from all regulation and that the Division's cigarette tax regulations which imposed record keeping and compliance obligations on a licensed Indian trader for the purpose of assuring the collection of tax on sales of cigarettes to non-Indian purchasers were not barred by the rule of ***Warren Trading Post***. The Court stated in part as follows:

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[4] Other cases on this subject are discussed in Taylor, "A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders," ___ Mich. St. Law Rev. __ (2007)(forthcoming), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=scott_taylor [viewed December 10, 2007.

> The state law we found pre-empted in *Warren Trading Post* was a tax directly "imposed upon Indian traders for trading with Indians". . . . That characterization does not apply to regulations designed to prevent circumvention of "concededly lawful" taxes owed by non-Indians . . . .
>
> Although broad language in our opinion in *Warren Trading Post* lends support to a contrary conclusion, we now hold that Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes (512 US, at 74-75, citations omitted).

In the present case, the Division's record keeping regulations are relied on for the purpose of distinguishing petitioner's income from sales of cigarettes that is exempt from the personal income tax under the rule of ***Warren Trading Post***–*viz.* sales to reservation Indians on the reservation–from petitioner's income from other sales which is subject to tax. We think this falls within the category of regulation that is "reasonably necessary" to the determination of lawful state taxes as contemplated by the Court's opinion in ***Milhelm Attea***. If petitioner wishes to establish that income from sales is exempt from tax, he must comply with these regulations and maintain and produce for audit adequate books and records.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Elias H. Attea, Jr. is denied;

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

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

4. The Notice of Deficiency dated April 22, 2004 is sustained.

DATED:Troy, New York
December 20, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner