STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ELIAS H. ATTEA, JR., AND KAREN ATTEA	:	DETERMINATION 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, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1990 and 1991.

On April 21, 1997 and April 25, 1997, respectively, petitioners, appearing by Gary D. Borek, P.C. (Gary D. Borek, Esq., of counsel) and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Craig Gallagher, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by February 27, 1998, which date began the six-month period for the issuance of this determination. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners or the Division of Taxation bears the burden of proof in this matter and whether that party has met its burden of proof.

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.

FINDINGS OF FACT

On August 14, 1997, petitioners submitted, along with their brief, 38 proposed findings of fact. In its brief submitted on November 24, 1997, the Division of Taxation responded to petitioners' proposed findings of fact and, among other things, pointed out certain typographical and language errors contained in these proposed findings of fact. In their reply brief filed on February 27, 1998, these errors were corrected and petitioners submitted revised proposed findings of fact which incorporated the corrections and, in addition thereto, removed those portions of the original proposed findings of fact to which the Division of Taxation objected. Accordingly, each of petitioners' proposed findings of fact, as revised, has been substantially incorporated into the following Findings of Fact, except:

(a) That portion of proposed finding of fact "3" which states that the sale of tobacco products was to Native Americans residing and doing business on Indian Reservations is rejected as being conclusory in nature and not supported by the record;

(b) Proposed findings of fact "4", "6", "7" and "9" are rejected as not being supported by the record;

(c) Proposed finding of fact "8" and that portion of proposed findings of fact "12" and "13" which state "operating under the same circumstances as Petitioner" are rejected as being conclusory in nature;

(d) Proposed finding of fact "17" is rejected as not being supported by the record (***see***, Finding of Fact "2");

(e) Proposed findings of fact "31" through "38" which relate to the timely filing of jurisdictional documents and pleadings and, while accurate in their content, are not relevant since there is no issue of timeliness herein.

1. 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]

2. 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.

3. 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

[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.

("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.

4. 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. 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.

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

6. 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.

7. 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.[2]

8. 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.

9. 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.

10. 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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[2]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.

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

12. 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).

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

14. 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.[3] Intercity Truck Lines was the carrier which transported the product

[3]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

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 this Administrative Law Judge provided any 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

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company leaves some doubt.

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.

15. 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.

16. 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.

17. 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 and Finance 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.

18. 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 and Finance of New York v. Milhelm Attea & Bros.(supra)***, wherein he stated that petitioner "sells only on Indian reservations."

19. 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:

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";

b. the opinion of the Appellate Division, Third Department, in ***Milhelm Attea & Brothers, Inc. v. Department of Taxation and Finance of the State of New York et al.*** (Action No. 1) and ***Elias H. Attea, Jr. v. Department of Taxation*** **and** ***Finance 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

c. the opinion of the New York State Supreme Court, County of Albany, in ***Milhelm Attea & Brothers, Inc., (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."

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioners contend 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 was placed or approved in New York and none of the orders was 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;

e. The Division should be 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.

21. The position of the Division of Taxation may be summarized as follows:

a. The burden is on petitioner to show that the deficiencies asserted by the Division are erroneous and petitioner has failed to meet such burden of proof;

b. The fact that petitioner possesses an Indian trader license does not preclude the State from determining whether income earned by an individual licensed as an Indian trader may be subject to New York's personal income tax;

c. 15 USC § 381 *et seq.* is not applicable in this matter because petitioner was conducting business in New York during the period at isssue;

d. A state income tax is fully enforceable and is not preempted simply because petitioner's activities took place within a foreign trade zone;

e. The State of New York's imposition of an income tax on petitioner does not violate the Due Process Clause or the Commerce Clause of the United States Constitution.

CONCLUSIONS OF LAW

A. Citing ***People ex rel. Monjo v. State Tax Commission*** (218 App Div 1, 217 NYS 669), petitioner contends that since he is a nonresident upon whom the State of New York seeks to impose its income tax, the burden is on the State, i.e., the Division, to prove that the income from petitioner's sale of tobacco products is subject to tax. Petitioner maintains that the Division has offered no proof that this income is subject to taxation by New York State and, accordingly, a determination granting the petition should be rendered. Petitioner's argument is without merit.

First, it must be pointed out that for each of the years at issue, a New York State return was filed by petitioner (***see***, Findings of Fact "1" and "2"), albeit a nonresident return. 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, for the purpose of ascertaining the correctness of the returns, was entitled 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]).

This was not a situation where the Division was attempting to impose tax upon a nonresident with no ties to the State. As previously noted, 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. The Division was, therefore, entirely within its rights to request from petitioner all applicable returns, schedules, books and records in order to determine whether the returns, as filed, were correct. In ***Matter of Orvis*** (Tax Appeals Tribunal, January 14, 1993, ***annulled*** 204 AD2d 916, 612 NYS2d 503, ***revd*** 86 NY2d 165, 630 NYS2d 680, ***cert denied*** ___ US ___, 13 3L Ed 2d 426), the Tribunal stated that:

> the rule is that 'a taxpayer claiming immunity from a tax has the burden of establishing his exemption' (***Norton Co. v. Department of Rev. of State of Illinois,*** 340 US 534, 537; ***see also, General Motors Corp. v. Washington,*** 377 US 436, 441, ***reh denied*** 379 US 875). This rule is applied where a taxpayer claims that a portion of its income has no nexus with a state and seems equally applicable where, as here, the taxpayer is asserting that it has no nexus with the State and that the Commerce Clause prohibits the State from imposing any tax.

As the Division correctly points out, the law is clear 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]; ***Delia v. Chu***, 106 AD2d 815, 484 NYS2d 204). What must be determined, therefore, is whether petitioner has met his burden of proof.

B. With respect to the proof submitted by petitioner, a review of the record discloses that, at least initially, petitioner (on the advice of his former representative), refused to provide the Division with his business or tax records (***see***, Finding of Fact "6"). 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, and 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" (***see***, Finding of Fact "7"). However, since neither petitioner nor his former representative would comply with numerous requests by the Division to execute a consent

extending the period for assessment of tax, notices of deficiency were issued by the Division and the documentation was not provided by petitioner.

Now, however, at this stage of administrative appeal before the Division of Tax Appeals, petitioner has submitted, as his Exhibit "M", what he acknowledges (***see***, Petitioners' Reply Brief, p.17) is more than 1,000 pages of documents purporting to represent each and every transaction giving rise to the income at issue. In ***Matter of Jenkins Covington, N.Y.*** (Tax Appeals Tribunal, August 25, 1988, ***confirmed*** 195 AD2d 625, 600 NYS2d 281, ***lv denied*** 82 NY2d 664), the Tribunal stated:

> Petitioners' failure to produce documentation concerning the transactions at issue during the audit is unfortunate since that was the appropriate time for adequate consideration by both parties of the documents and the nature of the transactions they represent. The formal nature of the hearing before the Administrative Law Judge operates against such discussion and analysis. While such documents can be reviewed post-hearing by the Administrative Law Judge, again the bilateral review and consideration that can occur during audit is absent.

In his brief and reply brief, petitioner maintains that the evidence submitted leaves no doubt that the tobacco sales at issue were made to Native Americans residing on Indian reservations and that the "documents show the transactions from the point of purchase of the tobacco products from the Canadian manufacturers to the delivery of the tobacco products to the Native American customers of Petitioner" (Petitioners' Reply Brief, p. 12). As will hereinafter be discussed, petitioner is only partially correct, since an examination of these documents has disclosed nothing relating to the delivery of the tobacco products to petitioner's customers. As the Tribunal noted in ***Matter of Greenwald*** (Tax Appeals Tribunal, November 24, 1993), "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."

C. As indicated in Finding of Fact "14", 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.

In its brief, the Division disputes petitioners' proposed finding of fact "3" on the basis that the record contains no proof that the tobacco products were sold to "Native Americans residing and doing business on Indian Reservations." The Division states that petitioner's affidavits (***see***, Finding of Fact "15") are insufficient and that there must be books, records or other evidence introduced to establish this fact.

In response, petitioner states the Division is "intimately familiar" with petitioner's business, as evidenced by representations to the United States Supreme Court (***see,*** Finding of Fact "21") in ***Department of Taxation and Finance v. Milhelm Attea & Bros., Inc***. (512 US 61, 129 L Ed 2d 52), and should, therefore, "be collaterally estopped from even raising the issue in this proceeding." It is somewhat unclear as to whether petitioner seeks to invoke the doctrine of collateral estoppel or that of equitable estoppel, so each will be separately addressed.

D. Collateral estoppel 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 (***Ryan v. New York Telephone 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, Capital Telephone Co. v. Pattersonville Telephone Co***., 56 NY2d 11, 451 NYS2d 11; ***Staatsburg Water Co. v. Staatsburg Fire District***, 72 NY2d 147, 531 NYS2d 876).

Petitioner contends 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 and Finance of New York v. Milhelm Attea & Bros., Inc.*** (512 US 61, 129 L Ed 2d 52), a case which 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*.). Petitioner's contention must be rejected since the issue in the present matter relates to personal income tax and has nothing whatsoever to do with cigarette tax regulations. Therefore, the doctrine of collateral estoppel has no application to this proceeding.

E. The doctrine of 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, 298, 409 NYS2d 847, 848). This rule applies particularly to a taxing authority because sound public policy favors full enforcement of the Tax Law (***Matter of Turner Construction Co. v. State Tax Commn.***, 57 AD2d 201, 203, 394 NYS2d 78, 80). Exceptions to the doctrine have been rare and limited to unusual fact situations (***see***, ***Haber v. United States***, 831 F2d 1051, ***affd on remand*** 904 F2d 45; ***Bolton v. Commr.***, 562 F Supp 30; ***Matter of Maximilian Fur Co.***, Tax Appeals Tribunal, August 9, 1990).

In ***Matter of Consolidated Rail Corp.*** (Tax Appeals Tribunal, August 24, 1995, ***confirmed*** 231 AD2d 140, 660 NYS2d 459, ***appeal dismissed*** 91 NY2d 848, 667 NYS2d 683), the Tribunal, discussing the doctrine of estoppel, stated as follows:

> This 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; ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988).

Initially, it must be noted that the statements (both written and oral) upon which petitioner seeks 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. Even if those statements can be imputed to the Division, petitioner has made no showing that he had a right to or did, in fact, rely on these statements to his detriment. Petitioner could have submitted independent proof that he sold the tobacco products in question to Native Americans residing and doing business on Indian reservations. If petitioner was unaware, until the filing of the Division's brief and its objections to this particular proposed finding of fact, that this was an issue which required independent proof, he could have moved to reopen the record to submit this proof as he did with respect to the five additional documents which he sought to have admitted into evidence by means of his motion of February 27, 1998 (***see***, Finding of Fact "17"). Obviously, the issue of whether petitioner sold to Native Americans on reservations is highly relevant and material; he had various options available to him to prove his contention and it is the function of this administrative body to weigh the evidence submitted, not to opine regarding his choice of what evidence to submit or his manner of furnishing the evidence. Petitioner has failed

to show that he relied on any statements made by Division (or other State) personnel and, more significantly, that he had the right to rely thereon. Accordingly, the doctrine of estoppel is hereby found to be inapplicable in this proceeding.

F. In his reply brief, petitioner maintains that the "unanswered" evidence submitted "leaves no doubt" that he was selling tobacco products exclusively to Native Americans on Indian reservations. In support of his position, petitioner points to the invoices submitted as Exhibit "M" along with the affidavits of petitioner. As to the invoices in Exhibit "M", it has been heretofore determined (***see,*** Conclusions of Law "B***"*** and "C") that there is no proof as to how or where the tobacco products were actually transferred to petitioner's customers and, accordingly, this exhibit cannot be found to sustain petitioner's burden of proving that the sales at issue were made to Native Americans residing on Indian reservations. Likewise, the Division may not be estopped from raising this issue in the present matter (***see***, Conclusions of Law "D" and "E"). Therefore, absent any other evidence, it is petitioner's affidavits (***see***, Finding of Fact "15") standing alone, which must suffice for petitioner to sustain his burden of proof on this issue.

Clearly, affidavits are admissible in an administrative proceeding (***see, Matter of Sholly***, Tax Appeals Tribunal, January 11, 1990; 20 NYCRR 3000.10[d]). However, depending upon the circumstances, the finder of fact is not required to find facts based upon the contents of an affidavit (***Matter of Orvis v. Tax Appeals Tribunal***, 86 NY2d 165, 630 NYS2d 680, ***supra***). In his reply brief, petitioner attempts to distinguish the facts in ***Orvis*** from the present matter by stating, in part, that there have been no contradictory statements made in this case and, in addition, that the documentary evidence confirms the statements made in the affidavits. With respect to the issue of selling the tobacco products to Native Americans residing and doing

business on Indian reservations, the documentary evidence does not confirm petitioner's statement in paragraph 15 of his affidavit (Exhibit "C") 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." This general allegation, unsupported by any other evidence, cannot suffice as proof which would warrant finding it as a fact. Therefore, based upon the absence of documentary evidence in the invoices submitted as Exhibit "M" and having rejected petitioner's contention that estoppel is applicable in this matter to preclude the Division from raising this issue and, furthermore, having rejected the general conclusory statement in petitioner's affidavit, it is hereby found that petitioner has not sustained 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.

G. Tax Law former § 631, in effect during the years at issue, provided as follows:

> (a) General. The New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:
>
> * * *
>
> (b) Income and deductions from New York sources.
>
> (1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:
>
> * * *
>
> (B) a business, trade, profession or occupation carried on in this state;
>
> * * *
>
> (c) Income and deductions partly from New York sources. If a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission, the items of income, gain,

> loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.

The applicable regulation, 20 NYCRR former 131.4, in effect during the years at issue, provided that:

> (a) (1) The New York adjusted gross income of a nonresident individual includes items of income, gain, loss and deduction entering into his Federal adjusted gross income which are attributable to a business, trade, profession or occupation carried on in New York State.
>
> (2) A *business, trade, profession or occupation* (as distinguished form 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, notwithstanding 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 therefrom for such taxpayer's income or part thereof, such taxpayer is carrying on a business or occupation. However, see section 131.10 of this Part with regard to the effect of the purchase and sale of property by a nonresident for such nonresident's own account.

The Division maintains that based upon the records submitted by petitioner concerning his business activities (***see***, Finding of Fact "14"), it must be concluded that virtually all of petitioner's business activities took place within New York State. The Division contends that petitioner had agents in New York. The Division alleges that petitioner's Schedule C deductions for warehouse allowances, outside labor, depreciation, car and truck expenses and travel are indicative that these were New York sourced deductions.

While the Division has offered no proof to substantiate its statements that petitioner had agents in New York or that he maintained warehouses, employees or vehicles in New York, as

stated in Conclusion of Law "A", it is petitioner who bears the burden of proof in this matter. The voluminous Exhibit "M" wherein petitioner produced documentation concerning the purchase of the Canadian tobacco products and the transportation of these products through U.S. Customs to the foreign trade zone, as indicated in Finding of Fact "14", contained no documentary evidence as to how and where the tobacco products were transferred to petitioner's customers. Petitioner's documentary proof is quite detailed and complete up to the point of the release of the products from the foreign trade zone. Thereafter, however, the only proof offered by petitioner is the conclusory statements contained in his affidavit (***see,*** Finding of Fact "15"). There is no explanation offered for the dearth of documentary evidence relating to the means and manner of transfer of the tobacco products to the customers. While petitioner maintains that his affidavit should suffice to prove that he had no employees or agents in the State, that he had no office, warehouse or other real property in the State, and that he transferred the products to his customers through the Federal free trade zone, this is simply not the case. As discussed in Conclusion of Law "F", despite the fact that affidavits are certainly admissible, the finder of fact is not required to find facts based upon the content of an affidavit. In his reply brief, petitioner reminds the Administrative Law Judge that he "must not forget that the ultimate fact to be proven in this case is a negative one, i.e., that Petitioners were not engage [sic] in certain activity in New York State." While this is true, it again must be noted that very detailed documentary proof was introduced which traced the whereabouts of the tobacco products from the point of purchase up to and through its release from the foreign trade zone. From this point, however, there is no documentary evidence in the record other than a bare invoice listing the name of the customer (in many cases, "Joe Anderson"). Petitioner has offered no explanation for his failure to provide this evidence. However, 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. It is logical to infer that this evidence is withheld because it would prove unfavorable (Richardson, Evidence § 92 [Prince 10th ed]).

After the release of the tobacco products from the foreign trade zone, were they released to employees of J.R. Attea Wholesale in New York? Were they stored in a warehouse or building maintained by or under the control of J.R. Attea Wholesale? Were the products transported by vehicles owned or leased by petitioner or his business? The answers to these questions are not in the record; however, the affidavit of petitioner containing very general and conclusory statements (***see***, Finding of Fact "15"), standing alone, is not sufficient to sustain petitioner's burden of proving that he: (1) had no employees, agents or representatives in New York; (2) that he maintained no office, warehouse or other business space in New York; and (3) that he did not systematically or regularly carry on the affairs of J.R. Attea Wholesale in New York.

In addition, since petitioner has 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. Pursuant to 20 NYCRR former 131.4, 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." As evidenced by the number of invoices relating to the income at issue (***see***, Finding of Fact "8"), there can be no doubt that during the years at issue, petitioner's activities were conducted with both permanency and continuity. 20 NYCRR former 131.4 further states 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. For the years 1990 and 1991, the amount of income at issue was $956,025.00 and $4,211,051.00, respectively. Clearly, this income represented almost all of petitioners' income for each year (***see,*** Findings of Fact "1" and "2"). " In sum, 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" (***Ausbrooks v. Chu***, 66 NY2d 281, 287, 496 NYS2d 969, 972). Therefore, 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 does, however, set forth a number of reasons why he maintains that this income is not subject to tax in New York. Each will be considered separately.

H. Citing ***Warren Trading Post Company v. Arizona Tax Commission*** (380 US 685, 14 L Ed 2d 165), petitioner contends 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 under a license granted by the United States Commissioner of Indian Affairs pursuant to federal statute (25 USC § 261). 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" (***id***. at 689, 14 L Ed 2d at 168).

The ***Warren Trading Post*** case can be distinguished from the present matter. In ***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 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 may fall on the United States or tribe [citations omitted]. ***Cotton Petroleum Corp. v. New Mexico*** (490 US 163, 175, 104 L Ed 2d 209, 226).

As the Division correctly points out, 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 happens to have Native American customers. In ***Warren Trading Post (supra*)**, the tax sought to be imposed was upon a retail business located *on* the reservation which was licensed to sell its products directly to reservation customers. In holding the tax invalid, the Court noted that such a state tax would put financial burdens on the appellant and the Indians with whom it deals and could thereby disturb the statutory plan which was set up by Congress in order to protect Indians against prices deemed unfair or unreasonable by the Commissioner of Indian Affairs. In the present matter, petitioner contends (and, as previously noted in Conclusions of Law "F" and "G", he has not sustained his burden of proving) that his customers were Native Americans residing and doing business on Indian reservations. He does not allege that he maintains a place of business on any reservation; he has not even demonstrated that his tobacco products were delivered to a

reservation. The invoices produced by petitioner simply indicate that, at least in some cases, a Native American purchased his tobacco products. Whether any or all of the tobacco products were subsequently sold on a reservation to Native Americans is entirely speculative. It is unclear from the evidence submitted by petitioner whether his customer took possession of the tobacco products in the foreign trade zone or whether they were transferred to the customer elsewhere. Petitioner's evidence lacks any documentation showing transportation of the tobacco products from the foreign trade zone and receipt by his customers.

Moreover, in ***Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*** (***supra),*** a case in which petitioner, admittedly, was a party (***see***, Findings of Fact "17", "18" and "19"), the Court , citing ***Central Machinery Co. v. Arizona State Tax Commission*** (448 US 160, 65 L Ed 2d 684), 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." (***Id***. at 71, 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*.

In summary, it cannot be found that petitioner's possession of a Federal Indian Trader license exempts, from New York State personal income tax, his income derived from the sale of tobacco products. In support of his argument, petitioner relies strictly upon ***Warren Trading Post (supra)***, a case which, while not expressly reversed, has had its holding "undermined" by subsequent decisions of the United States Supreme Court. Moreover, even if the decision in ***Warren Trading Post*** had not been limited by the very court which decided the case, petitioner has failed to show that the present matter would fall within the scope of the holding of ***Warren Trading Post.*** This is true because, by failing to prove that his tobacco products were sold on a

reservation for sale directly to reservation customers, petitioner has failed to show that imposition of the New York State personal income tax upon his income derived from the tobacco sales at issue would place a financial burden on the very persons (the Native Americans) whom the federal statute (25 USC § 261 [the so-called "Indian Trader statute"]) was enacted to protect.

I. Petitioner next asserts that, by virtue of the provisions of 15 USC § 381 *et seq.,* his income from his tobacco products business is not subject to taxation by New York State.

15 USC § 381(a) provides as follows:

> **Minimum standards**. No State, or political subdivision thereof, shall have the power to impose, for any taxable year ending after the date of the enactment of this Act [enacted Sept. 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> > (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
> >
> > (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

In his reply brief, petitioner states that "[e]ven 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." He adds that his only contact with New York is 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 states that: (1) at least some of the orders are placed and approved in New York; (2) it appears that petitioner maintains a warehouse in New York along with vehicles and employees; (3) his attorney/agent possessed the tobacco products within the foreign trade zone; and (4) 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.

There is no evidence in the record which indicates that any orders were placed or approved in New York or that petitioner's attorney or agent possessed the tobacco products within the foreign trade zone. As to whether petitioner owned or otherwise exercised control over any vehicles in New York or maintained a warehouse or had employees or agents in New York, it has heretofore been concluded that petitioner has failed to sustain his burden of proof to show that he had no vehicles, warehouse, employees, etc. in New York (***see***, Conclusion of Law "G"). The Division's final contention, i.e., that the lack of documentation as to how the products left the foreign trade zone and where they were transferred precludes the application of 15 USC § 381 is also meritorious. This is because it has been determined 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 (***see,*** Conclusion of Law "G").

A reading of 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. While, as previously stated, there is no evidence in this record to indicate that the orders from petitioner's customers were approved or rejected within New York State, it is clear that the

provisions of this statute cannot apply to a taxpayer, such as petitioner, who has been found to have income from a business, trade or occupation in the State.

J. Petitioner, in his reply brief, maintains 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. Citing ***During v. Valente*** (267 App Div 383, 46 NYS2d 385), petitioner states that New York does not have jurisdiction to impose taxes on transactions occurring within a federal free trade zone.

In response, the Division correctly notes that ***During*** does not address the issue of income taxes and cites to ***3M Health Care, Ltd. v. Grant*** (908 F2d 918) wherein the Court noted that in the Foreign Trade Zone Act, Congress did not express the extent to which the act might preempt state laws. The Division also points to ***R.J. Reynolds Tobacco Co. v. Durham County*** (479 US 130, 93 L Ed 2d 449) where the issue was whether a state could impose a tobacco processing tax on tobacco processed in a customs-bonded warehouse. The relevance of these cases to the present matter is questionable since, as petitioner notes, there is a distinction between customs-bonded warehouses and foreign trade zones. In any event, none of the cases cited by the parties sheds 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. Therefore, no further discussion of this issue is warranted especially since there is no indication that possession or control of the tobacco products by petitioner was the basis for imposing the tax at issue. Instead, it is the overall failure of petitioner to sustain his burden of proof (***see***, Conclusions of Law "F" and "G") to show that he had no New York presence that has led to the imposition of the income tax by New York.

K. Finally, petitioner contends 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 is not subject to tax by the State of New York. In support of his position , petitioner relies upon ***Quill Corp. v. North Dakota*** (504 US 298, 119 L Ed 2d 91), a case decided in 1992, in which the State of North Dakota imposed a use tax on property purchased for storage, use or consumption within the State which every retailer maintaining a place of business in the State was required to collect from consumers. Quill was a mail-order house incorporated in Delaware which had no offices or warehouses in North Dakota and which had no employees who worked or resided there. Quill refused to collect this use tax from its North Dakota customers, thereby leading to an action being commenced by the State to require it to pay the taxes, plus penalty and interest.

For the following reasons, petitioner's arguments regarding the Due Process Clause and the Commerce Clause are 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" (***id***. at 307, 119 L Ed 2d at 103). As previously noted, petitioner has failed to prove that all of his customers were Native Americans residing and doing business on Indian reservations (***see***, Conclusion of Law "F"). In any event, however, 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. Whether petitioner had a physical presence in New York is, by virtue of the holding in ***Quill,*** irrelevant; it is sufficient to satisfy the requirements of the Due Process Clause that he availed himself of the economic market in New York. Under this set of facts, it cannot be found that imposition of a personal income tax upon petitioner, by New York, is violative of the Due Process Clause of the United States Constitution.

With respect to the Commerce Clause, petitioner again relies on the decision of the United States Supreme Court in ***Quill***. The Court stated;

> [W]e 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]. (***id***. at 311, 119 L Ed 2d at 105).

In the present matter, petitioner's business has a substantial, if not exclusive nexus with New York. Petitioner has put forth no argument that the tax was not fairly apportioned. As to the issue of discrimination against interstate commerce, the Court in ***Washington Rev. Dept. v. Stevedoring Assn.*** (435 US 734, 55 L Ed 2d 682) held that since a state has a significant interest in exacting its fair share of the cost of state government from interstate commerce, all state tax burdens do not impermissibly impede interstate commerce in violation of the Commerce Clause. "The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity" (***id***. at 748, 55 L Ed 2d at 695). Petitioner has not shown that an income tax levied on his income by the State of New York could have or, in fact, did have any bearing on interstate commerce. As to whether the tax is fairly related to the services provided by New York, the evidence is clear that New York's roadways were utilized to transport petitioner's wares and all of the orders were received from New York. There has been no showing, therefore, that the personal income tax imposed upon petitioner by the State of New York violated the Commerce Clause of the United States Constitution.

L. The petitions of Elias H. Attea, Jr. and Karen Attea are denied and the notices of deficiency issued to petitioners on March 16, 1995 and March 20, 1995 are sustained.

DATED: Troy, New York
August 13, 1998

/s/ Brian F. Friedman
ADMINISTRATIVE LAW JUDGE